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THE CANADIAN ANNUAL DIGEST 1912

COMPRISING ALL

CANADIAN REPORTED CASES

FOR THAT YEAR

ARRANGED ACCORDING TO THE

STANDARD LAW CLASSIFICATION

WITH

TABLES OF THE CASES DIGESTED AND CASES AFFIRMED, REVERSED, OR SPECIALLY CONSIDERED.

TORONTO:

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PUBLISHERS' NOTE.

In this digest the system of classification which was inaugurated in the Canadian Annual Digest, 1911, known as the "Standard law classification" has been continued and extended in a most helpful manner.

The difficulty which has hitherto confronted the lawyer in preparing his cases is the lack of certainty as to whether he has exhausted the decided cases touching the point he is looking up.

The "Standard law classification" was adopted after a most careful investigation and comparison of the various modern systems of law digesting as being the most workable in Canada and one which would be of the greatest assistance to the practitioner in his work.

The greatest care has been taken in the selection of permanent main titles and of the sub-divisions which are placed at the commencement of each title as well as throughout the text. These subheads are prominently indicated by black-faced type, the idea being to assist the users of the digest in locating the subject he is looking up with the least possible delay.

The number feature in connection with this digest should recommend itself to all users. The bracketed letters and numbers are permanent classification signs, and cases in which the principle involved lends itself to be classified under any sub-division are all found in the one place. The advantages of this are self-evident.

The permanent classification number is placed at the commencement of the first of a number of cases upon a similar point and such cases are brought together in the digest.

The same classification numbers are used in the Dominion Law Reports. As an example take the case of *Albo* v. *Great Northern R. Co.*, 2 D.L.R. 290, 17 B.C.R. 226, which appears at col. 169 of this digest. By reference to the top of the page this case is found to be under the main title "Carriers." On referring to col. 161 where this title commences will be found in its entirety the complete scheme of the sub-division of this title. There are four main sub-divisions as follows:—

I. Who are common carriers; Relation to public.
II. Carriage of passengers and other persons.
III. Carriers of freight;
IV. Governmental control.

The case under consideration has preceding it the classification sign (§ III D 4—421). This indicates that the case comes under sub-

division III. Carriers of freight. On referring to column 161 again you will find that sub-division III. is further divided into eleven sub-heads marked with capital letters; "D" indicates that under it cases will be found relating to carriers of freight in respect to delivery of goods and D 4 relates to delay in delivery. The number 421 is our own permanent number under which we will classify from year to year all cases where the point involved is that of injuries due to the delay in the delivery of freight.

A full table of cases digested, as well as a table of cases affirmed, reversed or specially considered, will be found in the volume, and an appendix containing, in alphabetical arrangement, a list of the words and phrases specially considered in the digest.

For the first time in the history of Canada, a complete and fitting digest is given to the Bar. This digest has not been put together in a careless manner. The law decided in Canada during the year 1912 has been sought out by us and placed under its proper and fitting heading.

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A DIGEST

—OF—

ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS IN THE DOMINION OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM, DURING THE YEAR 1912.

ABANDONMENT.

Of action, see Dismissal.
Of appeal, see Appeal, VI.
Of property in insolvency proceedings, see Bankruptcy; Insolvency.
Of contract, see Contracts.
Of wife, see Husband and Wife, IV.
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Of homestead, see Homestead, III.
Of highways, see Highways, V.

ABATEMENT AND REVIVOR.

I. In general.
II. By death.
III. Pendency of prior action.
IV. Revivor.

Abatement of appeal, see Appeal.
Plea of, see Criminal Law; Pleading.

I. In general.

(No cases.)

II. By death.

(§ II—5)—Death of party.

The filing of an intervention, while a suit was suspended by the death of a party, is not prejudicial within the meaning of art. 174 C.P., and is not open to an objection to the form on that ground, but it may be proceeded upon when the suspension ceases.

Breakey v. Bernard, 6 D.L.R. 312, 18 La Rev. de Jur. 318.

An intervention, filed after the expiration of the delay allowed by art. 272 C.P. for contesting a petition for the continuance of the suit after the death of the plaintiff, is not open to an exception to the form on the ground that there were not two parties to the action at the time the intervention was filed, the filing of the petition itself being an act of continuance which the adverse party may or may not contest.

Breakey v. Bernard, 6 D.L.R. 312, 18 La Rev. de Jur. 318.

III. Pendency of prior action.

(No cases.)

IV. Revivor.

(No cases.)

ABSCONDING DEBTOR.

See Arrest; Attachment.

ABORTION.

(§ I—2)—Supplying drug or noxious thing.

The requirements of section 305 of the Criminal Code, prohibiting the unlawful supplying or procuring of any drug or other noxious thing with knowledge that it is intended to be unlawfully used or employed with intent to procure a miscarriage, are satisfied if the substance supplied be a drug, even though the quantity supplied be so small as to be incapable of doing harm; if not a drug, the substance must be proved to be a noxious thing, and noxious in the quantity supplied. (Per Meredith, J.A.). [Reg. v. Cramp, 5 Q.B.D. 307, referred to.]

Rex v. Scott, 4 D.L.R. 850, 19 Can. Cr. Cas. 370, 3 O.W.N. 1167, 22 O.W.R. 9.

Yellow jasmine or gelsemium is a drug or noxious thing the supplying of which for illegal purposes may constitute an offence under Cr. Code sec. 305.

Rex v. Scott, 4 D.L.R. 850, 19 Can. Cr. Cas. 370, 3 O.W.N. 1167, 22 O.W.R. 9.

ABSTRACTS.

See Records and registry laws; Land Titles (Torrens system).

ABUSE OF PROCESS.

(§ I—2)—Examination of witness—Attempted discovery of evidence.

It is an abuse of the process of the courts for a plaintiff by means of the examination of a witness on a pending interlocutory motion to seek to obtain discovery of the defendant's witnesses and the evidence upon which he intends to rely at the trial, but which is not relevant to the motion itself.

D. v. W., 3 D.L.R. 293, 3 O.W.N. 993, 21 O.W.R. 853.

ABUTTING OWNERS.

See Adjoining Owners; Highways, IV. 3.

ACCEPTANCE.

Of bills of exchange, see Bills and Notes, II.

Of offer generally, see Contracts, I D 4.

ACCESSION AND CONFUSION.

(§ I—5)—LANDSLIP FROM HIGHER TO LOWER LAND—RIGHTS OF THE RESPECTIVE OWNERS.

In the case of a subsidence or landslip through natural causes, from a high level land to a contiguous lower one, the proprietor of the part carried away, who, though notified to remove it, fails to do so, and when aware of its removal by the owner of the land on which it has fallen, stands by without objection or protest, is estopped, after the expiration of nearly two years, from suing to recover the value of it.

Bells' Asbestos Mines (plaintiffs appellants) v. The Kings' Asbestos Mines (defendants respondents), 21 Que. K.B. 234.

ACCESSORY.

See Criminal Law, I E.

ACCIDENT.

Insurance against, see Insurance.

Act of God; inevitable accident.

ACCOMPLICE.

Proof of acts or declarations of, see Evidence, X.

ACCORD AND SATISFACTION.

Compromise and settlement.

Contracts; of accord and satisfaction.

Debtor and creditor; accord and satisfaction between.

(§ I—8)—PROMISE ALONE AS SATISFACTION.

To constitute a bar to an action on an original claim or demand the accord must be fully executed, unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction. [See also 7 Halsbury's Laws of England, p. 443; Stewart v. Hawson, 7 U.C.C.P. 168, and Macfarlane v. Ryan, 24 U.C.Q.B. 474, specially referred to.]

Rumely v. Gorham, 1 D.L.R. 825, 21 W. L.R. 24.

(§ I—12)—ACCORD WITHOUT SATISFACTION.

A document, made after the execution of an executory agreement for the sale of an engine, stating that it was mutually agreed between the seller and the purchaser that whereas the purchaser complained that the engine was defective in certain specified parts and whereas the seller, while not admitting the alleged defects, desired to adjust all differences, therefore in consideration of the seller supplying the purchaser with certain specified new parts of the engine and crediting him with a specified sum on his account, the purchaser admitted full satisfaction of his complaint as to defects and the complete fulfilment of all warranties made by the seller and thereby released and waived all liability on the part of the seller, arising out of the original transaction, such document, however, not containing any promise on the part of the seller to supply the parts or to give the credit mentioned, will not operate as a satisfaction of the purchaser's right of action under the original contract in default of the actual delivery and acceptance of the engine parts but merely as an "accord" that if the seller did supply the parts and give the credit then the document should operate as a release to the seller of the claims of the purchaser arising from any defects in the engine.

Rumely v. Gorham, 1 D.L.R. 825, 21 W. L.R. 24.

ACCOUNTING.

Of executor or administrator, see Executors and Administrators, IV c.

Between partners, see Partnership.

(§ I—3)—BETWEEN DIRECTORS AND CORPORATION.

A director of a company cannot file a bill for an accounting against the company and his co-directors unless special circumstances are shewn. The report of a Royal Commission whose duties were inquisitorial and not judicial, finding that a sum of money received by the directors was unaccounted for and the fact that the complaining director was the Attorney-General of the Province at the time the money was received and as such an ex-officio director of the company by the act of incorporation, are not such special circumstances as would support a bill for such an accounting.

Pugsley (plaintiff, appellant) v. Bruce (one of defendants, respondent), 40 N.B. R. 515; Pugsley v. The New Brunswick Coal and Ry. Co., 4 N.B. Eq. 327.

(§ I—6)—QUEBEC PRACTICE.

A defendant who fails to file the account ordered by a judgment, and upon whose failure the plaintiff files an account under the provisions of article 568 C.P., cannot compel plaintiff to furnish the very details he had in his possession and which plaintiff had been endeavouring to obtain, but he may contest the account and supplement it with such details as he deems should go before the Court, and if he fails to do so, he is precluded from later attacking the account as irregular, after it has been approved by a judgment of the Court.

Frank v. Forman, 2 D.L.R. 8, 41 Que. S.C. 511.

ACCOUNTS.

(§ I—2)—Opening; correcting; review of.

A defendant who fails to file the account ordered by a judgment and upon whose failure the plaintiff files an account under the provisions of art. 568 C.P. cannot compel plaintiff to furnish the very details he had in his possession and which plaintiff has been endeavouring to obtain for years. The defendant's only course is to contest the account and supplement it with such details as he deems should go before the Court. Failing to do so, he is foreclosed from later attacking the account as irregular, after it has been confirmed by a judgment of the Court. (2) Semble—An account rendered should be broadly and liberally interpreted and objections thereto on merely technical and formal grounds should be disregarded. [Evans v. Wilson, 1 Que. P.R. 186.]

Frank v. Forman, 13 Que. P.R. 29.

(§ I—5)—Between insurance company and its agents.

An account between an insurance company and one of its agents, wherein the agent is charged with each premium due by him on policies he has obtained and where credits are given him for specific premiums paid, is not a running account within the meaning of the law, even though extensions of time may have been afforded the agent to make his remittances.

London and Lancashire Fire Insurance Co. v. Hart, 8 D.L.R. 332.

An account between an insurance company and one of its agents, wherein the agent is charged with each premium due by him on policies he has obtained and where credits are given him for specific premiums paid, is not a running account within the meaning of the law, even though extensions of time may have been afforded the agent to make his remittances. [See to same effect London and Lancashire Fire Insurance Co. v. Hart, 8 D.L.R. 332.]

Northern Assurance Co., Ltd. v. Hart et al., 8 D.L.R. 805.

ACTION.

I. Nature and right.
- A. In general; what actionable; notice of.
- B. Premature; conditions precedent.

II. Union, choice, or form of remedies.
- A. Kind; name.
- B. Consolidation.
- C. Splitting; successive suits.
- D. Joinder.
- E. Identity.

Assignment of right of action, see Assignment.

Appearance in, see Appearance.

Actions for injuries from defects in bridges, highways and streets, see Bridges; Highways, IV.

Actions on contracts, generally, see Contracts, VI.

Costs and fees, see Costs and Fees.

Dismissal and discontinuance, see Dismissal and Discontinuance.

Independent suit for alimony, see Divorce and Separation.

Between husband and wife as to property, see Husband and Wife.

Limitation of time for bringing, see Limitation of Actions.

Parties to action, see Parties.

Between partners, see Partnership, VI.

Rights and remedies of surety, see Principal and Surety, II.

As to removal of causes, see Certiorari; Removal of Causes.

Violation of Sunday law, see Sunday, IV.

Suits as to taxes, see Taxes, III.

Venue of, see Venue.

Ordering stay of proceedings in, see Stay.

Permission to sue in form pauperis on behalf of infant, see Infant.

On various instruments and obligations, see Bills and Notes, III.; Bonds; Contracts; Insurance, VI.; Mortgage, VI.; Patents, Shipping.

Particular causes of action for wrongs, see Assault and Battery; Case; Conspiracy; Death; False Imprisonment; Fraud and Deceit; Fraudulent Conveyances; Libel and Slander; Malicious Prosecution; Negligence; Nuisances; Patents; Seduction.

Various matters of procedure, see Attachment; Continuance and Adjournment; Depositions; Evidence; Execution; Judgment; Jury; Levy and Seizure; Trial; Witnesses; Writ and Process.

I. Nature and right.

B. Premature; conditions precedent.

(§ I B 1—5)—Premature; conditions precedent.

Where an extra-Provincial corporation contracts outside of British Columbia for the sale of plant and machinery to be delivered in that Province and there erected and installed by the vendor corporation, after which it is to test the plant and demonstrate its capacity to the purchaser, such extra-Provincial corporation is thereby "carrying on business" in British Columbia so as to require an extra-Provincial company's license under the Companies Act, R.S.B.C. 1911, ch. 39, in order to be entitled to bring action in the Courts of that Province.

Kominick Co. v. B.C. Pressed Brick Co., 8 D.L.R. 859, 22 W.L.R. 526.

(§ I B 1—7)—Accepting offer to sell after issuing writ.

A cause of action must be complete before an action upon it is commenced; and, therefore, an action cannot be maintained upon a contract, where the offer was made

before, but was not accepted until after, the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

(§ I B 2—10)—Restoration of benefits received.

Nature and right—Condition precedent, as to prior release—Families Compensation Act (B.C.).

Trawford v. British Columbia Electric R. Co., 8 D.L.R. 1026.

(§ I B 3—17)—Notice.

While a notice of action, under sec. 84 of 49 Vict. (N.B.) 1886, ch. 25, in a false imprisonment case brought jointly against the officers who issued the warrant and the constable who executed it may be objectionable on the ground that the notice does not set forth the grounds of each officer's liability, yet, if it clearly states the part which each took in the commission of the wrong, the joint notice is sufficient, because the arrest and imprisonment of the plaintiff were in law the joint act of both officers. [McGilvery v. Gault, 17 N.B.R. 641, 19 N.B.R. 217, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

The notice of action required under sec. 84 of 49 Vict. (1886) ch. 25 (N.B.) in respect of a claim for damages for false imprisonment is to be construed liberally, and it is sufficient if the notice substantially informs the defendant of the ground of complaint. [Jones v. Bird, 5 B. & Ald. 837; Howard v. Remer, 2 El. & Bl. 915, 23 L.J.Q.B. 60, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East, L.R. 295.

Under sec. 84 of 49 Vict. (1886) ch. 25 (N.B.), prescribing that the name and place of abode of the attorney shall be endorsed on the notice of action, it is sufficient if they appear anywhere in the notice. [Baxter v. Hallett, 10 N.B.R. (5 All.) 544; McGilvery v. Gault, 17 N.B.R. 641, 19 N.B.R. 217, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

The provision of the Militia Act, requiring at least one month's notice in writing to be served upon defendant or left at his usual place of abode before action can be brought against any officer or person acting in pursuance of that statute, applies where an action is brought against members of a civilian rifle association for alleged negligence while engaged in an act done in pursuance of the Militia Act, R.S.C. 1906, ch. 41.

Webster v. Leard, 7 D.L.R. 429, 11 East. L.R. 203.

A constable who arrests a person without a warrant, but on the order of his superior the chief of police, although the arrest may be illegal, acts in the exercise of his functions as a peace officer and is a person performing a public duty within the meaning of art. 88, C.P.Q., and as such is entitled to a month's notice of action under that article.

The objection of want of notice should be taken by exception to the form and if taken only in the pleas the action will be dismissed, but with the costs of a preliminary exception only.

A justice of the peace who signs a warrant in blank is not liable in damages for so doing if he had nothing to do with the use made of the document; he is not entitled to notice of action, but the action against him will be dismissed without costs.

A chief of police who causes the arrest of a person by a subordinate without a warrant, and such person's imprisonment in the common gaol and detention there under a commitment previously signed in blank by a justice of the peace, but executed by the chief without the justice's knowledge, does not act in the bona fide exercise of his functions and is not entitled to the notice of action required by art. 88, C.P.Q.

Asselin v. Davidson, 13 Que. P.R. 423 (Sup. Ct.).

Where a statutory enactment requires notice of suit to be given to a city corporation before an action in damages can be instituted, such notice, in the absence of any contrary stipulation, may be given by the plaintiff's attorneys and may be validly served by bailiff.

City of Westmount v. Hicks, 8 D.L.R. 488.

II. Union, choice, or form of remedies.

A. Kind; name.

(1) An action based on notes the loss of which is alleged, is nevertheless properly taken as a summary matter. (2) If, in an action founded upon notes, a foreign judgment on such notes is alleged, action is nevertheless a summary matter. [Riordan v. McLeod, 13 Que. P.R. 64, 67.] (3) The fact that a non-resident defendant has been called by other newspapers than those mentioned in the order is no ground for exception to the form.

Traders Bank of Canada v. James Bell Klock et al., 13 Que. P.R. 177 (Sup. Ct.).

An action praying that the defendant be ordered to deliver shares of the capital stock of a mining company, and for the payment of an additional sum on a promissory note, is governed by the rules concerning summary matters.

Simpson v. Reeves, 13 Que. P.R. 192.

When by error the words "summary procedure" appear on the copy of the writ while they have been struck in the original, an exception to the form will not lie on account of this informality, especially if plaintiff before service of said exception, notified defendant that it was not his intention to proceed summarily. (2) The absence of details is matter for a

motion for particulars, not for an exception to the form.

Ménard v. Leduc, 13 Que. P.R. 199.

(§ II A—43)—PENAL OR REMEDIAL.

An action under art. 1834 C.C., as amended, against one who has failed to declare his matrimonial status, is well brought by a plaintiff suing alone in his own name exclusively. [Comp. Cardinal v. Geoffroy, 13 Q.P.R. 44, 413; Lamontagne v. Galbraith, 13 Q.P.R. 397.]

Morse v. Langston, 14 Que. P.R. 70 (Sup. Ct.).

(§ II A—44)—UNDER FACTORIES ACT OR UNDER EMPLOYERS' LIABILITY ACT.

It was the intent of the legislature that a violation of the statutory duty imposed by the Nova Scotia Factories Act, which requires that all dangerous parts of millgearing, machinery, etc., shall be, so far as practicable, securely guarded, should create a liability, independent of the Employers' Liability Act, for the benefit of a servant who sustained injuries as a result of such violation of the Factories Act. (Per Ritchie, J). [Vallance v. Falle, 13 Q.B.D. 109; Groves v. Lord Wimborne, [1898] 2 Q.B. 402, and Sault Ste. Marie Pulp and Paper Co. v. Myers, 33 Can. S.C.R. 23, specially referred to.]

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

B. Consolidation.

(§ II B—45)—CONSOLIDATION.

In Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the court or a judge in the manner in use in the superior courts of common law prior to the Judicature Act 1881, the true meaning of the expression "in the manner in use," etc., is not to continue the practice enforced before the Act, but is to require that, if an order is made, it should be treated in the same manner as before. [Martin v. Martin & Co., [1897] 1 Q.B. 429, followed.]

Kuula v. Moose Mountain Ltd. (No. 2), 5 D.L.R. 814, 3 O.W.N. 1203, 22 O.W.R. 64, 26 O.L.R. 332.

The consolidation of four actions, each by a different plaintiff against the same defendants, cannot, upon the motion of the common defendants, be granted either in the strict sense of the word "consolidation," to stay absolutely the proceedings in three actions and to require the plaintiffs to unite all their claims in one action, or, in the looser and less accurate sense, to select one action as the test action and stay the trial of the others pending the determination of the test action, as the particular issues in each case would be distinct from the issue in the others, though each action was based upon an alleged injury to the premises of the plaintiff, caused by the spread of the same fire negligently set out by the defendants on their land and negligently allowed to spread to the plaintiff's land. [Amos v. Chadwick (1877), 4 Ch.D. 869, affirmed (1878), 9 Ch.D. 459; Westbrooke v. Australian Royal Mail Steam Navigation Co. (1853), 23 L.J.N.S. C.P. 42; Lee v. Arthur (1908), 100 L.T.R. 61; Williams v. Township of Raleigh, 13 P.R. (Ont.) 50, specially referred to.]

Kuula v. Moose Mountain Ltd. (No. 2), 5 D.L.R. 814, 3 O.W.N. 1203, 22 O.W.R. 64, 26 O.L.R. 332.

Where several actions are brought by different plaintiffs against the same defendant, alleging that the plaintiffs were induced to purchase shares by fraudulent misrepresentations, consisting of oral statements made at different interviews, the case is not one for consolidation.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

The Court will not order, at the instance of the plaintiffs, consolidation of actions brought by different plaintiffs against the same defendant upon claims that they were fraudulently induced to subscribe for shares in a company, where the alleged fraudulent statements were not covered by any common prospectus or other representation made generally to all of such plaintiffs as distinguished from the separate representations made to each of them.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

An order may be made consolidating two actions brought by the same plaintiffs to recover the loss under a fire insurance policy, where the second action was brought within the statutory period of limitation to prevent the lapse of the claim in case it should be held that the first action was premature. [Martin v. Martin (1897), 1 Q.B. 429, applied.]

Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

Order for trial of actions together—Terms—Costs.

Clarkson v. McNaught (No 3), 1 D.L.R 918.

Parties common defendant — Distinct claims of different plaintiffs for damages arising from fire set out by defendant—Direction as to trial—Multiplicity of proceedings—Examinations for discovery.

Kuula v. Moose Mountain Limited, 2 D.L.R. 900, 3 O.W.N. 1015.

Common defendant—Distinct causes of action—Direction as to trial.

Lyon v. Gilchrist, 2 D.L.R. 902, 3 O.W.N. 1086.

D. Joinder.

(§ II D—60)—JOINDER.

In an action for an instalment of $300, past due on a mortgage, and for the repayment of $105 of insurance on the mortgaged premises as agreed, $200 for goods sold and delivered and $37.50 for insurance thereon, where the evidence shews that, by an agreement between the defendant and the plaintiff, the defendant assumed the liability of $542.97 due by the plaintiff to a third party, of which $200 was to be ap-

plied in satisfaction of the goods sold and the balance on the mortgage, and the defendant set out a statement of account between the parties shewing a balance due the plaintiff $175, which the defendant paid into Court, the claim for insurance paid on the goods fails and, the defendant's statement of account being correct, judgment will be rendered for the balance due the plaintiff for $175.

Chapdelaine v. Wilkinson, 4 D.L.R. 290, 20 W.L.R. 775.

Two separate causes of action, in one of which one of the defendants has no concern, cannot be joined.

Ney v. Ney (No. 2), 1 D.L.R. 641, 3 O.W.N. 927, 21 O.W.R. 524.

Where a vendor seeking rescission of an agreement for the sale of lands is unable to ascertain the exact legal relations existing between the two defendants against whom he makes his claim alternatively and pleads that he was induced to sign the agreement, of which he asked the rescission by the fraud of both defendants, one of the defendants being a company dealing as real estate agents, which had acted as agents for the vendor, and the other defendant being the person in whose name the land was purchased, who was also vice-president of the defendant company; the cause of action is a single one, viz., the breach of trust arising out of the alleged fraud, and the statement of claim is not irregular as for misjoinder of two causes of action. [Smurthwaite v. Hannay, [1894] A.C. 494, 10 Times L.R. 649, followed; Thomas v. Day, 4 D.L.R. 238, distinguished; Phosphate Sewerage Co. v. Hartmont, 5 Ch. D. 394, and Kerr on Fraud and Mistake, 14th ed., 412, specially referred to.]

Pringle v. Dwyer, 6 D.L.R. 446, 22 W.L.R. 158.

A simple contract creditor suing on behalf of himself and all other creditors of his debtor to set aside an alleged fraudulent conveyance by the latter may join the debtor as a defendant and recover judgment against him for the amount of his claim.

Burns v. Matejka, 1 D.L.R. 837, 19 W.L.R. 863.

Plaintiffs joining in action—Exchange of shares - Separate causes of actions — Election—Transfer—Registration.

McKay v. Mason, 4 O.W.N. 354, 23 O.W.R. 872.

ADJOINING OWNERS.

Boundaries between, see Boundaries, II.

Injury to lateral support, see Lateral Support.

Rights in party wall, see Party Wall.

(§ I—5)—Boundaries—Overlapping.

In proving the possession of adjoining lots of land referred to as boundaries in a given instrument concerning a lot of woodland, it is not necessary to prove a title that reaches back to the Crown, occupation with colour of title in the case of such land being sufficient.

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

ADJOURNMENT.

In general, see Continuance and Adjournment.

ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

ADMIRALTY.

I. Jurisdiction.

II. Practice; pleading and procedure.

Jurisdiction upon salvage claims, see Courts, IV. D 1.

As to liability of carriers, generally, see Carriers.

As to matters peculiar to vessels, see Shipping.

I. Jurisdiction.

(§ I—2)—Jurisdiction over subject matter generally.

The master of a ship is only entitled to a reasonable notice terminating his contract for employment; what is reasonable notice is a question of fact for the trial Judge, who in an action in rem for wages in lieu of notice of dismissal may condemn the ship or its bail for such wages in the nature of damages for wrongful dismissal. [See also 1 Halsbury's Laws of England, p. 69; The Great Eastern (1867), L.R. 1 A. & E. 384.]

Kane v. the ship "John Irwin," 1 D.L.R. 447, 13 Ex. Ct. R. 502.

Water supplied to a ship for the use of her engines and crew is not "equipping a ship" within the meaning of sec. 4 of the Admiralty Courts Act, 1861, which gives the Admiralty jurisdiction over any claim for the building, equipping or repair of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court. The scope of the Act is to protect material men who build, equip or repair a ship as a ship, and to extend a limited lien to men who furnish necessaries in foreign ports, the latter term meaning anything necessarily supplied to the ship in the prosecution of her work.

Peter Judge & Sons v. The Ship "John Irwin," 14 Can. Ex. R. 20.

(§ I—4b)—Jurisdiction over persons and vessels.

Where the master of a ship, which is in its home port, acting under instructions from the owners' manager, purchased certain supplies for repairing the ship prior to her sailing, which, following the customary practice of the firms furnishing the goods, were charged to the ship or to its

owners, the credit will be presumed to have been given to the owners and not to the master, and the master having incurred no personal liability, is not entitled to enforce a maritime lien for such supplies. [The Ripon City, [1897] P. 226, distinguished.]

Kane v. the ship "John Irwin," 1 D.L.R. 447, 13 Ex. Ct. R. 502.

(§ II—6)—PARTIES.

In an action in Admiralty by ship owners to recover salvage remuneration for rescuing a disabled ship in response to her call for aid, the Court may, upon consent of the master and crew of the salving vessel entitled to participate with the owners in the distribution of the salvage remuneration, join as parties at the hearing, and determine the amount of salvage remuneration and its apportionment.

Pickford & Black v. Steamship "Lux," 8 D.L.R. 924, 14 Can. Ex. 108.

II. Practice; Pleading and Procedure.

(§ II—8)—SEIZURE AND CUSTODY OF THE RES.

A warrant for the arrest of a ship for supplies furnished, may be issued by the deputy registrar, notwithstanding the affidavit therefor omitted the material allegations of the national character of the ship and that the aid of the Court was necessary, as, under Rule 39 (Admiralty Rules, Canada, 1892), the registrar has power to dispense with some of the prescribed particulars for the issuance of a warrant, without disclosing his reason for so doing, and without laying his discretion open to review.

Letson v. "The Tuladi," 4 D.L.R. 157, 17 B.C.R. 170, 21 W.L.R. 570.

(§ II—18)—AMENDMENT.

In Admiralty proceedings, alterations or amendments will not be allowed in the "preliminary acts" at the instance of the party who filed such "preliminary act." [The "Miranda" (1881), 7 P.D. 185, followed; 1 Halsbury's Laws of England, 94, referred to.]

Pallen v. "The Iroquois," 6 D.L.R. 527, 21 W.L.R. 565, 15 B.C.R. 156.

ADMISSIONS.

By pleading or failure to plead, see Pleading, I.

ADVERSE POSSESSION.

I. WHAT CONSTITUTES.
A. In general.
B. On boundary.
C. Vendor and purchaser.
D. Landlord and tenant.
E. As to dower; mortgage or trust.
F. As to tenants in common and by entirety.
G. As to remaindermen or reversioners.
H. As to public; highway, canal, or tide land.
I. Colour of title.
J. Claim; hostility.
K. Extent and kind of possession.
II. EFFECT; TIME REQUIRED.
III. WHO MAY HOLD ADVERSELY.

Easement by prescription, see Easements.

As to limitation of action, see Limitation of Actions.

Adverse possession by mortgagee, see Mortgage.

I. What constitutes.

A. In general.

(§ I A—1)—WHAT CONSTITUTES.

In 1765 a certain block of land, a portion of which is the land in question in this suit, was granted by the Crown to J. S., R. S. and J. W., and from that date a documentary title can be traced to the present time vesting this land in the plaintiff company. In 1855, the then owner of the land and the predecessor in title of the plaintiff company, gave a lease of a portion of it, and from that time to the present the different owners and predecessors in title of the plaintiff company have given leases to various persons and collected the rents. The plaintiff company during its ownership has also given leases and collected rents. In 1872, the defendant S. and his father went on the property and drove some stakes on the boundaries of the land in dispute, cut wood and made some excavations, either searching for magnesia or for some other reason. From this date down to the present, the defendant has been more or less on the land, digging holes and making excavations. He did not live on the land, but went on it and performed these acts whenever he was able. During all this time the land not occupied by buildings was under lease to other persons for pasturage purposes, though the defendant recently drove off their animals on numerous occasions. The defendant's father died in 1891, but neither he nor the defendant ever collected any rent from the tenants on the land in dispute, while the plaintiff company and its predecessors in title have collected rents during the whole time of their ownership. In September, 1909, through his solicitor, the defendant wrote to the various tenants claiming damages for trespass and threatening suit, but nothing further was ever done; and in October, 1909, he gave a deed of a portion of this land to one M. M. W.:—Held, that the defendant has no title by possession as his possession was not open, notorious and exclusive; as the plaintiff company and its predecessors in title exercised their rights and occupancy during the whole of the defendant's alleged possession. Decree that the plaintiff company is the owner in fee

simple of the tract of land in dispute, and for an injunction restraining the defendants from interfering with or disposing of or using or dealing with its land in any way, and further, that the defendants give the plaintiff company possession of the lands and premises. The deed to M. M. W. will be declared void and set aside.

Turnbull Real Estate Co. v. Segee et al., 4 N.B. Eq. 372.

(§ I A—2)—Possessio pedis.

Entry upon and cultivation of a plot of land claimed under a grant from the crown is not sufficient to give title by constructive possession of the whole as against a prior grantee also in possession and exercising acts of ownership over a portion of the land described in his grant.

Where the land claimed under both grants is woodland, occasional acts of cutting and cultivation by one of the parties will not suffice to give a statutory title as against the other, such acts amounting to no more than a mere possessio pedis.

McInnes v. Stewart, 45 N.S.R. 435.

B. On boundary.

(§ I B—5—On boundary.

A blazed line running around the whole of the land in question, run by a private surveyor at the instance of the occupant, will not establish in his favour a title by possession, although no disturbance thereof was made for the statutory period as such act lacks publicity and conveys no sufficient intimation that the occupant is claiming title to the whole of the area included within the blazed lines. (Per Graham, E. J.) [Wood v. Leblanc, 34 Can. S.C.R. 627, followed.]

Swinehammer v. Hart, 5 D.L.R. 106, 11 E.L.R. 260.

In an action en bornage merely without a demand for revendication of land or establishment of a specified boundary line, each party is at the same time plaintiff and defendant. The one who is named as defendant may, at an ex parte hearing, establish his right to a line indicated by a fence up to which he has had possession for thirty years, but he cannot set it up when the action is contested and he has asked that it be dismissed with costs.

Barrette v. Ampleman, Q.R. 42, S.C. 218 (Ct. Rev.).

E. As to dower; mortgage or trust.

(§ I E—22)—Mortgage.

The title of a registered owner of land registered under the Torrens system or new system of registration in Manitoba is not extinguished by adverse possession of the land held by his mortgagee and persons claiming under him for the statutory period which by R.S.M. 1902, ch. 100, sec. 20, is applicable to lands not so registered. [Compare sec. 29 of the Ontario Land Titles Act, 1 Geo. V. ch. 28; and see Belize Estate v. Quilter, [1897] A.C. 367.]

Smith v. National Trust Co. 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

I. Colour of title.

(§ I 1—49) — Deeds, generally; subsequent grant from crown.

Where land was divided into 300 acre lots, also into tiers of 30 acre lots and the allotment proceedings, as well as the registry thereof, by the commissioners appointed by the Crown to apportion the land among the grantees named in a township grant, clearly shewed but three tiers of 30 acre lots, a subsequent grantee from the Crown of lots in a fourth tier thereof, which would overlap one of the 300 acre lots, did not by such subsequent grant, acquire title to the overlapping land, since the rule is that the first grantee in point of time and possession takes all of the land called for in his allotment. [Boehner v. Hirtle, 9 E.L.R. 258, reversed on appeal.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

K. Extent and kind of possession.

(§ I K—55)—Extent and kind of possession.

The "actual, constant, and visible occupation," necessary to possessory title to land is not shewn by the fact that the land has been fenced for thirty years and by a statement by the claimant of the land that for twenty years off and on he had stored lumber and other stuff there, even when supplemented by a further statement that some material remained there continuously. [Campeau v. May, 2 O.W.N. 1420, specially referred to.]

Re Hewitt, 3 D.L.R. 156, 3 O.W.N. 902.

The possession which would give a right to the possessory action en réintégrande must be exclusive and when there is between two parties a dispute as to the title to land of which they have joint possession the remedy is an action au petitoire or en bornage.

Tremblay v. Parish of St. Alexis, Q.R. 21 K.B. 284.

Description — Plans — Evidence Title by possession—Limitations Act—Act of ownership—Cultivation and cropping.

Fox v. Ross, 3 D.L.R. 878, 3 O.W.N. 1347, 22 O.W.R. 244.

(§ I K—56)—Of surface.

The harvesting of natural fruit establishes the possession of land in him who does it and gives him a right of action en complainte against those who interfere with such possession.

Couillard v. Bolduc, Q.R. 42 S.C. 282 (Sup. Ct.).

Surface rights in land, being proprietary rights, cannot be lost by non-user as in the case of a servitude; therefore a third party may acquire it by prescription as his possession has all the necessary elements and they exist in respect to the possession

of surface rights. The party in adverse possession can then obtain title by prescription against the owner of the subsoil without obtaining it against the owner of the surface and vice versa as the two titles are distinct and divisible.

Goldstein v. Allard, 14 Que. P.Q. 36 (Sup. Ct.).

(§ I K—58)—Under deed or colour of title.

Where a grantee of wild land in British Columbia under a conveyance intended only as security has for more than 20 years performed the only act of possession of which it is capable, namely, paid all the taxes upon it, while the grantor although aware of this and under an obligation to make periodical payments of interest, has done and paid nothing, the grantee has had such possession as to give him the benefit of the Statute of Limitations, R.S.B.C. 1897, ch. 123 [see now R.S.B.C. 1911, ch. 145], and an action for redemption by the grantor is barred by that statute.

Kirby v. Cowderoy, 5 D.L.R. 675, 105 L.T. N.S. 74.

II. Effect; time required.

(§ II—61)—Continuity and interruption.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. [Trustees, Executors and Agency Co. v. Short, 13 App. Cas. 793, followed.]

Robinson v. Osborne, 8 D.L.R. 1014, 4 O.W.N. 120, 27 O.L.R. 248.

Where a mortgage registered under the Ontario Registry Act, 10 Edw. VII. ch. 60, is paid off by the mortgagor, and a discharge thereof is registered in the statutory form, the effect is not to discharge the mortgage as against a person claiming title by adverse possession against the mortgagor since the making of the mortgage was but to reconvey to the mortgagor his original title in fee with the right to possession as from the date of the repayment. [Lawlor v. Lawlor, 10 Can. S.C.R. 194; Henderson v. Henderson, 23 A.R. 577, and Ludbrook v. Ludbrook, [1901] 2 K.B. 96, applied.]

Noble v. Noble, 1 D.L.R. 516, 3 O.W.N 519, 20 O.W.R. 889, 25 O.L.R. 379. [Reversed on appeal on this point, Noble v. Noble, 4 O.W.N. 359.]

A person admitted into possession as tenant at will and remaining in possession without acknowledgment for ten years after the lapse of one year from being placed in possession will not acquire a title by adverse possession against the mortgagee of the lands claiming under a mortgage made prior to the tenacy at will unless a ten year period has elapsed under the statute, 10 Edw. VII. (Ont.) ch. 34, sec. 23, from the last payment of any part of the principal money or interest secured by the mortgage.

Noble v. Noble, 1 D.L.R. 516, 3 O.W.N. 519, 20 O.W.R. 889, 25 O.L.R. 379. [Affirmed on this point, Noble v. Noble, 4 O.W.N. 359.]

Where certain cadastral lots are acquired by deed of sale the owner cannot acquire territory beyond such lots by alleging that his deed gives him a larger area, by a ten years' acquisitive prescription, as this would constitute acquiring beyond his title. In such case he could only acquire the ownership of territory beyond such lots by a possession as owner for thirty years.

Hamel v. Ross, 3 D.L.R. 860.

(§ II—62)—Tacking.

A buyer cannot add the possession of his predecessors in title to arrive at a thirty years' prescription unless he be their ayantcause by universal or particular title. [Butler v. Legare, 8 Que. L.R. 307, and Stoddart v. Lefebvre, 11 L.C.R. 481, followed.]

Hamel v. Ross, 3 D.L.R. 860.

In an action wherein the defendant, as against the owner of record of certain lands, claims adverse title thereto, basing such claim upon statutory prescriptive occupation under several successive trespassers, and when the requirement is an actual continuous occupation of the lands for at least ten years, it is a condition precedent to the acquirement of title by such adverse possession to shew that each succeeding trespasser immediately followed his predecessor without any break whatever in the chain, and every such occupation less than the full prescribed period and not followed by immediate possession in the same adverse chain ceasing upon its abandonment to be effectual for any purpose.

Robinson v. Osborne, 8 D.L.R. 1014, 4 O.W.N. 120, 27 O.L.R. 248.

(§ II—63)—Between claimants by right of possession.

Where two parties claim to be entitled to land as possessing it, and the possession of neither has been uninterrupted, unequivocal and exclusive, the proper remedy consists in a petitory action, or an action to determine boundaries (en bornage) and not a possessory action (en réintégrande).

Tremblay v. Parish of St. Alexis, 3 D. L.R. 552.

AFFIDAVITS.

On motions, see Motions and Orders, I.

(§1—5)—Sufficiency of.

Where an affidavit for a garnishee summons purported to verify a statement of claim said to be marked as an exhibit to the affidavit, a statement of claim not in fact marked as an exhibit cannot be read as part of the affidavit.

Clokey v. Huffman, 1 D.L.R. 679.

AGENCY.

See Principal and Agent.

AGGRAVATION.

Of damages, see Damages, III.

AGREEMENTS.

Contracts generally, see Contracts.

AGRICULTURAL SOCIETIES.

(§ I—1)—AGRICULTURAL SOCIETIES AS CORPORATIONS.

A number of persons purported to organize themselves as a corporate body, by the name of the "Brooklyn Agricultural Society," under the provisions of ch. 56 of the Revised Statutes of Nova Scotia. No special Act of incorporation was sought or obtained:—Held, that the Legislature did not intend to confer corporate powers upon agricultural societies by the provisions of the enactment in question, and, furthermore, that ch. 127 of such revised statutes only defines the powers and privileges of incorporated companies and does not provide for their creation.

Brooklyn Agricultural Society v. Reagh, 10 East. L.R. 295.

ALIENS.

I. IN GENERAL; IMMIGRATION; DEPORTATION.

II. NATURALIZATION.

III. DISABILITIES AND CAPACITIES; PROPERTY RIGHTS.

I. In general; immigration; deportation.

(§ I—3)—IMMIGRATION—DEPORTATION.

Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law:—Held, that the Act was not retrospective in this regard and did not apply; and as the old Act contained no provision for the deportation of such a person he could not be deported thereunder.

In re Rahim (No. 1), 16 B.C.R. 469.

The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order-in-council passed since the coming into force of the Act could not be held to deal with such a person.

In re Rahim (No. 2), 16 B.C.R. 471.

The written consent of the Judge of the Court in which it is intended to bring an action to recover a penalty under the Act respecting the Importation and Employment of Aliens, as required by sec. 4 of ch. 97, R.S.C. 1906, must shew the name of the person in respect of whom the offence is alleged to have been committed, give the time and place thereof, and shew also that such person was an alien or foreigner, with sufficient certainty to identify the particular offence intended to be charged, although not in the same technical form required in an information. [Rex v. Breckenridge, 10 O. L.R. 459, followed; Rex v. Johnson & Carey Co., Limited, 2 O.W.N. 1011, 18 O.W.R. 985, specially referred to.]

Ririazes v. Langtry, 3 D.L.R. 824, 21 W. L.R. 430.

It is not a violation of secs. 2 and 12 of the Alien Labour Act, R.S.C. 1906, ch. 97, for the proprietor of a hotel to employ aliens who have come into Canada at their own expense, in response to a notice written on a blackboard in an employment office in New York, to the effect that six waiters are wanted at once at such hotel in Montreal, with the display of which the hotel proprietor was in no way connected, since the notice did not amount to a promise of employment.

Windsor Hotel Co. v. Hinton (No. 1), 5 D.L.R. 224.

The importation of aliens for employment as waiters in hotels conducted on the European plan, is expressly permitted by sec. 9 of the Alien Labour Act, ch. 97, R.S.C. 1906.

Windsor Hotel Co. v. Hinton (No. 1), 5 D.L.R. 224.

One who, for a money consideration, furnished false naturalization papers to be sent by another to a person living in the United States, in order to permit the latter to enter Canada by misrepresentation, in violation of the Immigration Act, 9 and 10 Edw. VII. ch. 27, 1910, as amended by 1 and 2 Geo. V. ch. 12, 1911, is guilty of a violation of sec. 33 (8) thereof, which declares any person guilty of an offence who shall knowingly and wilfully land or assist to land or attempt to land in Canada any immigrant or person whose entry is forbidden by such Act.

Rex v. Palangio, 4 D.L.R. 611, 19 Can. Cr. Cas. 372, 3 O.W.N. 1440, 22 O.W.R. 540.

Section 33 (8) of the Immigration Act, 9 and 10 Edw. VII. ch. 27 (D), which declares it an offence for any person or transportation company to knowingly and wilfully land or to assist to land or to attempt to land in Canada any prohibited immigrant or person whose entry is forbidden by the Act, is not restricted to the prohibited classes mentioned in sec. 3 of the Act, but applies also to persons who are assisted to enter by misrepresentation.

Rex v. Palangio, 4 D.L.R. 611, 19 Can. Cr. Cas. 372, 3 O.W.N. 1440, 22 O.W.R. 540.

II. Naturalization.

(No cases.)

III. Disabilities and capacities; property rights.

(§ III—19)—SUITS BY AND AGAINST.

In an application for an award for compensation upon the death of a workman, under the Workmen's Compensation Act (B.C.), 2 Edw. VII. ch. 74, now R.S.B.C. 1911, ch. 244, while an alien dependent, whether resident or non-resident, has the same status as a resident British subject for recovery of the compensation, the legal personal representative of the deceased, or other person suing in a representative capacity for the dependent's claim, is required to be a resident of the province.

Krzus v. Crow's Nest Pass Coal Co., 8 D.L.R. 264, [1912] A.C. 590.

Upon an application for an award of compensation for the death of a workman under the Workmen's Compensation Act, 2 Edw. VII. (B.C.) 74, now R.S.B.C. 1911, ch. 244, where the dependent of the deceased workman is an alien non-resident, the personal representative may claim such compensation although he would hold it if recovered, for the benefit of such alien non-resident dependent. [Krzus v. Crow's Nest Pass Coal Co., 16 B.C.R. 120, 17 W.L.R. 687, reversed; Jefferys v. Boosey, 4 H.L.C. 815, and Tomalin v. S. Pearson & Son, Ltd., [1909] 2 K.B. 61, distinguished; Baird v. Birsztan (1906), 8 F. 438, and United Collieries Co. v. Simpson, [1909] A.C. 383, referred to. See advance report of the present case, 4 D.L.R. 253.]

Krzus v. Crow's Nest Pass Coal Company, 8 D.L.R. 264, [1912] A.C. 590.

ALIMONY.

See Divorce and Separation, V.

ALTERATION OF INSTRUMENTS.

I. IN GENERAL.

II. BILLS AND NOTES.

A. In general.

B. What alterations are material.

I. In general.

(No cases.)

II. Bills and notes.

B. What alterations are material.

(§ II B—19)—PLACE OF PAYMENT.

An acceptance of an offer to sell, which varies the amount of the cash payment, and increases the amounts of the deferred payments, is merely a counter offer to purchase and no contract is made by it, although the total price is not thereby changed. [Pearson v. O'Brien, 18 W.L.R. 563, affirmed on appeal.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

AMENDMENT.

On appeal, see Appeal, IV.

Of judgment, see Judgment, I.

Of pleading, see Appeal; Pleading, I.

Of records, see Records.

Of statute, see Statutes.

Of information in summary proceedings, see Summary Conviction.

Amendment of writ and declaration, see Writ and Process, I.

ANIMALS.

I. RIGHTS AND LIABILITIES CONCERNING.

A. Rights of owners generally.

B. Liability for killing or injuring dogs.

C. Liability for injuries by.

D. Running at large.

E. Animals with infectious diseases.

F. Tax on dogs.

II. CRUELTY TO.

Negligence in fast driving of horse on highway, see Highways.

Injury to, by railroad train, see Railroads, II.

Liability of bailee of, for injury to, see Bailment.

Negligence in treatment by veterinary, see Veterinary Surgeon.

I. Rights and liabilities concerning.

A. Rights of owners generally.

(§ I A—8)—LIABILITY OF OWNER FOR INJURIES FROM VICIOUS HORSE.

In an action for injuries caused by a vicious horse belonging to a corporation, scienter is established against the corporation, if it be proved that the servant of the corporation having charge of the horse was informed of its vice. [Stiles v. Cardiff Steam Navigation Co., 33 L.J.Q.B. 310, applied.]

Nadeau v. City of Cobalt Mining Co., 3 D.L.R. 495, 3 O.W.N. 1126.

Injury to servant by kick of master's horse—Habit of kicking—Scienter—Imputed knowledge of master—Incorporated company—Negligence.

Nadeau v. City of Cobalt Mining Co. (No. 2), 3 D.L.R. 885, 3 O.W.N. 1379.

B. Liability for killing or injuring dogs.

(§ I B—13)—DOGS RUNNING AT LARGE.

Where a by-law passed under the authority of sub-secs. 1 and 2 of sec. 540 of the Consolidated Municipal Act, 1903, justifies the killing of any dog found running at large more than half a mile from the prem-

ises of its owner, a dog is to be deemed "found" within the meaning of the by-law where it is first seen by its pursuers and it cannot lawfully be killed if, having been first seen less than half a mile from its owner's premises, it subsequently goes beyond that distance.

McNair v. Collins, 6 D.L.R. 510, 3 O.W.N. 1639, 22 O.W.R. 891, 27 O.L.R. 44.

C. Liability for injuries by.

(§ I C—20)—LIABILITIES FOR INJURIES BY.

Trespass—Savage monkey—Kept in yard adjoining theatre where performance given—Liability of proprietors of theatre—Yard no part of theatre premises.

Connor v. Princess Theatre, 4 O.W.N. 502.

(§ I C 1—26)—WHILE TRESPASSING OR RUNNING AT LARGE GENERALLY.

A husband is responsible for the damages caused by the trespass of a cow which is kept in his custody and control and of the use of which he gets the benefit although his wife may have the title or ownership of same.

Broderick v. Forbes, 5 D.L.R. 508.

(§ I C 2—32)—KNOWLEDGE OF VICIOUS DISPOSITION.

One who owns a dog that was in the habit of running out and barking at passers-by on the highway, is liable for injuries sustained by a skilled horsewoman, who, while exercising care, was thrown from her horse by reason of its becoming frightened and unmanageable at the barking of the dog, which ran into the highway as she was passing.

Carlson v. McEwen, 3 D.L.R. 787.

(§ I E—42)—LIABILITY OF SELLER.

In the matter of sales of horses, a sickness known under the name of "weaving" or "weaver," or motion of the head, neck and body of the animal, from one side to the other, which cannot be easily noticeable and where the observation is necessary, and where in this case the animal had to be placed under a constant inspection to discover the sickness such sickness will constitute a hidden defect which will give rise, in favour of the purchaser, to an action to rescind the sale.

Cullen v. Picard, 18 Rev. de Jur. 210.

II. Cruelty to.

(No cases.)

ANNUITIES.

Trust to pay annuities, see Trust, I.

(§ I—3)—APPORTIONMENT.

Where a settlement terminated with the death of the settlor, and by the terms of his will the income from the principal thereof was payable to annuitants therein named, such income cannot be diverted to the payment of annuities which the testator charged generally upon the income of his estate.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ I—4)—PAYING PREVIOUS DEFICIENCIES FROM SURPLUS.

The surplus income from an estate for any one year, after the payment of all annuities for that year chargeable thereon is available for the payment of arrearages of annuities for previous years.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ I—7)—CHARGE ON INCOME.

Where by will an annuity is payable primarily from a designated fund the securities belonging thereto will be marshalled and the annuity paid from the income thereof before resort will be permitted to the income of the testator's general estate.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.N. 562.

Where arrearages in the payment of annuities are due to the income upon which they are expressly charged not being sufficient to pay them in the order of priority established by will, they do not remain a charge upon the income of the estate after the time fixed for distribution until they can be paid in full.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

A gift of an annuity as an express charge upon the income of an estate is not enlarged so as to create a charge upon the corpus thereof by loose expressions in a will to the effect that it shall be a charge upon the estate or its investments.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ I—8)—INCOME AND REVENUE.

Where a testator gave all his estate, real and personal to his executors in trust, and directed them to pay the income therefrom to his widow and children, until the death or marriage of the widow, and, upon the happening of either of those events, to divide the estate and give to each child absolutely an equal share thereof, and his executors purchased a release of the equity of redemption of certain lands mortgaged to their testator in his lifetime, and subsequently the mortgagors were, in an action brought by them for that purpose, permitted to redeem the property upon the payment, with interest, of the full amount secured by the mortgage and of the full amount paid by the executors for the release of the equity of redemption, together with all proper allowances for taxes and for other necessary expenditures, the moneys received by the executors for the redemption of the mortgaged lands are to be charged with the amounts advanced from time to time by the executors with five per cent. on the balances from time to time due, with annual rests, and the balance of the redemption money then re-

maining is to be apportioned between the capital and income of the testator's estate by ascertaining the sum which put out at interest at the date of the testator's death and accumulating with compound interest with yearly rests, would, with the accumulations of interest, have produced, on the day of receipt, the amount actually received in payment of the redemption, the sum so ascertained to be treated as capital and the residue left after deducting such sum from the amount received for the redemption to be treated as income.

Leadley v. Leadley, 3 D.L.R. 483, 3 O. W. N. 1218, 22 O.W.R. 14.

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XI. GRANTING LEAVE TO APPEAL.

I. Right of appeal; what cases reviewable.

A. In general.

(§ I A—2)—HABEAS CORPUS.

Notwithstanding the Habeas Corpus Act, R.S.O. 1897, ch. 83, there is no appeal to the Ontario Court of Appeal from the unanimous judgment of the Court below refusing to discharge the prisoner on habeas corpus where he is held under a conviction under the Ontario Liquor License Act, unless the Attorney-General certifies under sec. 121 of the latter statute (R.S.O. 1897, ch. 245), that the point in dispute is of sufficient importance to justify an appeal.

Re Leach and Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

B. Finality of decision.

(§ I B—5)—FINALITY OF DECISION.

When, to a complaint to the Public Utilities Commission, relating to excessive charges by a public utility, an objection is taken by the latter that the complaint does not set forth the pendency of a contestation, nor an interest in the complainant, a decision by the Commission that overrules

the objection, is not a "final" decision as to its jurisdiction or upon a "question of law" (art. 763, R.S.Q. 1909), from which an appeal will lie to this Court.

Per Carroll, J.:—The Commission has the power to entertain and dispose of such a complaint, made by a person between whom and the public utility, no contestation on the matter exists.

Montreal Light, Heat & Power Co. v. Gribble. 21 Que. K.B. 193.

A judgment by which the Superior Court maintains a declinatory exception in an action for recovery of penalties for alleged violation of the Public Health Law, and refers the cause to the Circuit Court as having exclusive jurisdiction in the matter, is a judgment which definitively disseizes the Superior Court of the cause, and that in consequence an appeal to the King's Bench from such judgment may be taken "de plano" and without having to be allowed under art. 1121 C.P. [Benoit v. Corp. St. Denis, K.B., Montreal, unreported, followed.]

Goudreau v. Corp. Montmagny, 18 Rev. de Jur. 372.

(§ I B—11)—As to costs.

It is not necessary that the "special reasons," for which the Court refuses to award costs to a successful defendant against the plaintiff, should rest upon grounds of legal responsibility. If the reasons for such refusal do not disclose an error in principle, the decision should not be reversed in appeal.

Van-Felson v. Boudreau, 18 Rev. de Jur. 216.

(§ I B—15)—Interlocutory judgment.

A judgment in an action for boundary which dismisses a plea of prescription, sets aside the report of a surveyor, previously appointed, based on a prescriptive title, and appoints a new surveyor to make a fresh report, is an interlocutory and not a final judgment, and an appeal therefrom to the Court of Review can only be taken in accordance with the provisions of arts. 1202a and following (C.P. Que. 8 Edw. VII. ch. 74, sec. 6). [Mercier v. Barrette, 25 Can. S.C.R. 94, specially referred to.]

Bohl v. Caron, 4 D.L.R. 772, 41 Que. S.C. 236.

An order of a County Court Judge setting aside a judgment and allowing the defendant to come in and defend on terms is not a decision upon a point of law and there is no appeal from such an order under sec. 80 of the County Courts Act C.S. 1903, ch. 116. [Ex parte McCulley, 20 N.B.R. 87, followed.]

Joiens (plaintiff, appellant), and Lockhart (defendant, respondent), 40 N.B.R. 455.

(§ I B—16)—As to attachment or order for sequestration.

When the carrying out of a judgment of sequestration will effect a disposal of the rights of either party such as cannot be recalled or rectified by the final judgment on the merits, such judgment of sequestration is a final judgment from which an appeal lies de plano and without leave.

The Chicoutimi Pulp Co. v. The Jonquieres Pulp Co., 18 Rev. de Jur. 83.

(§ I B—18)—Eminent domain.

An appeal lies, under sec. 58 of the King's Bench Act, to the Court of Appeal from an order setting aside an award of damages made by an arbitrator in a proceeding to open a public street over private property, notwithstanding that the provisions of the city charter, under which the proceedings were instituted, did not provide for an appeal from the order of the Court of King's Bench. (Per Cameron, and Richards, JJ.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

The power of the Court of King's Bench, under sec. 823 of the charter of the city of Winnipeg, pertaining to the award by arbitrators of compensation for land taken for a public street, is not exhausted upon that Court setting aside an award, and an appeal lies from such order to the Court of Appeal, which, thereupon, has all the powers set forth in that section upon the Court of King's Bench. (Per Cameron, and Richards, JJ.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

C. Criminal cases.

(§ I C—25)—Criminal cases.

A Court of Criminal Appeal has the right to order a new trial when new evidence discovered before the rendering of the verdict is not allowed to be placed before the jury. After verdict rendered, however, only the Minister of Justice could order a new trial.

Rex v. Manconi, 3 D.L.R. 112. 20 Can. Cr. Cas. 81.

The Ontario Court of Appeal, on a criminal appeal, has no jurisdiction to intervene in a case of error or misunderstanding, its jurisdiction being limited by sec. 1014 of the Criminal Code in a stated case to questions of law; the application for relief in a case of error or misunderstanding being to the Minister of Justice, under sec. 1022 of the Criminal Code (1906).

Rex v. Pilgar, 8 D.L.R. 830, 4 O.W.N. 330, 23 O.W.R. 433.

In the absence of Federal legislation permitting it, an appeal does not lie from an order discharging on habeas corpus a person from custody under a commitment for extradition. [Cox v. Hakes, 15 App. Cas. 506, and Rex v. Carroll, 14 Can. Crim. Cas. 338, 14 B.C.R. 116, followed; Barnardo v. Ford, [1892] A.C. 326, and Re Hall, 8 A.R. (Ont.) 135, distinguished.]

Re Tiderington, 5 D.L.R. 138, 20 W.L.R. 355, 17 B.C.R. 81.

Even though a County Court does not pos-

sess jurisdiction to permit the giving of cash bail on an appeal from a conviction by a police magistrate under Cr. Code (1906), sec. 797, upon a summary trial, an appeal is not lost where the attorney for the prosecution assents to the acceptance by the Court of such bail, receives payment of the money, and permits the prisoner to go at large.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235.

Since sec. 3982 (j) of ch. 35, of 1 Geo. V. of Quebec, regulating the sale of cocaine, morphine and their compounds, expressly provides that sec. 15 of the Criminal Code regulating appeals should apply to prosecutions thereunder, the Court of King's Bench has, by virtue of such Act, as well as under judicial authority, jurisdiction to entertain an appeal from a conviction under such Act. [The King v. Bigelow, 8 Can. Cr. Cas. 132; The King v. McLeod, 12 Can. Cr. Cas. 73; Scottstown Corporation v. Beauchesne, 5 Que. K.B. 554; Superior v. City of Montreal, 3 Can. Cr. Cas. 379; sub-sec. 27 of sec. 91 of British North America Act, 1867; sub-sec. 14 of sec. 92 of the same Act, and sec. 749 of the Criminal Code, specially referred to.]

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

Where a motion to quash a summary conviction has been dismissed and the conviction ordered to be amended under Code sec. 1124 as to a defect in form leave to appeal from the dismissal should be refused, if the evidence warranted all the amendments necessary to make a good conviction.

The King v. Demetrio, 1 D.L.R. 515, 3 O.W.N. 602, 20 O.W.R. 999.

Reserved case—Perjury—Examination for discovery.

Rex v. Howley, 8 D.L.R. 1025.

(§ I C—26)—Right of Crown to appeal.

The question whether an indictment was properly quashed on a motion made before pleading thereto and before trial, may be reserved at the instance of the Crown for the opinion of the Court of Appeal under sec. 1014 of the Criminal Code, which will be liberally construed so as to prevent a miscarriage of justice. [Brisbois v. The Queen (1888), 15 Can. S.C.R. 421, and Morin v. The Queen (1890), 18 Can. S.C.R. 467, distinguished.]

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

The License Commissioners of the City of Montreal who appeal to the Court of King's Bench from a judgment of the Superior Court maintaining a writ of prohibition against them are not obliged to place stamps on their proceedings nor to give security for costs since they act for and in the name of the Crown.

An appeal even by the Crown or the State, in actions under ch. 40 of the Code of Procedure, that is quo warranto, mandamus or prohibition, should be brought within thirty days, if not the appeal will be dismissed on motion.

Choquet v. Demers, 13 Que. P.R. 223 (K.B.).

The Quebec Court of King's Bench cannot, in lieu of quashing a sentence upon a writ of habeas corpus and discharging the prisoner, refer the matter to the Court of Appeal for amendment of the sentence, since that would amount to forcing an appeal upon the accused for the benefit of the Crown.

Hoolahan v. Malepart, 5 D.L.R. 479.

(§ I C—27)—Where there is sufficient evidence to convict.

Where there was evidence before a magistrate trying a prosecution for an offence forbidden by law on which he might have convicted the accused, this conviction will not be disturbed, as the magistrate is the judge of the weight to be attached to the evidence. [R. v. St. Clair, 3 Can. Crim. Cas. 551, 27 O.A.R. 308, at p. 310, followed.]

Rex v. Riddell, 4 D.L.R. 662, 19 Can Cr. Cas. 400, 3 O.W.N. 1628, 22 O.W.R. 847.

II. Jurisdiction of particular Courts.

A. Of Supreme Court of Canada.

(§ II A—35)—Jurisdiction of Supreme Court of Canada.

Where an action is brought for specific performance of an agreement to deliver certain securities, or, in the alternative, for damages, and it appears that the defendant has rendered himself temporarily unable to deliver the securities, and the Court of Appeal by its judgment gives to the plaintiff his choice between specific performance as soon as the securities are available for delivery, and an immediate reference as to damages, an appeal lies as of right to the Supreme Court from the judgment of the Court of Appeal under sub-sec. (c) of sec. 38 of the Supreme Court Act, R.S.C. ch. 139, inasmuch as the action is in the nature of a suit or proceeding in equity.

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles (No. 4), 6 D.L.R. 541, 3 O.W.N. 1381, 27 O.L.R. 97.

A judgment of a provincial Court of last resort varying the judgment given on the trial of an action for damages for alleged breach of contract, and affirming the plaintiff's right of recovery with certain limitations as to damages as to which a reference was directed, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada, within the statutory definition of that term contained in section 2 of the Supreme Court Act, R.S.C. 1906, ch. 139, as a judgment order or decision "whereby the action is finally determined and concluded." [Clarke v. Goodall, 44 Can. S.C.R. 284, and Crown Life Insurance Co. v. Skinner, 44 Can. S.C.R. 616, specially referred to.]

The notice of appeal being given the Court en banc is seized of it, and the filing of the appeal book is merely a provision for bringing the material relating to the appeal before the Court and does not in any way affect the time within which notice must be given or determine the sittings to which such notice must be given.

Patterson et al. v. Palmer, 4 S.L.R. 455.

(§ III E—91)—SERVICE OF NOTICE OF APPEAL.

Upon an appeal from a summary conviction the notice of appeal may be served either upon the justice or upon the respondent under Cr. Code 750 (amendment of 1909), but where the respondent is not served, more must be shewn than service upon a person to whom the witness, called in proof of service, had been directed on enquiry for a man bearing the same surname and initials as the justice; the appellant should prove that the person served was the justice who tried the case.

Pahkala v. Hannuksela (No. 1), 8 D.L.R. 34.

A notice of appeal from a decision of a justice of the peace may be signed by an advocate on behalf of the appellant without any express authority, but authority must be expressly shewn where the notice is signed by the advocate's clerk, and unless such authority be shewn the notice is insufficient.

Scott v. Dalphin, 7 Terr. L.R. 401.

The Court of Appeal hearing an appeal by the Crown by way of reserved case from a ruling in favour of the accused on a criminal trial will hesitate to hear the appeal of which notice has been served on his counsel but not on the accused personally, although counsel for the accused is present to argue the appeal and admits that he had shewn the accused the notice of appeal; but an adjournment for personal service will not be necessary if the accused attends in person at the argument of the appeal.

Rex v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 21 W.L.R. 652, 22 Man. L.R. 353.

F. Time; extension.

(§ III F—95)—TIME FOR TAKING APPEAL.

The meaning of rule, O. LVII., r. 3 (Nova Scotia), which stipulates that "the notice of appeal shall be served within ten days from the day that the appellant or his solicitor first had notice that the order upon the decision appealed from had been made," is not ten days from the service of the order nor ten days from the filing of the order, but ten days from "notice" of it, and for this purpose notice by telegram is effective.

Rex v. Pelton, 8 D.L.R. 77.

The inscription in appeal must be filed in the prothonotary's office before service of the notice of appeal and security on the other side. But if respondent's attorney is present when security is furnished and does not object to its being given, respondent acquiesces in the appeal and cannot complain of the aforesaid irregularity.

Leroux & Valade, 13 Que. P.R. 310.

The time for taking an appeal from the decision of the Minister of Lands (B.C.), refusing an application to purchase Crown lands is to be computed from the date of the official rejection of the claim and not from a prior date when the district commissioner gave notice to the applicant that the Lands Department had instructed him not to accept applications for the land until further advised.

Caskie v. Minister of Lands, B.C., 7 D.L.R. 616, 22 W.L.R. 498.

The right of appeal by way of petition against the decision of the Minister of Lands (B.C.), refusing an application for purchase of Crown lands is not preserved by the filing of a petition in a district registry within the statutory period of thirty days when no service of that petition is made on the Minister of Lands, but a fresh petition is filed too late in the principal registry and the latter petition is served on the Minister. [Land Act, R.S.B.C. 1911, ch. 129, sec. 163, considered.]

Caskie v. Minister of Lands, B.C., 7 D.L.R. 616, 22 W.L.R. 498.

(§ III F—98)—EXTENSION OF TIME FOR APPEALING.

Where a judgment of the Court of Appeal has given to the plaintiff in an action for specific performance of an agreement to deliver stock and bonds his choice between specific performance and a reference as to damages, and the defendant has not appealed from such judgment to the Supreme Court of Canada, being under the impression that no appeal would lie, and the plaintiff has elected to take a reference, and appeals have been taken from the referee's report, the Court of Appeal should not, at the instance of the defendant, extend the time for appealing to the Supreme Court of Canada from its original judgment.

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles (No. 4), 6 D.L.R. 541, 3 O.W.N. 1381, 27 O.L.R. 97.

Where the prisoner had since been discharged upon habeas corpus by a Judge of the Supreme Court having undoubted jurisdiction and any question as to whether a Master of the Court had power to discharge would be merely academic, there is no merit that would call for indulgence by extending the time for appealing from a prohibition order in respect of the Master's previous decision upon a similar application made on the prisoner's behalf.

Rex v. Pelton, 8 D.L.R. 77.

Where the appellant has allowed the time for giving notice of appeal to lapse, an application made to the Court after a long delay for an extension of time for serving the formal notice should not be granted unless within the limited period the appellant has taken some step from which his inten-

Rule (1897) 832, when the security required by the Privy Council Appeals Act, 10 Edw. VII. (Ont.) ch. 24, has been perfected. [This practice has since been varied by statute of 1912, 2 Geo. V. (Ont.).]

Stavert v. Campbell, 1 D.L.R. 689, 3 O. W. N. 716, 21 O.W.R. 370, 25 O.L.R. 515.

Where the mortgagor would be barred from re-opening a foreclosure, as is probably the effect of sub-sec. 8, of sec. 93, of the Land Titles Act, R.S.S. 1909, ch. 41, and, unless the application to stay proceedings upon an appeal from an order affecting the right to redeem were granted, the mortgagee might obtain a certificate of title to the lands, a stay of proceedings should be granted pending the appeal, on payment of the costs of the application and on giving security for the costs of the appeal. [See also Williams v. Box, 44 Can. S.C.R. 1; Reeves v. Konschur, 2 S.L.R. 125; Richards v. Thompson, 18 W.L.R. 179.]

Wasson v. Harker (No. 3), 7 D.L.R. 528, 22 W.L.R. 323.

In an action against two defendants to have a Crown grant revoked, judgment was given in the Supreme Court annulling the grant, but also maintaining a claim of one of the defendants for betterments to the property. The defendants appealed to the King's Bench from the judgment of revocation and the plaintiff inscribed in review from that part of the judgment which maintained the claim for betterments. It was held that an application by the defendants to stay proceedings upon the appeal to the King's Bench, until after decision of the appeal to the Court of Review should be rejected.

Pontiac Gold Mining Co. v. Beaumont, 18 Rev. de Jur. 517.

(§ III B—77)—APPEAL FROM SUMMARY CONVICTION; EFFECT ON ORIGINAL WARRANT.

On an appeal taken under sec. 751 of the Criminal Code, 1906, applicable to appeals from summary convictions and to certain appeals from summary trials (Cr. Code 797) the original warrant of commitment on the conviction appealed from is not vacated by the lodging of the appeal and the granting of bail to the accused and the further enforcement of such warrant may be proceeded with without a fresh warrant after the affirmance of the conviction upon such appeal.

Rex v. Durlin, 4 D.L.R. 660, 19 Can. Cr. Cas. 392, 17 B.C.R. 207, 21 W.L.R. 837.

C. Parties.

(§ III C—81)—DEATH OF PARTY BELOW.

An action, in the nature of "quo warranto" to oust the defendant from the office of school commissioner, having been dismissed by the Court of Review, the plaintiff appealed to the King's Bench, but died after having inscribed in appeal, and his widow and universal legatee produced a petition in continuance of suit. The respondent objected that a right to continue such an action was not transmissible by succession and that the continuance should consequently not be allowed. It was held that, costs having been adjudged against the appellant by the Court of Review, his universal legatee had an interest to continue proceedings in appeal, but that, at the present stage of the cause, the Court would not express an opinion whether or not the universal legatee, as such, had an interest to pray for removal of the defendant from office.

Desaulniers v. Desaulniers, 18 Rev. de Jur. 518.

D. Mode; conditions; regulations.

(§ III D—85)—MODE; CONDITIONS; REGULATIONS.

The signature of an attorney to a document of procedure (e.g., an inscription in review) which is affixed by means of a stamp instead of being written by hand, is valid, where no prejudice is caused by the adoption of this method. [Neil v. Champoux, 7 Que. L.R. 210, Cantin v. Belleau, 15 Que. S.C. 7, and Buzzell v. Harvey, 1 Que. P.R. 214, specially referred to.]

Grondin v. Tisi and Turner, 4 D.L.R. 819, 41 Que. S.C. 530.

E. Citation; notice; appearance.

(§ III E—90)—NOTICE OF APPEAL.

An appeal from the judgment of the provincial Court of last resort affirming the judgment given at the trial of the action disposing of the rights of the parties and directing a reference to determine the amount of damages, is not an appeal from "a judgment upon a motion to enter a verdict or nonsuit upon a point reserved at the trial" within the terms of sec. 70 of the Supreme Court Act, R.S.C. (1906), ch. 139, so as to require a notice of appeal within twenty days after the decision of the Court of Appeal of the province.

Windsor, Essex and Lake Shore Rapid Railway Co. v. Nelles, 1 D.L.R. 156.

A notice of appeal is insufficient where the grounds stated therein are (1) that the judgment appealed from is against the law, evidence, and the weight of evidence; (2) that the trial Judge erroneously admitted and excluded evidence, and (3) that the judgment was erroneous "upon such other grounds as may appear in the pleadings and proceedings, such alleged grounds being too indefinite. (Per Beck, J.)

Alfred and Wickham v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, 20 W.L.R. 111.

Defendant served notice of appeal to a sittings of the Court en banc to be holden fifteen days after service of the notice. By the Rules of Court appeal books were required to be filed at least thirty days before the date fixed for the sittings. The appellant, therefore, moved to postpone the hearing:—Held, that there being no prescribed time before the opening of the Court for giving notice of appeal, the appellant was justified in giving such notice for the next ensuing sittings.

The notice of appeal being given the Court en banc is seized of it, and the filing of the appeal book is merely a provision for bringing the material relating to the appeal before the Court and does not in any way affect the time within which notice must be given or determine the sittings to which such notice must be given.

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The right of appeal by way of petition against the decision of the Minister of Lands (B.C.), refusing an application for purchase of Crown lands is not preserved by the filing of a petition in a district registry within the statutory period of thirty days when no service of that petition is made on the Minister of Lands, but a fresh petition is filed too late in the principal registry and the latter petition is served on the Minister. [Land Act, R.S.B.C. 1911, ch. 129, sec. 163, considered.]

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Where a judgment of the Court of Appeal has given to the plaintiff in an action for specific performance of an agreement to deliver stock and bonds his choice between specific performance and a reference as to damages, and the defendant has not appealed from such judgment to the Supreme Court of Canada, being under the impression that no appeal would lie, and the plaintiff has elected to take a reference, and appeals have been taken from the referee's report, the Court of Appeal should not, at the instance of the defendant, extend the time for appealing to the Supreme Court of Canada from its original judgment.

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles (No. 4), 6 D.L.R. 541, 3 O.W.N. 1381, 27 O.L.R. 97.

Where the prisoner had since been discharged upon habeas corpus by a Judge of the Supreme Court having undoubted jurisdiction and any question as to whether a Master of the Court had power to discharge would be merely academic, there is no merit that would call for indulgence by extending the time for appealing from a prohibition order in respect of the Master's previous decision upon a similar application made on the prisoner's behalf.

Rex v. Pelton, 8 D.L.R. 77.

Where the appellant has allowed the time for giving notice of appeal to lapse, an application made to the Court after a long delay for an extension of time for serving the formal notice should not be granted unless within the limited period the appellant has taken some step from which his inten-

tion to appeal might be inferred. [Ross v. Robertson, 7 O.L.R. 494; McClemont v. Kilgour Manufacturing Co., 4 D.L.R. 351, 3 O. W.N. 1351, referred to.]

Cain v. Pearce Co. (No. 2), 6 D.L.R. 325, 4 O.W.N. 70, 23 O.W.R. 43.

Where, under section 335 of the Inspection and Sale Act, R.S.C. ch. 85, the Court or Judge hearing an appeal from a conviction under that Act has once extended the time for hearing and decision beyond the 30 days thereby limited, the time for such hearing and decision is then wholly at large and in the discretion of the Court or Judge.

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.W.R. 381.

The Court to which an appeal may be taken from a summary conviction upon compliance with the statutory requirements as to notice and security (Cr. Code, sec. 750, as re-enacted, 1909) has no jurisdiction to extend the time for service of notice of appeal.

The King v. White, 19 Can. Cr. Cas. 156, 10 E.L.R. 297.

Where the judgment of a Divisional Court is for such an amount that an appeal therefrom to the Court of Appeal lies as of right, and a substantial question of law of general interest is involved in the action, and there is an intention, communicated to the respondent's solicitors, to appeal within the proper time, but, owing to an oversight in the office of the appellant's solicitors, notice of appeal has not been served in time, the time for appealing may be extended. [Ross v. Robertson, 7 O.L.R. 494, referred to.]

McClemont v. Kilgour Manufacturing Co. (No. 2), 4 D.L.R. 351, 3 O.W.N. 1351, 22 O.W.R. 403.

Where notice was not given in proper time of an appeal from an order of a Judge in Chambers extending the time to appeal from the judgment at the trial, and no appeal was specially taken from such order, the Court hearing the principal appeal will not review the propriety of the extension order upon an objection that the principal appeal, apart from such order, is made too late. (Per Drysdale, J.) [Belden v. Freeman, 21 N.S.R. 106, specially referred to.]

Van Buskirk v. McDermott, 5 D.L.R. 5, 11 E.L.R. 100.

The limitation of sixty days for appealing to the Supreme Court of Canada under sec. 69 of the Supreme Court Act, R.S.C. (1906), ch. 139, may under sec. 71 of that Act be extended by the Court appealed from, but not by the Supreme Court of Canada. [Windsor, Essex & L. S. Rapid Ry. Co. v. Nelles (1912), 1 D.L.R. 156, affirmed on this point.]

Windsor, Essex and Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 309.

The limitation of sixty days for appealing to the Supreme Court of Canada under sec. 69 of the Supreme Court Act, R.S.C. (1906), ch. 139, may under sec. 71 of that Act be extended by the Court appealed from, but not by the Supreme Court of Canada.

Windsor, Essex and Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 156.

Section 71 of the Supreme Court Act, R.S.C. 1906, ch. 139, providing that the Court proposed to be appealed from, or any Judge thereof, may under special circumstances, allow an appeal although the same is not brought within the time prescribed by the Act, applies only to judgments otherwise appealable, and does not confer power to grant leave to appeal from a judgment which is interlocutory only or which is not a "final judgment" within the definition of that statute. [Vaughan v. Richardson, 17 Can. S.C.R. 703, and News Printing Co. v. Macrae, 26 Can. S.C.R. 691, specially referred to.]

Nelles v. Hesseltine; Windsor, Essex and L. S. Rapid R. Co. v. Nelles, 2 D.L.R. 732, 21 O.W.R. 430, 3 O.W.N. 862.

G. Security.

(§ III G—101)—Necessity.

Art. 1214 C.P. (Que.) is imperative in declaring that unless an appellant declare in writing in the office of the Court whose judgment is appealed from, that he does not object to the judgment rendered against him being executed, or unless he file a copy of any judgment ordering provisional execution of the judgment appealed from, in which cases he is only bound for the payment of the costs, he "must give good and sufficient security that he will effectually prosecute the appeal, that he will satisfy the condemnation and pay all costs and damages adjudged if the judgment appealed from is confirmed," and, therefore, the Court has no discretion in the matter and the security must be furnished absolutely according to the statute.

Miller v. Diamond Light and Heating Co., Ltd., 5 D.L.R. 99.

(§ III G—102)—Sufficiency.

Security for costs only, is not sufficient on an appeal from an order condemning one to render an account within thirty days, or on default, to pay a sum of money received on account of the plaintiff, since the security must, under art. 1214 C.P., be for an amount sufficient to pay all costs, interest, and damages that can be taxed on confirmation of the judgment. [The Montreal, Rutland and Boston R. Co. v. Hattan, M.L.R. 1 Q.B. 72; Moore v. Lamoureux, Que. 5 Q.B. 532; Brunet v. The United Shoe Machinery Co. of Canada, 12 Que. P.R. 207, followed; O'Leary v. Francis, Que. 12 S.C. 243; Rochette v. Ouellet, 9 Q.L.R. 361; Rochette v. Ouellet, 6 L.N. 412, distinguished.]

Miller v. Diamond Light and Heating Co., Ltd., 5 D.L.R. 99.

On an appeal from an order condemning one to render an account within thirty days, or on default to pay $42,913.20, security need not be given for the payment of such sum, but only for the payment of such costs,

interest, and damages as may be taxed upon a confirmation of the judgment.

Miller v. Diamond Light and Heating Co., Ltd., 5 D.L.R. 99.

A deposit of $2,000 cash under art. 1963 C.C. (Que.), providing that "when a person cannot find surety, he may in lieu thereof deposit some sufficient pledge as security" is insufficient on an appeal from an order condemning the defendant to render an account within thirty days, or on default to pay $42,913.20, and the appeal will be dismissed, unless the defendant shall, within ninety days, either give new security to satisfy all costs and damages if the judgment is affirmed, or make a further deposit of $5,000.

Miller v. Diamond Light and Heating Co., Ltd., 5 D.L.R. 99.

On an appeal from a summary conviction imposing a fine and, in default of payment, imprisonment, the appellate Court is not deprived of jurisdiction to hear the appeal by a clerical error in the recognizance whereby the amount of appellant's personal obligation was omitted although filled in as to the sureties.

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 246.

(§ III G—106)—TIME FOR GIVING SECURITY.

The department of the provincial treasurer, prosecuting an appeal from a judgment whereby the appellants, license commissioners in the City of Montreal, were prohibited from giving effect to a decision of cancellation of an inn-keeper's license which had issued in favour of the respondent, is not required to affix stamps to the inscription in appeal or to give security thereon, but an appeal from a judgment rendered upon the special proceedings provided for in ch. 40 C.P., cannot be made after thirty days from the rendering of the judgment, even if such appeal be at the instance of the Crown. The appeal was from a judgment maintaining a demand for prohibition against the license commissioners of the City of Montreal, in favour of the respondent. The respondent moved to quash the appeal on the grounds that the inscription had not been stamped, that security in appeal had not been given, and that the appeal had not been taken within the thirty days mentioned in art. 1006 C.P.

Choquet et al. v. Demers, 18 Rev. de Jur. 14.

(§ III G—107)—CASH DEPOSIT.

A cash deposit under Cr. Code sec. 750 to answer the costs of an appeal from a summary conviction is a security payable to the Crown.

Groulx v. Sicotte, 19 Can. Cr. Cas. 101, 13 Que. P.R. 31.

Where an appeal from a summary conviction awarding a money penalty was taken under Cr. Code sec. 749 to the Court of King's Bench (Crown side) in the Province of Quebec, and that Court dismissed the appeal without making any order in respect of the cash deposit made by the appellant under Cr. Code sec. 750, the Superior Court of Quebec on evocation from the Circuit Court has jurisdiction to decide a contestation respecting the ownership of the money deposited.

Groulx v. Sicotte, 19 Can. Cr. Cas. 101, 13 Que. P.R. 31.

IV. Record and case in Appellate Court.

C. Contradictions in.

(§ IV C—120)—CONTRADICTIONS IN.

Items in controversy will not be considered which are not involved in the action in which the appeal is taken.

Maritime Gypsum Co., Ltd., v. Redden, 8 D.L.R. 155, 11 East. L.R. 155.

D. Amending; perfecting.

(§ IV D—125)—AMENDMENTS ON APPEAL.

A question not going to the merits of a case and not raised by the notice of appeal, cannot be brought to the attention of the Court by a supplementary or "explanatory" notice of appeal. (Per Beck, J.)

Alfred and Wickham v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, 20 W.L.R. 111.

Where no mistake has been made, but the grounds of appeal set out in a notice of motion by way of appeal are untenable, and an amendment of such grounds is sought for the purpose of enabling new points to be argued, the Court will have regard to the nature of the litigation and to the possibility of ending it by a decision upon the new points sought to be raised, in determining whether the amendment should be granted.

Foxwell v. Kennedy, 3 D.L.R. 703, 3 O.W.N. 1225, 22 O.W.R. 21.

An amendment of the grounds of appeal in a notice of motion by way of appeal is not allowed in every case, and, while it is as of course in an ordinary case, it will not be allowed simply because a mistake has been made.

Foxwell v. Kennedy, 3 D.L.R. 703, 3 O.W.N. 1225, 22 O.W.R. 21.

F. Evidence.

(§ IV F—135)—EVIDENCE.

Printing of evidence applicable to the issue in appeal, but adduced by a litigant not a party to the appeal. Ordered, that the respondent should print the evidence in question, as by its motion it alleged such evidence to be necessary for the decision of the appeal.

Quebec Land Co. v. City of Quebec, 18 Rev. de Jur. 132.

I. Findings.

(§ IV I—150)—FINDINGS.

In an issue as to lunacy a Divisional Court has no power, either under the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, or under the Ontario Con. Rules, or otherwise, of its own motion and against the protest of one of the parties to the issue,

to re-open the case and to call for and hear a large amount of fresh evidence and to determine the issue upon the original evidence and the fresh evidence thus obtained, not as upon an appeal but as in the first instance. [In re Enoch and Zaretsky Bock and Co.'s Arbitration, [1910] 1 K.B. 327, and Kessowji Issur v. Great Indian Peninsula R. Co., 96 L.T.N. S. 859, specially referred to; Re Fraser, 24 O.L.R. 222, reversed on appeal.]

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

Ontario Rule 498 (C.R. 1897) does not throw the case in appeal open for the reception of further evidence unless grounds are shewn for obtaining the special leave of the Court; and such leave will, in general, be confined to the production of such evidence as, upon an application of which the opposite party in the appeal would be notified and would have an opportunity of meeting, a proper case is made for adducing at that stage; though, where it appears to the Appellate Court that, by reason of some slip or oversight, evidence necessary for the full elucidation of a point, or which would complete more or less formally the proof or some instrument or fact bearing upon the issues, has been omitted, it may, in its discretion, of its own motion direct the production of the necessary evidence. [Re Fraser, 24 O.L.R. 222, reversed on appeal.]

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

(§ IV I—153)—SUFFICIENCY.

A judgment for the defendant in an action on a promissory note given by him to the plaintiff will not be disturbed where the trial Judge found on the facts that it had been paid by the defendant conveying to the plaintiff land the former had agreed to sell to a third person, who had sold his equity therein to the plaintiff, the latter assuming payment of the former's indebtedness on the land to the defendant, under an agreement between the three that the amount due the plaintiff from the defendant on such note should be credited by the latter on the indebtedness the plaintiff had assumed.

Lindsay v. La Plante, 3 D.L.R. 449, 21 W.L.R. 477.

L. Certificates.

(§ IV L—165)—CERTIFICATES.

An appeal from the certificate of a taxing officer on a taxation between a solicitor and his client is to be treated as an appeal from a Master's report, and is to be taken in conformity with Manitoba King's Bench Rule 682 rather than in pursuance of rules 684 and 685.

Re Phillipps and Whitla, 1 D.L.R. 291, 20 W.L.R. 229, 48 C.L.J. 198, 22 Man. L.R. 150.

V. Objections and exceptions; raising question in lower Court.

A. Definiteness; sufficiency.

(§ V—230)—OBJECTIONS AND EXCEPTIONS; RAISING QUESTION IN LOWER COURT.

An objection to an interlocutory order that it was made on an affidavit of information and belief which did not disclose the source of such information (N.S. Judicature rules, order 36, rule 3) is too late if first raised in appeal.

Buckley v. Fillmore, 8 D.L.R. 526.

(§ V A—238)—TO FINDINGS OR CONCLUSIONS OF COURT.

An objection that the cause of action set up in a statement of claim was not supported by the evidence will not be considered on an appeal of a cause that was not defended on the trial, as such objection, had it been made on the trial, might have been met by an amendment of the statement of claim so as to conform to the evidence.

Ferguson v. Swedish Canadian Lumber Co., Ltd., 2 D.L.R. 557, 10 E.L.R. 386.

(§ V A 2—251)—WHAT QUESTIONS RAISED.

Where in an action on calls on shares of capital stock, there is no proof of a by-law that shares should be sold at a discount, and no objection was made below to such want of proof, the Court hearing the case in appeal may permit proof of the by-law to be put in. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed; Cook v. McMullen, 5 O.W.R. 507; Hargreaves v. Hilliam (1894), 58 J.P. 655, cited in Court below.]

Boeckh v. Gowganda Queen Mines, 8 D. L.R. 782, 46 Can. S.C.R. 645.

VI. Preliminary motions; dismissal; abatement; abandonment; quashing.

A. In general.

(§ VI A—281)—MOTION TO AFFIRM JURISDICTION.

A preliminary motion to affirm the jurisdiction on an appeal to the Supreme Court of Canada will be dismissed and the parties left to their rights on the hearing, if the facts shewn on the preliminary motion are insufficient to enable the Court to finally determine whether the judgment or order appealed from was final and so subject to appeal or was interlocutory only and, therefore, not subject to appeal. [Clark v. Goodall, 44 Can. S.C.R. 284; Crown Life v. Skinner, 44 Can. S.C.R. 616, and McDonald v. Belcher, [1904] A.C. 429, specially referred to.]

Windsor, Essex and Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 309.

B. Grounds for dismissal.

(§ VI B—286)—LACK OF CONTROVERSY, CHANGE IN CIRCUMSTANCES PENDING APPEAL.

Where a verdict for an amount less than the claim is given with the consent of the

defendant and is so entered on the record, the plaintiff, who took the benefit of it and took no objection although represented by counsel, must be taken to have also consented; the judgment so entered is a consent judgment and as such is not appealable under the Manitoba County Courts Act, R.S.M. 1902, ch. 38.

Timmons v. Brown, 1 D.L.R. 311, 20 W.L.R. 346, 22 Man. L.R. 47.

(§ VI B—287)—IRREGULARITIES IN PAPERS OR PROCEEDINGS.

Although article 1213 C.P. (Que.) provides that, after the inscription of appeal to the King's Bench, notice thereof must be served on the attorney for the opposite party, an objection to an appeal duly inscribed on the ground of want of notice is waived if the same objection might have been taken at the filing and allowance of security on the appeal and the party now objecting was there represented and did not object. [Gross v. Racicot, 11 Que. P.R. 124, distinguished.]

Valade v. Leroux, 2 D.L.R. 108.

VII. Hearing and determination.

A. In general; rules of decision.

(§ VII A—290)—IN GENERAL, RULES OF DECISION.

On an appeal from a summary conviction a preliminary motion may be made to quash the conviction appealed from upon grounds appearing on the face of the proceedings, ex. gr. the lack of any evidence as to an essential part of the offence.

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 246.

C. Evidence; amendments; trial de novo.

(§ VII C—301)—EVIDENCE.

In dealing with the reception of further evidence bearing upon matters which have occurred before the decision upon the merits at the trial, an Appellate Court should exercise great caution, owing to the danger of throwing open the whole matter after it has been investigated at a trial, and the opinion of the trial Judge and his reasons for it have become known. [Trimble v. Hortin, 22 A.R. 51, referred to.]

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

The power of Appellate Courts to direct the reception of further evidence is purely statutory, and exercisable only to the extent conferred either expressly or by fair implication.

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

(§ VII C—302)—AMENDMENTS.

Where the Court of King's Bench, had objection been made to its jurisdiction because a submission to arbitration of the question of compensation for land taken for a public street was not made a rule of Court, could have granted an adjournment for the purpose of having the submission made a rule of Court, the Court of Appeal has the like power on an appeal from the order of the Court of King's Bench quashing the award made. (Per Cameron, and Richards, JJ.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

F. Decisions in favour of party, or not affecting him.

(§ VII F—328)—ACADEMIC QUESTION.

The reserving of purely academic questions for the opinion of the Court of Appeal, while within the powers of the Court below, the Court of Appeal may refuse to hear them.

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

H. Interlocutory matters; orders, etc., not appealed from.

(§ VII H—340)—INTERLOCUTORY MATTERS.

An interlocutory judgment dismissing an exception to the form to pleadings as being vague and indefinite is not appealable to the Court of Review.

Lagacé v. Boyer, 14 Que. P.R. 13 (Sup. Ct.).

Where a motion for a foreign commission is first made to a Judge instead of to the registrar of the Court under N.B. Rules, order 30, rule 5, and the commission has been issued, an appeal from the order will not be entertained merely on the ground that the applicant should have been ordered to pay the costs of the irregular application.

Cluff v. Brown, 8 D.L.R. 688, 11 East. L.R. 78.

An appeal from the trial judgment does not reopen interlocutory orders based on material that could not be before the trial Judge. (Per Drysdale, J.) [Compare Windsor, Essex and L. S. R. Co. v. Nelles (No. 1), 1 D.L.R. 156, 159; Windsor, Essex, and L. S. R. Co. v. Nelles (No. 2), 1 D.L.R. 309, and Nelles v. Hesseltine; Windsor, Essex and L. S. R. Co. v. Nelles (No. 3), 2 D.L.R. 732.]

Van Buskirk v. McDermott, 5 D.L.R. 5, 11 E.L.R. 100.

I. Discretionary matters.

(§ VII I—345)—DISCRETIONARY MATTERS.

A Judge has large discretionary powers in fixing the place of trial, upon a summons for directions. Here, the Court refused to change the Judge's order.

Windsor Lumber Co. v. Rundle, 40 N.B. R. 522.

(§ VII I 1—346)—COSTS.

The Court will not review a taxation of costs by a Judge of the County Court even where the amount allowed appeared to be excessive unless the Judge has first been ap-

plied to to review his taxation and has refused to do so.

The Canadian Bank of Commerce v. Colwell, 5 D.L.R. 831.

An Appellate Court will not set aside on appeal a discretionary order as to costs made by the Court below unless it appears that there has been a violation of principle or a misapprehension of facts in making the order appealed from. [Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466, approved.]

McEwan and Dougherty v. Marks, 4 D.L.R. 369, 21 W.L.R. 34.

Where party and party costs are given out of an estate by the trial Judge, an Appellate Court will not vary the order or provide for solicitor and client costs to a successful beneficiary, not an executor or trustee.

Re Mountain, 4 D.L.R. 737, 3 O.W.N. 1011, 21 O.W.R. 866, 26 O.L.R. 163.

On an appeal from a Local Master's disposition of costs on refusing an application for security for costs under Rule 622 of Saskatchewan Rules of Court, 1911, though no leave to appeal is necessary, the order should be dealt with on the same principle as a discretionary order where leave to appeal is necessary and has been obtained, and on such appeal the Appellate Court will not interfere with the discretion exercised by the Court below unless there has been a violation of principle or a misapprehension of facts. [In re Gilbert, 28 Ch. D. 549; Young v. Thomas, [1892] 2 Ch. 134, specially referred to.]

Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466.

Leave to appeal from a Local Master's disposition of costs on the dismissal of an application for security for costs is not necessary under Rule 622 of the Saskatchewan Rules of Court, 1911. [Foster v. Edwards, 48 L.J.Q.B. 767, followed.]

Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466.

(§ VII I—351)—DISMISSAL FOR WANT OF PROSECUTION.

The dismissal of an action for want of prosecution is discretionary, and the order of the Master in Chambers in such a case will not be interfered with, unless the Judge in appeal can say that the Master exercised his discretion wrongly, or that his order was not the right order. [Siever v. Spearman, 74 L.T.R. 132, followed.]

McNaughton v. Mulloy (No. 2), 3 D.L.R. 317; 3 O.W.N. 1061.

(§ VII I 2—352)—MATTERS OF PROCEDURE.

The discretion used by the Court of original jurisdiction as to incidents of procedure and informalities therein should not be interfered with by Appellate Courts unless substantial injustice has been done.

Sterling v. Levine, 7 D.L.R. 266.

(§ VII I 3—353)—LEAVE TO DEFEND.

The Court of Appeal will not interfere with the exercise of a trial Judge's discretion in granting leave to defend an action after judgment by default, unless it appears that there was an abuse thereof.

Royal Bank of Canada v. Fullerton Lumber and Shingle Co., Ltd., 2 D.L.R. 343, 17 B.C.R. 11.

An order granting leave to defend an action, after entry of judgment, upon payment of the costs of the action up to judgment, and payment into Court of the amount of the judgment, to abide the result of the trial, does not amount to such an abuse of the wide discretion vested in the trial Judge as will justify interference by the Appellate Court.

Royal Bank of Canada v. Fullerton Lumber and Shingle Co., Ltd., 2 D.L.R. 343, 17 B.C.R. 11.

(§ VII I 3—356)—AMENDMENT.

Where it appears that the evidence was taken at the trial of an action for damages for slander as if the circumstances shewing how the words alleged, which were not in themselves actionable, could have been understood in the defamatory sense charged in the innuendo, the Court hearing an appeal from a verdict for the plaintiff may direct an amendment of the pleadings to supply the omission under the powers of the Judicature Act of New Brunswick, 1909, marginal rule 486.

Sonier v. Breau, 3 D.L.R. 184, 10 E.L.R. 391.

(§ VII I—361)—ADMISSION OF EVIDENCE.

Where the Court of Appeal has ordered a new trial of a criminal case tried before a County Court Judge's Criminal Court because of the improper admission of evidence, the case is remitted to the same Court for trial upon his original election for speedy trial therein and waiver of his right to a jury.

The King v. Deakin (No. 2), 2 D.L.R. 282, 19 Can. Cr. Cas. 274, 17 B.C.R. 13.

(§ VII I 6—375)—CONDUCT OF TRIAL, JURY.

Although an order upon an interlocutory application to strike out the jury notice may have been improperly made under the general rules of Court in force at the time it was made, the Divisional Court, hearing an appeal therefrom may make the substantive order which by the new Rules of Court passed, pending the appeal, the Court appealed from is authorized to make. [Bank of Toronto v. Keystone Fire Ins. Co., 18 P.R. (Ont.) 113, followed; and see Canadian Ten Year Digest, 1943, 1946, 1948.]

Ferguson v. Eyre, 1 D.L.R. 69, 3 O.W.N. 505, 20 O.W.R. 873.

The Appellate Court will not interfere with the trial Judge's exercise of discretion, under marginal rules 426-432 of the B.C. Rules, 1906, in refusing the plaintiff a jury in an action for damages for the breach of an agreement to supply water for domestic

and irrigation purposes, and for a mandatory injunction to compel performance thereof.

McArthur v. Rogers, 2 D.L.R. 347, 17 B.C.R. 48.

(§ VII I—387)—STAY OF EXECUTION.

Where a trial Judge, in the exercise of his discretion, refused a stay of execution, a second application to the Court of Appeal having concurrent jurisdiction to grant a stay, will be dismissed unless some special circumstances are shewn. [The Annot. Lyle (1886), 11 P.D. 114; Barker v. Lavery, 14 Q.B.D. 769, followed; B.C. order 58, rule 16, specially referred to.]

Williamson v. Grigor, 6 D.L.R. 53, 22 W.L.R. 29.

J. Questions not raised below.

(§ VII J—390)—QUESTION NOT RAISED BELOW.

Where an appeal is brought from the refusal of a motion for a new trial a ground of such motion which had been stated in the notice of motion but which was not argued or mentioned on the hearing of the motion upon oral argument and upon which the Judge was not asked to pass and concerning which, therefore, he expressed no opinion, will not be considered on an appeal from the denial of such motion.

Hale v. Tompkins, 6 D.L.R. 502, 11 East. L.R. 91.

(§ VII J 3—408)—NEGLIGENCE.

The question whether a Master has, by delegating the conduct of his business to a competent manager and foreman, absolved himself from liability for injuries sustained by a minor servant who was directed to temporarily work at a dangerous machine without first being warned as to the dangerous nature thereof, cannot be raised for the first time in the Court of Appeal. [Young v. Hoffman, [1907] 2 K.B. 646, and Cribb v. Kynoch, Ltd., [1907] 2 K.B. 548, distinguished.]

Stokes v. Griffin Curled Hair Co., 4 D.L.R. 844, 3 O.W.N. 1414, 22 O.W.R. 474.

(§ VII J 3—400)—NEW THEORIES.

A plaintiff whose claim is wholly for equitable relief to which he is found disentitled may be refused leave on an appeal from such finding to change the form of his action so as to raise a new cause of action regarding the same subject-matter in lieu of the claim already made.

Bullen v. Wilkinson, 2 D.L.R. 190, 3 O.W.N. 859, 21 O.W.R. 427.

(§ VII J 4—417)—AS TO PLEADING, DEFENCES.

Where there are both a statute and a municipal by-law upon which a defendant might rest his defence, and, at the trial, he concedes that he cannot rely upon the statute and stands upon the by-law, it is not open to him, upon appeal, to fall back upon the statute.

McNair v. Collins, 6 D.L.R. 510, 3 O.W.N. 1639, 22 O.W.R. 891, 27 O.L.R. 44.

(§ VII J 4—419)—INDICTMENT, INFORMATION AND COMPLAINT.

An objection to an information based on a municipal by-law prohibiting the use of abusive, insulting, and provoking language toward another while on a public street, because of the omission of the word "abusive" therefrom, is too late where made for the first time upon an appeal from the decision of a County Judge upon the review of a magistrate's conviction, where the statute authorizing the by-law is sufficient to warrant a by-law in the terms of the conviction without the word "abusive."

The King v. Elderman, 19 Can. Cr. Cas. 445.

(§ VII J 5—428)—WITNESS NOT SWORN.

Where a witness upon a material fact has been permitted without legal sanction to testify on affirmation instead of upon oath, the result is a mistrial and a new trial should be ordered under Cr. Code sec. 1018.

The King v. Deakin, 19 Can. Cr. Cas. 62, 19 W.L.R. 43, 16 B.C.R. 271.

(§ VII J 7—435)—AS TO INSTRUCTIONS TO JURY.

On a criminal trial an instruction is not erroneous by which the jury were told, in substance, that the accused would be guilty of the offence of procuring under Cr. Code (1906), sec 216 (f), only if they found that, at the time the accused induced a woman to enter a brothel she was not already an inmate of such a place.

Rex v. Mah Hung, 2 D.L.R. 568, 17 B.C.R. 56, 20 Can. Cr. Cas. 40.

While the lack of objection on the prisoner's behalf at a criminal trial to an erroneous instruction in the Judge's charge is not necessarily fatal to an appeal, it is a matter which the Appellate Court will consider as a circumstance tending to uphold the trial proceedings notwithstanding the irregularity, when determining whether or not any substantial wrong or miscarriage had been thereby occasioned without which the conviction must be affirmed under sec. 1019 of the Cr. Code (Can.) 1906.

The King v. Lew, 1 D.L.R. 99, 19 W.L.R. 853, 19 Can. Crim. Cas. 281, 17 B.C.R. 77.

K. Errors waived or cured below.

(§ VII K—445)—ERRORS WAIVED OR CURED BELOW.

An objection that a submission to arbitration had not been made a rule of Court, will be considered waived and not open to consideration on appeal where the parties appeared before the Court of King's Bench and submitted a motion to set aside the award of an arbitrator without raising such question. (Per Perdue, J.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

(§ VII K—446)—ARRAIGNMENT AND PLEA.

An objection that the preliminary enquiry in a criminal case was not conducted ac-

cording to law will not avail where the accused, who had been committed for trial, pleaded not guilty and stood trial without questioning the regularity of the preliminary proceedings.

The King v. Sequin, 3 D.L.R. 257, 20 Can. Cr. Cas. 69.

(§ VII K 2—451a)—COMPLAINT, DECLARATION OR PETITION.

Where on an exception to the form raising want of production of notice of action the plaintiff is allowed to amend his declaration to allege the giving of the notice, and a copy of the notice is produced, and the exception subsequently dismissed as being without further object, and the case goes to trial by jury and judgment is rendered therein, such judgment will not be interfered with by an appellate Court on the ground that the amended declaration was never served.

City of Westmount v. Hicks, 8 D.L.R. 488.

L. Review of facts.

(§ VII L—470)—REVIEW OF FACTS ON APPEAL.

Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the Court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate Court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law. [Atlantic and North-west Railway Co. v. Wood (1895), A.C. 257, 64 L.J.C.P. 116, followed, under which a similar question under sub-sec. 2 of sec. 161 of the Canadian Railway Act, 1888, being sec. 168 of 3 Edw. VII. (Can.) ch. 58, was decided.]

Canadian Northern Pacific R. Co. v. Dominion Glazed Cement Pipe Co., Ltd., 7 D.L.R. 174, 22 W.L.R. 335.

Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where conflicting views as to the quantum of damages were apparent but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question.

Canadian Northern Pacific R. Co. v. Dominion Glazed Cement Pipe Co., Ltd., 7 D.L.R. 174, 22 W.L.R. 335.

By an inscription in law, defendant cannot raise questions of facts, nor deny the facts alleged, but the same must be presumed to be true. In the present case the evidence alone of the divers circumstances and facts alleged in plaintiff's declaration will shew whether the responsibility and compensation for the accident in question in this cause, are to be determined by the Workmen's Act, 9 Edw. VII. ch. 66, or by the common law, and under such circumstances the Court will order "preuve avant faire droit" on defendant's inscription in law.

Biggs et ux. v. Grand Trunk R. Co., 18 Rev. de Jur. 383.

Whether or not a workman, killed by accident in the course of his employment, was the sole support of the ascendant who claims indemnity for his death, being only a question of fact the decision of the Court of first instance thereon should only be reformed in review where there is palpable error therein.

The provision of art. 1312 C.C. that the decree for separation as to property is without effect so long as it remains unexecuted does not apply to the case of a decree for separation de corps which involves separation as to property as a secondary consequence.

Bernard v. Davis, Q.R. 42 S.C. 170 (Ct. Rev.).

Question of Fact—Finding of Trial Judge—Evidence.

Stone Limited v. Atkinson Brothers, 2 D.L.R. 920, 3 O.W.N. 572, 20 O.W.R. 989.

(§ VII L—472)—REFERRED OR RESERVED WITHOUT FINDING.

Upon the trial of a mechanics' lien action under the statutory provisions of the Nova Scotia Mechanics' Lien Act, the trial Judge should not refer any of the questions involved to the Court of Appeal without himself deciding the same, but if it appears that the question which he did decide was sufficient to dispose of the action the case need not be referred back to deal with questions which could not affect the result.

Dixon v. Ross, 1 D.L.R. 17.

(§ VII L 2—475)—OF VERDICT.

The Supreme Court of New Brunswick will not, on an appeal from an order of a County Court refusing a new trial on the ground that the verdict of the jury was against the evidence, interfere with the finding of the Court below. (Per Barry, J.) [Sheraton v. Whelpley, 20 N.B.R. 75, specially referred to; see also Hilland v. Hamm, 17 N.B.R. 289.]

Hale v. Tompkins, 6 D.L.R. 502, 11 East. L.R. 91.

Although an Appellate Court may think that the preponderance of testimony is in favour of the unsuccessful party in an action tried with a jury, it cannot substitute its opinion for that of the jury, or interfere with the jury's conclusions except upon some error or other substantial ground.

Zufelt v. Canadian Pacific R. Co., 7 D.L.R. 81, 4 O.W.N. 39.

The findings of fact made by a Judge in an action tried by him without a jury do not stand upon the same footing before an

Appellate Court as the findings of a jury, but the Appellate Court, if it considers them erroneous, may come to a different conclusion and act upon it, and a finding as to damages is in precisely the same position in this respect as any other finding of fact. [Jones v. Hough, 5 Ex. Div. 155, followed; Phillips v. South Western R. Co., 4 Q.B.D. 406, 5 Q.B.D. 78, discussed and applied; Bigsby v. Dickinson, 4 C.D. 24; North British and Mercantile Insurance Co. v. Tourville, 25 Can. S.C.R. 177; and Prentice v. Consolidated Bank, 13 A.R. 69, referred to; judgment of Riddell, J., Bateman v. County of Middlesex, 24 O.L.R. 34, and of a Divisional Court, S.C., 25 O.L.R. 137, varied by reducing the damages from $12,500 to $10,000.]

Bateman v. County of Middlesex, 6 D.L.R. 533, 3 O.W.N. 1541, 22 O.W.R. 685, 27 O.L.R. 122.

To justify the setting aside of a verdict on the ground of excessive damages, the Appellate Court must find that the damages are so excessive that twelve reasonable men could not have given them, or that the jury have disregarded some direction of the Judge or have considered topics which they ought not to have considered, or have applied a wrong measure of damages. [Praed v. Graham, 24 Q.B.D. 53, and Johnston v. Great Western Ry. [1904], 2 K.B. 250, 73 L.J.K.B. 568, 20 Times L.R. 455, applied.]

Taylor v. B. C. Electric R. Co. Ltd., 1 D.L.R. 384, 19 W.L.R. 851.

(§ VII L—476)—Of verdict, negligence.

A verdict for the plaintiff for injuries sustained by the starting of a car with a jerk as he was about to alight therefrom will not be disturbed where there was sufficient evidence, although conflicting, to go to the jury that the plaintiff had not time to alight in safety before the car started.

Jacob v. Toronto R. Co., 3 D.L.R. 818, 22 O.W.R. 180, 3 O.W.N. 1255.

A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snow-plough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

Jones v. Canadian Pacific R. Co., 5 D.L.R. 332, 3 O.W.N. 1404, 22 O.W.R. 439.

A verdict against a street railway company in favour of the plaintiff for injuries sustained by being struck by a street car will not be disturbed where, from the evidence, the jury was justified in finding that the car was negligently operated at excessive speed in crossing a public street at a dangerous point where the view was obstructed, and that the plaintiff, who was driving a long waggon, exercised reasonable care in approaching and endeavoring to cross the track and took reasonable care to save himself from injury, and that the motorman in charge of the car had time to avoid the accident after he became aware that the plaintiff intended to cross the track.

Goodchild v. Sandwich, Windsor, and Amherstburg R. Co., 4 D.L.R. 159, 22 O.W.R. 152, 3 O.W.N. 1252.

Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train on which car the plaintiff was riding were closed while the train was standing at a certain station; where the jury balances the probabilities (a) on the testimony of the defendant company's conductor and brakeman for the negative and (b) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

McDougall v. Grand Trunk R. Co., 8 D.L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

A verdict in favour of an injured servant will not be disturbed where the evidence as to his contributory negligence is conflicting and not so conclusive and undisputed as to warrant the withdrawal of that question from the jury.

McClement v. Kilgour Manufacturing Co., 3 D.L.R. 362, 3 O.W.N. 999, 21 O.W.R. 856.

Review of verdict—Liability of railway for causing death.

Grand Trunk R. Co. v. Parent, 7 D.L.R. 810.

(§ VII L 2—477)—Review of verdict, criminal cases.

When it appears upon a reserved case that there was evidence upon which the jury could reasonably find as they did, the Appellate Court should not grant a new trial merely because a different conclusion may appear to it to have been preferable on a consideration of the whole evidence.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

Where the Appellate Court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the Appellate Court in setting aside a conviction for murder or directing a new trial under the Cr. Code 1906, sec. 1019, by reason of the trial Judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder. [Rex. v. Eberts (No. 1), 7 D.L.R. 530, affirmed.]

Rex. v. Eberts (No. 2), 7 D.L.R. 538.

(§ VII L 2—480)—As to damages.

Where the damages awarded by the jury at the first trial were held to be excessive and the Court of Appeal had ordered a new trial and the result of the new trial was a verdict for a still larger sum, the Court of Appeal, upon an appeal from the second verdict, may itself fix the amount of damages instead of sending the case back for a third trial before a jury by virtue of its statutory powers. [See Annotation to this case.]

Taylor v. B. C. Electric R. Co., Ltd., 1 D.L.R. 384, 19 W.L.R. 851.

(§ VII L 3—485)—Of findings of Court.

Where it is evident upon an appeal, in a case tried without a jury, that the trial Judge based one of his conclusions entirely upon the inferences which he drew from certain facts to which he referred in his opinion or written reasons for judgment, and the Appellate Court is of opinion that he erred in such conclusions, it may draw from the same facts the inferences which it considers to be the proper ones, and dispose of the case upon its own finding of the effect of the transaction in question.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

Where the Judge at the trial has seen and heard the witnesses for the plaintiff, but the evidence of those for the defendant has been taken de bene esse and read at the trial, and it appears to an Appellate Court that the evidence for the defendant was given with clearness and candour, while that for the plaintiff is discredited by the plaintiff's own letters, and the agreement sued upon by the plaintiff is, under the undisputed circumstances, a very improbable transaction, the Appellate Court may reverse findings of fact in favour of the plaintiff, and may hold that he has not made out his case, in spite of the fact that the trial Judge has expressly given credit to the witnesses on his behalf. [Kinsman v. Kinsman, 5 D.L.R. 871. reversed.]

Kinsman v. Kinsman (No. 2), 7 D.L.R. 31, 4 O.W.N. 20, 22 O.W.R. 979.

The Appellate Court should not reverse the finding of fact of the trial Court where the same is based upon preponderating evidence unless the Court hearing the appeal is of opinion that the evidence relied upon to support the finding of the Court below is absolutely inconsistent with a reasonable view of the circumstances, and not merely that there are phases in the transaction pointing strongly against the finding appealed from.

Trites-Wood v. Waters, 3 D.L.R. 545, 20 W.L.R. 924.

In an action for the recovery of wages for the services of the plaintiff and his wife, where the defendant appeals from the trial Judge's finding as to a certain alleged payment to the wife purporting to be in accord and satisfaction of the debt, the Appellate Court will properly consider among suspicious circumstances: (a) that the wife has separated from her husband and is working for the defendant under a new arrangement; (b) that the wife, after her husband's action was brought, took at the defendant's suggestion a long-date promissory note without interest (ante-dated) as in settlement of the action; (c) that the wife apparently lent herself to help the defendant in the action; (d) that the evidence for the defence was conflicting and unsatisfactory.

Styles v. Lasher, 8 D.L.R. 236, 22 W.L.R. 451.

An Appellate Court, hearing an appeal from the findings made by the Court below, trying a personal injury action without a jury, should reconsider the whole evidence, and particularly where the case depends upon the inferences or conclusions to be drawn from facts not substantially in dispute. [Boggs v. Scott, 34 N.B.R. 110; Papageorgionv v. Turner, 37 N.B.R. 449, and Coghlan v. Cumberland, [1898] 1 Ch. 704, referred to.]

Turnbull v. Corbett, O'Brien v. Corbett, 8 D.L.R. 343, 11 East. L.R. 67.

(§ VII L 3—489)—Finding of Court—testamentary capacity.

A finding of the Surrogate Court that a testator was mentally competent to make a testamentary disposition of his property will not be disturbed on appeal unless so manifestly and clearly wrong as to amount to a miscarriage of justice.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

(§ VII L 3—491)—Findings of Court, fraud.

Where the purchaser and the real estate agent by whom the sale transaction was put through were joined as defendants in an action by the vendor to set aside the sale and a judgment was given setting aside the sale with costs against both defendants, and the defendant purchaser reconveyed in pursuance of the judgment and paid the costs, an appeal on the part of the agent will not be sustained where the real subject of the litigation is at an end by the compliance of the co-defendant with the decree and no substantial variance is asked, except as to the considerants of the written opinion as to fraud which were not embodied in the formal decree. [Wolfson v. Oldfield, 18 W.L.R. 450, affirmed on appeal.]

Wolfson v. Oldfield, 2 D.L.R. 110, 20 W.L.R. 484, 22 Man. L.R. 170.

(§ VII L 3—492) — Findings of court, agency.

Where there was ample evidence to warrant the trial Judge in his finding that the plaintiff's services as a real estate broker in listing for sale at the instance of a person other than the owner, property which was afterwards sold through another broker, were rendered gratuitously,

an Appellate Court should not reverse the trial judgment based upon such finding whereby the broker's action for commission was dismissed.

McEnroe v. Trethewey, 4 D.L.R. 398. 21 W.L.R. 848.

(§ VII L 3a—495)—VALUATION OF PROPERTY BY COURT.

Where a person, wrongfully in possession of property, has wrongfully refused to render to the joint owners an accounting of the property in question, upon proper proceedings for that purpose, the value of the property may be estimated and fixed by the Court, and the amount so fixed may be made binding as against the persons wrongfully refusing to account, unless he shall, within a fixed period after judgment, duly render a detailed and verified accounting, upon which a different valuation may fairly and reasonably be adjudicated.

Houde v. Marchand, 8 D.L.R. 431.

(§ VII L 3—498)—AMOUNT OF DAMAGES.

An assessment of damages by a trial Judge for the flooding of lands will not be disturbed on appeal, notwithstanding the Appellate Court might, on the evidence, have reached a different conclusion.

Cain v. Pearce Co., 5 D.L.R. 23, 3 O.W.N. 1321, 22 O.W.R. 174.

(§ VII L 3—508)—TRIAL WITHOUT JURY.

It is the duty of an Appellate Court to reverse the decision of a trial Judge on a question of fact upon a trial without a jury, "if the evidence coerces the judgment" of the Appellate Court to do so.

Green, Swift & Co. v. Lawrence, 7 D.L.R. 589.

Where an action for personal injuries sustained through the defendant's negligence is tried by a Judge without a jury and the damages awarded by him are so small as to shew that he must have omitted to take into consideration some of the elements of damage, the Appellate Court may, on appeal by the plaintiff, increase the amount on a consideration of the trial depositions without remitting the case for a new trial. [Rowley v. London and N.W. R. Co., L.R. 8 Ex. 221, and Phillips v. South Western R. Co., 5 Q.B.D. 78, applied.]

Vanhorn v. Verral, 4 D.L.R. 624, 3 O.W.N. 1567, 22 O.W.R. 860.

Upon the question as to whether the owner of farm lands, contiguous to a river, in protecting his lands against the inroads of the river by the construction of wingdams, has exceeded his right of defence, and so constructed and maintained the wingdams as to injure the lands of proprietors on the opposite bank of the river, or so as to alter the channel of the river to the detriment of the lands of his opposite neighbours; if the trial Judge, trying the case without a jury, finds against the defendant, the Appellate Court will consider whether the evidence for the defendant is of such a strong and overwhelming character as to justify the overturning of the finding of the trial Judge, and when unable, upon the whole case presented by the defence, to discover any such preponderating testimony, the finding will not be disturbed.

Lorraine v. Norrie, 6 D.L.R. 122.

Where no reasons for judgment were given by the trial Judge appealed from, and it did not appear on the record in appeal therefrom that the trial Judge had discredited the plaintiff's testimony, the judgment dismissing the action at the close of the plaintiff's case will be set aside and a new trial ordered if it appears to the Appellate Court that the plaintiff had made out a prima facie case which, on such ruling, the defendants desired to answer by calling witnesses.

McBride v. Rusk, 7 D.L.R. 656.

(§ VII L 4—510)—OF FINDINGS BY REFEREE.

Where there is evidence to support a finding of an arbitrator under the provisions of the B.C. Workmen's Compensation Act, who upon conflicting testimony found that the workman was not justified in leaving his place in the factory, and for purposes of his own, going behind a certain machine, where he was injured and that, in so doing, he was not acting in the course of his employment, such findings are findings of fact and not of law, and will not be disturbed by the Supreme Court of British Columbia upon a stated case on questions of law. [Low v. General Steam Fishing Co., Ltd., [1909] A.C. 523, at p. 534, specially referred to.]

Scalzo v. The Columbia Macaroni Factory, 4 D.L.R. 866, 17 B.C.R. 201, 21 W.L.R. 223.

A motion by the defendants entitled to the equity of redemption to re-open a Master's report in a mortgage action upon the ground of mistake will not be refused where a substantial grievance to the defendants is suggested by the material produced and the mortgagee's security is ample, although the omission to bring all the facts before the Master may have been due to the default of the defendant's solicitor. [Home Building and Savings Assocn. v. Pringle, 3 D.L.R. 896, 3 O.W.N. 1595, reversed on appeal.]

Home Building and Savings Association v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137.

Breach of contract—Reference—Contradictory evidence—Finding of Master.

Jamieson v. Gourlay, 6 D.L.R. 856, 4 O.W.N. 217, 23 O.W.R. 209.

Review of findings of Master—Mortgage action—Monthly rests—Reference back.

Colonial Investment and Loan Co. v. McKinley, 6 D.L.R. 880, 3 O.W.N. 949.

Upon a reference to the Master in Ordinary from the trial Court as to the quantum of damages in a claim for a fire loss, the findings of the Master (within the scope of such reference) are in cer-

tain respects on the same footing as the findings of the trial Judge himself; and while upon appeal from such findings the appellate Court does not and cannot abdicate its right and its duty to consider the evidence; yet where the Court of Appeal is asked to set aside the Master's findings it will give special weight to the following tests of their probable correctness: (a) careful statement of reasons by the Master, (b) his personal inspection of the property involved, (c) his opportunity of seeing the witnesses on the stand. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222; Beal v. Michigan Central R. Co. (1909), 19 O.L.R. 502; Booth v. Rattê (1892), 21 Can. S.C.R. 637, 643; Re Sanderson and Saville (1912), 6 D.L.R. 319, 26 O.L.R. 616, 623, referred to.]

Nassar v. Equity Fire Insurance Co. (No. 2), 8 D.L.R. 645, 23 O.W.R. 340, 4 O.W.N. 340.

Where in a claim for a fire loss the plaintiff sets up a $3,000 valuation and the defendant pays into Court as sufficient to pay the plaintiff's entire claim $1,250, and where the trial Judge determines in the plaintiff's favour the question of fraud in the plaintiff's proofs of loss, but refers the quantum of damages to a Master, and where the Master assesses the loss at only $400, upon an application by the plaintiff to set aside the findings of the Master upon the ground that he thereby, in effect at least, reversed the findings of the trial Judge and thereby in substance though not in form found fraud in the proofs of loss, the objection basing such an application cannot be given effect, the decision of the trial Judge merely having negatived at the time of the trial a fraudulent over-valuation, not an actual over-valuation, and not limiting the right to weigh the evidence to be thereafter given on the reference. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222, referred to.]

Nassar v. Equity Fire Insurance Co. (No. 2), 8 D.L.R. 645, 4 O.W.N. 340, 23 O.W.R. 340.

(§ VII L 5—515)—On appeal from Appellate Court.

The Supreme Court of Canada will not disturb a judgment of the Court of Appeal of British Columbia on a mere question of quantum of damages, where that Court, by virtue of the power given to it by rule 869 (a) of the rules of the Supreme Court of British Columbia, has reduced a verdict of the trial Court in an action for personal injuries arising out of an accident. [Taylor v. British Columbia Electric R. Co., 1 D.L.R. 384, 16 B.C.R. 420, affirmed.]

Taylor v. British Columbia Electric R. Co. (No. 2), 8 D.L.R. 724.

The rule that the Supreme Court of Canada will not interfere with the judgment of a Provincial Court of Appeal reducing the quantum of damages assessed by the trial Court does not prevent interference in cases where some element of damages for which no compensation is allowed by law may have been given a place in the total of damages reached. (Dictum per Idington, J.) [Praed v. Graham, 24 Q.B.D. 53, considered; see also Johnston v. Great Western R. Co., [1904] 2 K.B. 250, and Dunn v. Prescott Elevator Co., 26 A.R. (Ont.) 389, 30 Can. S.C. R. 620.]

Taylor v. British Columbia Electric R. Co. (No. 2), 8 D.L.R. 724.

M. What errors warrant reversal.

(§ VII M 1—524)—Consolidation of actions.

Where the plaintiff, while actions on policies of insurance were pending, to which defences had been interposed, brought two new actions, which, notwithstanding they had not proceeded to the length of pleading, were ordered consolidated with the older actions, after which the trial Court found in favour of the plaintiff in all the actions, such order of consolidation as well as the judgments so rendered, will be vacated, but without prejudice to an application to the trial Court, under sec. 158 of the Ont. Insurance Act of 1912 (2 Geo. V. (Ont.) ch. 33), to make a further order of consolidation upon the completion of the pleadings in the new actions, whereupon the cases shall be heard upon the evidence already taken, together with such further testimony as either party may desire to give in relation to such new actions. [Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901, reversed.]

Strong v. Crown Fire Insurance Co. (No. 2), 4 D.L.R. 224, 3 O.W.N. 1534, 22 O.W.R. 734.

(§ VII M—535)—As to evidence.

Where evidence was, against defendant's objection, received by the Court tending to prove a custom of which the Court could take judicial notice without formal proof, its admission is not a ground for setting aside the verdict. [McKenzie v. Scovil, 12 N.B.R. 6, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177.

The rejection in an action for a breach of warranty of soundness on the sale of a horse, of testimony tending to shew that the horse was sound prior to and at the time of sale, does not occasion any substantial wrong or work a miscarriage of justice sufficient, under the N.B. Judicature Act, 1909, to justify the reversal of a judgment in favour of the plaintiff, where the defendant admitted that at the time he sold and warranted the horse, he had noticed that the intermittent attacks to which the horse was subject were of a serious nature, although he then declined to believe that the trouble was of more than a trifling character.

Hale v. Tompkins, 6 D.L.R. 502, 11 East. L.R. 91.

(§ VII M 3—541)—Erroneous reason.

A judgment of a trial Judge will be reversed on a question of fact only when it is evident that he made a mistake, and where the evidence, as a whole, does not sustain his decision.

Baillargeon v. St. George's, 4 D.L.R. 894.

(§ VII M—545)—Uncontroverted facts.

In a case on appeal, where the Appellate Court (Alberta) is, upon the hearing of an appeal, restricted in the receiving of evidence to evidence "on questions of fact as to matters which have occurred after the date of the decision from which the appeal is brought," yet it has the power to grant a new trial for the purpose of enabling additional evidence to be given, and, since the Supreme Court of Canada (under Supreme Court Act, sec. 98) in the event of an appeal to it, would have power itself to receive further evidence, a case on appeal in the Alberta Court may properly be treated as though a statutory law of another province (specially referred to by both parties in the pleadings as in force) had been duly proved at the trial.

Dodge v. Western Canada Fire Insurance Company (No. 2), 6 D.L.R. 355.

(§ VII M 3—550)—Facts otherwise proved.

Where the defendant, in a criminal conversation case was examined for discovery before the trial without objecting to testify on the ground of privilege, and where he testified in his own defence at the trial and upon cross-examination repeated substantially everything included in the discovery depositions an objection taken on appeal against the verdict on the ground that the depositions on discovery were put in evidence at the trial by the plaintiff against the defendant's objection founded on the statute 32-33 Vict. (Imp.) ch. 68, sec. 3, will not be allowed. [Fleury v. Campbell, 18 P.R. (Ont.) 110, referred to.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336.

(§ VII M 3—575)—In cases tried without a jury.

In an action for malicious prosecution and false arrest tried without a jury, an Appellate Court has the right to revise the judgment of the trial Judge as to the appreciation of evidence offered for or against the character of one of the parties to the suit, and to increase the amount of damages awarded when the allowance is unjust and unfair.

Kalmanovitch v. Muller, 1 D.L.R. 628. 18 La Rev. de Jur. 159.

The findings of fact of a trial Judge sitting without a jury, who has had the opportunity of hearing the witnesses give their evidence, will not be reversed by a Court of Appeal if there is evidence upon which such findings can be supported. A new trial will not be granted on the ground of the discovery of new evidence, unless such new evidence be conclusive in its character. The defendant told the plaintiff that he would buy the plaintiff's horse if one Pearson, who was employed by the defendant, could work it. The plaintiff delivered the horse to Pearson, who worked it, and informed the defendant that it was satisfactory, whereupon the defendant said he would pay for the horse. Held, that these acts constituted an unqualified acceptance of the horse by the defendant.

Knight v. Hanson, 7 Terr. L.R. 306.

(§ VII M 4—588)—Misdirection.

Upon a motion for a new trial on the ground of misdirection, the expressions objected to are to be interpreted by the meaning conveyed as they are associated with the context, and the question of misdirection is to be determined upon a fair and reasonable construction of the entire charge given to the jury.

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

(§ VII M 7—640)—Summoning and selection of jury.

The omission of the sheriff, in striking from the grand jury panel, on his own motion, the names of two jurors known to him to be exempt from jury duty, and the substituting of duly qualified jurors therefor, to have before him the affidavit of exemption required by sec. 43 of ch. 162 of R.S.N.S., cannot, under the provisions of sec. 1011 of the Criminal Code (1906), be questioned on appeal from a judgment in a criminal case. (Per Graham, E. J.)

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

(§ VII M 8—657)—Insufficiency of verdict.

It is the duty of an Appellate Court to sustain a judgment upon a verdict if there is reasonable evidence to support the findings and if the findings themselves are reasonably sufficient to determine the issues between the parties.

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 3 O.W.N. 695, 21 O.W.R. 454, 25 O.L.R. 524.

(§ VII M 8—658)—Failure to find.

Where an application is made by a landlord to a County Judge against an overholding tenant under the Landlord and Tenant Act (Ont.), and where the Judge makes no findings of fact, but simply dismisses the application, it is in substance an application for a writ of possession, and the Judge's refusal to make any finding as to whether the tenant "wrongfully holds against the right of the landlord," although dismissing the application, is, in effect, a refusal of a writ of possession from which there is a right of appeal to the Divisional Court under sec. 78 of the Act. [Landlord and Tenant Act, 1 Geo.

V. (Ont.) ch. 37, secs. 75 and 78, referred to.]

Re Dickson & Co. and Graham, 8 D.L.R. 928, 27 O.L.R. 239, 4 O.W.N. 100.

(§ VII M 8—659)—AMOUNT; MEASURE OF DAMAGES.

The sum of ten thousand dollars is not excessive damages for personal injuries to a servant twenty-six years old due to a collision between trains causing him to be knocked down by the coal heater of the car he was in and to be so severely burned by the coals that his face was badly disfigured and his head was left so tender that he would not be able to stand extreme heat or cold and his right hand was so severely burned as to render it permanently useless, leaving him unable to follow his trade of blacksmith. [Tobin v. Canadian Pacific R. Co., 2 D.L.R. 173, and Johnston v. Great Western R. Co., [1904] 2 K.B. 250, specially referred to.]

Gordon v. Canadian Northern R. Co., 2 D.L.R. 183, 20 W.L.R. 705.

Twelve thousand dollars is not an excessive verdict for damages for personal injuries to one left a permanent cripple and unable to follow his usual occupation as conductor of a construction train earning two hundred and fifty dollars a month in summer and as conductor of a freight train in winter earning, at least, one hundred and twenty dollars a month, whose future earning power would be problematical and such verdict cannot be said to have been founded upon a wrong measure of damage where the income which it would bring in, at current investment rates, would be less than one half of his previous earnings. [Johnston v. G. W. R. Co., [1904] 2 K.B. 250; Bateman v. Middlesex, 25 O.L.R. 137, and Sheahen v. Toronto Ry. Co., 25 O.L.R. 310, specially referred to.]

Tobin v. Canadian Pacific R. Co., 2 D.L.R. 173, 20 W.L.R. 676.

VIII. Judgment.

A. In general.

(No cases.)

B. Rendering modified judgment.

(§ VIII B—670)—RENDERING MODIFIED JUDGMENT.

The Court of Appeal, upon reversing, because no negligence on the part of the defendant was shewn, a judgment in favour of the plaintiff for negligently causing the death of his son, based on Lord Campbell's Act and the Employers' Liability Act as well, cannot assess compensation under sec. 6, of sub-sec. 4, of the Workmen's Compensation Act (B.C.); the trial Court is the only tribunal with jurisdiction to do so. [Greenwood v. Greeenwood, 97 L.T.N.S. 771, 24 Times L.R. 24, specially referred to.]

McCormick v. Kelliher, 4 D.L.R. 657, 21 W.L.R. 542.

(§ VIII B—672)—REDUCTION OF DAMAGES, REMITTITUR.

In an action for personal injuries in a negligence action against a street railway, where it appeared that the plaintiff, a man aged thirty-one, was permanently incapacitated by the injury from following any continuous occupation, although he might be able to earn something towards his own support, a verdict for $11,500 is not unreasonable and will not, under ordinary circumstances, form a ground for ordering a new trial or reducing the verdict on appeal.

Carty v. British Columbia Electric Co., 2 D.L.R. 276, 19 W.L.R. 905.

C. Remanding; granting new trial.

(§ VIII C—675)—REMANDING, REMITTITUR.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of plaintiff for the appointment of viewers and experts the trial Judge irregularly appoints a single expert under secs. 392 et seq. of the Code of Civil Procedure (Que.), and such appointment is on appeal declared irregular, the cause will be remitted to the trial Court to be reinscribed for hearing on the roll at the stage it had reached when the motion for expertise was made.

Pontbriand v. Chateauguay, 7 D.L.R. 22, 46 Can. S.C.R. 603.

Where the trial Judge submits to a single expert, appointed by the Judge sua sponte at the trial, questions not relevant under the pleadings, the cause will be remitted for rehearing from the point reached in the trial when the motion for the appointment of the expert was entered.

Pontbriand v. Chateauguay, 7 D.L.R. 22, 46 Can. S.C.R. 603.

Where an Appellate Court is not satisfied upon the argument of the appeal that the case has been so fully developed as to enable a proper decision to be given, it should direct a new trial.

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

(§ VIII C—676)—DIRECTION TO TRIAL COURT.

Upon an appeal from a decision of a District Court Judge under the Workmen's Compensation Act (Alta.), limited by statute to questions of law, the Appellate Court on reversing the trial Judge as to the law will remit the cause to the trial Judge if a further finding of fact becomes necessary because of such reversal, so that the District Court Judge may pronounce a new judgment in view of the decision in appeal and of his own further findings of fact.

Cargeme v. The Alberta Coal and Mining Co., 6 D.L.R. 231, 22 W.L.R. 68.

(§ VIII C—677)—ENFORCEMENT OF AFFIRMED JUDGMENTS.

Section 150, sub-sec. (e) of the Liquor License Act, R.S.N.S. 1900, ch. 100, which provides that, upon the affirmance on appeal

of a conviction thereunder, if it is adjudged by the conviction that the person convicted "shall be imprisoned," the County Court Judge hearing the appeal may issue his warrant of commitment, applies only where the commitment imposed imprisonment in the first instance without the alternative of a fine, and the County Court Judge has no authority to issue a warrant of commitment because of the default of the unsuccessful appellant in paying the fine which the conviction imposed, although the conviction provided that in default of payment the defendant should be imprisoned unless the fine were sooner paid. [Ex parte Abell, 33 C.L.J. 626, followed.]

Rex v. Ackerson, 7 D.L.R. 95.

E. Effect of decision; subsequent proceedings.

(§ VIII D—681)—COST OF TRANSCRIPT, BRIEF, ETC.

When a judgment of the Court of Review, although partially changing the first judgment, does not alter it as to costs, the losing party will have to pay the transcription of the depositions which are costs in the case.

Crowley v. Silverstone, 13 Que. P.R. 332 (Sup. Ct.).

(§ VIII E—686)—EFFECT OF DECISION, CONCLUSIVENESS.

Where an action on a promissory note is dismissed on grounds which do not effectually dispose of the question of the liability of the maker of the note, leave may be reserved to the plaintiff to bring another action thereon.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

A judgment given by a Division Court in Ontario, upon an appeal taken from a summary conviction, whereby the conviction was quashed on the ground of the insufficiency of the information, is a decision "on the merits."

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

IX. Rehearing.

(§ IX—695)—REHEARING ON APPEAL.

Where an interlocutory order adding a party defendant was made on default of the appearance of the added party at the hearing of an appeal from an order refusing to add him as a defendant, but the order in appeal contained terms for the protection of the added party as to pleading the Statute of Limitations up to the date of his being added, the Court may properly decline to re-open the appeal where the added party is at liberty by a substantive application to move against the order adding him.

Broom v. Toronto Junction, 3 D.L.R. 699, 3 O.W.N. 1228, 22 O.W.R. 41.

X. Liability on appeal bond.

(No cases.)

XI. Granting leave to appeal.

(§ XI—720)—GRANTING LEAVE TO APPEAL.

Leave to appeal to the Court of Appeal will not be granted the liquidator of a company under secs. 101 (c) and 104 of the Winding-up Act, from the decision of the trial Court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed, he could not prevail in the action unless he could successfully contend, as he must, in order to succeed that the bills of sale under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

Re Canadian Shipbuilding Co. (No. 2), 7 D.L.R. 304, 4 O.W.N. 157, 23 O.W.R. 149.

Leave to appeal to the Court of Appeal on the ground that the question raised by the judgment of the trial Court is of great public importance, will not be granted the liquidator of a company under secs. 101 (c) and 104 of the Winding-up Act, R.S.C. 1906, ch. 144, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

Re Canadian Shipbuilding Co. (No. 2), 7 D.L.R. 304, 4 O.W.N. 157, 23 O.W.R. 149.

In granting leave to appeal from a conviction upon an indictment, the Court of Appeal may settle the form of the questions upon which it directs the trial Court to state a case.

The King v. Tansley, 19 Can. Cr. Cas. 42, 20 O.W.R. 698, 3 O.W.N. 411.

Leave to appeal to the Privy Council will not be granted by the Quebec Court of King's Bench from a decision of that Court, in matters of certiorari or of prohibition unless it be shewn that future rights are involved. [O'Farrell v. Brassard (1878), Ramsay's Appeal Cases (Que.), 55, followed.]

Gosselin v. Bar of Montreal (No. 2), 2 D.L.R. 37, 13 Que. P.R. 308.

Where the amount in question is less than the amount in respect of which an appeal can be taken without leave, an application for leave to appeal will not be granted merely to review the question of the proper exercise of a judicial discretion by the Court below.

Re Sturmer and Town of Beaverton, 3 O.W.N. 613, 25 O.L.R. 566, 21 O.W.R. 55.

Leave to appeal is properly refused where the amount in question is below the statutory sum and the decision sought to be appealed from introduces no new rule of decision.

Re Sturmer and Town of Beaverton, 2 D.L.R. 501, 3 O.W.N. 613, 21 O.W.R. 55, 25 O.L.R. 566.

Where a party appeals to a Divisional Court from a judgment after trial with a

jury, and contends that he is entitled to judgment upon the findings of the jury, but does not ask for a new trial, and the Divisional Court nevertheless grants a new trial without disposing of the motion for judgment, it is a proper case for granting leave to appeal to the Court of Appeal, but such leave should be upon the terms that the party appealing shall abandon his right to a new trial.

Dart v. Toronto R. Co., 3 D.L.R. 776, 22 O.W.R. 102, 3 O.W.N. 1202.

An appeal does not lie under article 46 C.P. from an order denying a motion to have a summary proceeding declared to be a non-summary one.

Nesbitt v. Investment Trust Co., 5 D.L.R. 144.

It is not a valid ground of challenge to the array that the venire issued in the name of "George, by the grace of God, King," etc., instead of "George the Fifth, by the grace of God, King," etc. (2) That it is not a valid ground of challenge to the array, for misconduct on the part of the sheriff, to allege as such misconduct that the sheriff had summoned as a petit juror a person whose name appeared as a juror both upon the list of grand jurors and the list of petit jurors for the same assizes, that two other names on the list of petit jurors were names of non-existent persons, and that instead of the required number of jurors—forty—the sheriff had thus summoned only thirty-seven. (3) That leave to appeal by stated case, upon a ground of wrongful communication with two of the sworn jurors by third persons, would not be granted where it appeared from the affidavits that all that was said in the case of one of the jurors were the words, "Je sais que je ne peux pas te parler, mais je peux bien te donner la main," uttered by the third person while shaking hands with the juror, that the communication to the other juror was by a person who said to the juror that he had come to the town to pay him a small debt, but would have to pay it later, that both statements were made while the sitting of the Court was being adjourned in the course of the examination of the witnesses, and that in neither instance did the third person speak of the cause on trial or have any concern with it. (4) That leave to appeal by stated case upon the ground of misconduct of jurors would not be granted, when it merely appeared from the affidavits that a sworn guardian had found a bottle partly filled with gin on a couch on which a sworn juror had slept and an empty bottle under the couch of another juror in the room in which the jurors had been kept overnight and that a juror afterwards asked the guardian for the partly filled bottle saying that he was ill. (5) That leave to appeal by stated case on the ground that an important witness for the defence could not be examined at the trial would not be granted, where it appeared from the entries and affidavits that the witness had given testimony at the preliminary inquiry, that before the trial an order had been made, on the prisoner's application, that subpœnas should issue "in forma pauperis" to the witnesses for the defence, that a constable had attempted to summon the absent witness at his former place of abode, but could not find him, that there was credible information that the witness was absent in the United States, that, the trial having been proceeded with, the absent witness was called for the defence, but made default, that a postponement was not applied for and that upon application of counsel for the prisoner the deposition of the absent witness, taken at the preliminary inquiry, was read to the Court and the jury.

The King v. Plourde, 18 Rev. de Jur. 372.

A judgment deciding that an action has been rightly taken under summary procedure is not one from which leave to appeal should be granted.

Nesbitt v. The Investment Trust Company, 13 Que. P.R. 285 (Sup. Ct.).

No leave to appeal is granted from a motion to quash a by-law passed by a County Council establishing a continuation school in a high school district which never existed in fact.

Re Henderson and the Township of West Nissouri, 46 Can. S.C.R. 627, affirming, 24 O.L.R. 517, and 23 O.L.R. 21.

The policy of the Winding-up Act, R.S.C., ch. 144, as to appeals from orders settling the list of contributories of an insolvent company, is that after the first appeal to a Judge in Court from the decision of the referee, leave to appeal from the order of the Judge to the Court of Appeal should not be granted unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceedings. [Re McGill Chair Co., 5 D.L.R. 73, 26 O.L.R. 254, 3 O.W.N. 1074, and Re Matthew Guy C. and A. Co., 4 D.L.R. 764, 26 O.L.R. 377, 3 O.W.N. 1233, specially referred to.]

Re McGill Chair Co. (Munro's case) and Re Matthew Guy Carriage and Automobile Co., 5 D.L.R. 393, 3 O.W.N. 1326, 22 O.W.R. 222.

Leave to appeal, after the proper time has expired, on the ground that there has been a subsequent decision of the Court of Appeal altering the law as it was previously understood, will not be granted where the litigating parties have dealt with the subject matter in dispute in such manner as to so alter their positions regarding it and to put it out of the power of the Court to restore the status quo. Quære, whether

leave should ever be granted on that ground alone.

Ross v. Pearson, 7 Terr. L.R. 324.

Leave to appeal may be granted before the order appealed from has been taken out, but to enter and prosecute an appeal against an order without taking out such order is an irregularity. Such irregularity, however, if not objected to on an application to settle the appeal book, will be waived.

Bank of Hamilton v. Leslie, 7 Terr. L.R. 301.

The Court has no authority, under sec. 744 of the Criminal Code, 1892, to grant leave to appeal unless it is made to appear on the application that the trial Judge has refused to reserve a case upon the questions sought to be raised by way of appeal. Held, also, following Regina v. Skelton, 3 Terr. L.R. 58, that upon a charge of perjury it is unnecessary to allege any intent to mislead.

Rex v. Hinman, 7 Terr. L.R. 186.

Leave to appeal—Receiving stolen money—Evidence—Judge's charge—Application for stated case.

Rex v. Chilman, 1 D.L.R. 914.

Leave to appeal to a Divisional Court from order of Judge in Chambers was granted.

Swaisland v. Grand Trunk R. Co., 2 D.L.R. 898, 3 O.W.N. 1083.

Leave to appeal to Divisional Court from order of Judge in Chambers—Discovery—Slander.

Brown v. Orde, 3 D.L.R. 867, 3 O.W.N. 1312, 22 O.W.R. 231.

Order refusing to quash conviction.

Rex v. Harran, 3 D.L.R. 885, 3 O.W.N. 1450, 22 O.W.R. 596.

Order of the Board of Railway Commissioners—Canada Supreme Court—Fixing cost of installation, maintenance and protection of crossing of railway by municipally-owned street railway.

Edmonton Street R. Co. v. Grand Trunk Pacific R. Co. (No. 2), 7 D.L.R. 888, 22 W.L.R. 45.

Inadvertence of solicitor—Failure to give notice of appeal.

Helson v. Morrisey, Fernie and Michel R. Co. (No. 2), 7 D.L.R. 822.

Leave to appeal to Divisional Court from Judge in Chambers—Con. Rule 777 (3) (a), (c).—Motion.

Dick and Sons v. Standard Underground Cable Co. (No. 1), 6 D.L.R. 855, 4 O.W.N. 111, 23 O.W.R. 96.

Stay of proceedings—Prior judgment against company—Res judicata—Estoppel—Negligence.

Campbell v. Verral, Gibson v. Verral, 4 O.W.N. 355, 23 O.W.R. 973.

Leave to appeal—Conviction for usury—Importance of question.

Rex v. Eaves, 8 D.L.R. 1026.

Principal and surety—Compromise of action—Double ranking—Appeal under R. S.C. ch. 144, sec. 101 (c).

Re Stratford, etc., Fuel Co., 4 O.W.N. 497, 23 O.W.R. 690.

Leave to appeal—Conviction—Sufficiency of particulars.

Rex v. Lemelin, 8 D.L.R. 1025.

APPEARANCE.

(§ I—1)—By attorney.

Though in law a mandatory has the right to renounce his mandate, the Court has nevertheless the right to dismiss a motion by the attorney of record praying "acte" of his declaration of withdrawal from the cause at a time when the action is about to be tried by a jury.

Van-Felson v. Bourdeau, 18 Rev. de Jur. 216.

(§ 1—5)—Conditional appearance.

Where, in an action on an insurance policy, the defendant moves to set aside an order allowing service out of the jurisdiction, and it appears doubtful whether the contract was made within or without the territorial jurisdiction of the Court or whether the alleged breach took place within the jurisdiction, the proper course is to let the order stand, and to give leave to the defendant to enter a conditional appearance. [Burson v. German Union Ins. Co., 10 O.L.R. 238, 3 O.W.R. 230, 372; Canadian Radiator Co. v. Cuthbertson, 9 O.L.R. 126; Blackley Ltd. v. Elite Costume Co., 9 O.L.R. 382, and Kemerer v. Watterson, 20 O.L.R. 451, followed.]

Farmers Bank v. Heath (No. 1), 5 D.L.R. 290, 3 O.W.N. 682, 21 O.W.R. 283.

Where a party to an action failed to take advantage of Con. Rule (Ont.) 173, providing that a conditional appearance might be entered by leave of the Court or a Judge; and entered an unconditional appearance, he cannot after recovery of judgment against him object to the jurisdiction of the Court to entertain a petition by solicitors representing the prevailing party in the action for an order declaring them entitled to a lien for their costs upon the judgment recovered by their client and for payment of these costs by the losing party.

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 3 O.W.N. 1588, 22 O.W.R. 786.

Where, in an action on an insurance policy, the defendant moves to set aside an order allowing service out of the jurisdiction, and it appears doubtful where the contract was made and the alleged breach took place, the proper course is to let the order stand, and give leave to the defendant to enter a conditional appearance. [Canadian Radiator Co. v. Cuthbertson, 9 O.L.R. 126; Blackley Ltd. v. Elite Costume Co., 9 O.L.R. 382, and Kemerer v. Watterson, 20 O.L.R. 451, followed; Farmers Bank v. Heath (No. 1), 5 D.L.R. 290, 3 O.W.N. 682, affirmed on appeal.]

Farmers Bank v. Heath (No. 2), 5 D.L.R. 291, 3 O.W.N. 805 and 879, 22 O.W.R. 614.

Notwithstanding that the rules of Court do not provide for a conditional appearance, a defendant may nevertheless appear under protest and thus save any rights that would otherwise be waived. The ground of protest, however, should be specifically stated. An unconditional appearance by the defendant to an action instituted in the Supreme Court, but entered in the wrong judicial district, waives the defect.

Pinki v. The Western Packing Co. of Canada, 7 Terr. L.R. 200.

While the proper practice under Order XII., rule 30, of the English practice rules, applicable in Alberta, providing for an entry by defendant of a conditional appearance is to apply ex parte for leave to do so, and for the clerk upon filing the conditional appearance to stamp on the memorandum words to the effect that it is to stand as unconditional unless the defendant obtains an order to set aside the writ, an appearance entered in the ordinary form, but adding that it is without prejudice to defendant's right to apply to discharge or set aside the order authorizing the service of the writ upon her and to set aside the service of the said writ and to set aside the said writ, is sufficient as a conditional appearance, since it is sufficient notice to plaintiff that the appearance is conditional and such an appearance entitled the defendant to apply to set aside an order allowing service of a writ to be made substitutionally. [Mayer v. Claretie, 7 Times L.R. 40, applied.]

Walker v. Harris, 7 D.L.R. 366.

(§ I—6)—NOTICE.

Notice of appearance is not necessary under Judicature Ordinance, C.O. 1898, ch. 21.

Bell Engine and Thresher Co. v. Bruce, 7 Terr. L.R. 460.

ARBITRATION.

I. IN GENERAL.
II. ARBITRATORS; UMPIRE.
III. AWARD.
IV. SUBMISSION TO ARBITRATION.

Of insurance loss, see Insurance.

Judge, without jurisdiction, adjudicating by consent; quasi-arbitrator, see Courts, II.

As to eminent domain and expropriation, see Eminent Domain.

As to measure of damages, see Damages.

I. In general.

(§ I—1)—IN GENERAL.

The Arbitration Ordinance, C.O. 1898, ch. 35, governs submissions in writing only, and there may be a valid submission by parol at common law altogether outside that Ordinance. Comments on the Prairie Fires Ordinance, C.O. 1898, ch. 87.

Ulmer v. Adolf, 7 Terr. L.R. 246.

(§ I—2)—AGREEMENTS FOR; WHAT MAY BE SUBMITTED TO.

Where the vendor of a timber limit guarantees the existence of a specified amount of timber, and agrees to make good any deficiency by deduction from the purchase price, the amount of such deduction to be ascertained by arbitration, in an action for the purchase price the purchaser may counterclaim for damages for the breach of the vendor's guarantee, notwithstanding that there has been no arbitration, but he cannot set up as a defence that the timber described in the agreement has not been delivered, and that the vendor is not entitled to recover the purchase price until the value of any deficiency has been ascertained by arbitration, and deducted therefrom. [David v. Swift, 44 Can. S.C.R. 179, referred to.]

Cameron v. Cuddy, 7 D.L.R. 296.

II. Arbitrators; umpire.

(§ II—12)—MISCONDUCT.

Misconduct of arbitrators, in its legal sense as regards the power of the Court to set aside an award, does not necessarily imply any improper motive to the arbitrators.

Re False Creek Flats Arbitration, 1 D.L.R. 363, 20 W.L.R. 387, 17 B.C.R. 282.

Misconduct of arbitrators, in its legal sense as regards the power of the Court to set aside an award, does not necessarily imply any improper motive to the arbitrators. [Re False Creek Flats Arbitration (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 21 W.L.R. 761.

The fact that the person proposed as an arbitrator by a corporation in a statutory arbitration is largely interested in another corporation which for a number of years previously had operated some of its undertakings upon joint account with the appointing corporation will not alone be a ground of disqualification where no such joint operations had taken place in two years and likelihood of bias was not suggested on any other ground. [Christie v. Town of Toronto Junction, 24 O.R. 443; Vineberg v. Guardian Assurance Co., 19 A.R. 293; Rex v. Justices of Queen's County, [1908] 2 I.R. 285, at p. 294, specially referred to.]

Plaunt v. Gillies Brothers (Ltd.), 3 D.L.R. 283, 3 O.W.N. 921, 21 O.W.R. 509.

(§ II—13)—PRIOR PARTICIPATION IN DISPUTE.

Where one designated as referee by the parties themselves acted prior to the award as chief adviser to the agent of one of the parties, though with no intent to do wrong, the award must be set aside and the referee removed. [See Hudson on Building Contracts, 3rd ed., 755.]

Wilkerson v. McGugan and Gaston, 2 D.L.R. 11, 20 W.L.R. 651.

III. Award.

(§ III—16)—Validity of award.

Misconduct of arbitrators—Costs.

Re Windatt and the Georgian Bay and Seaboard R. Co., 4 O.W.N. 395, 23 O.W.R. 509.

(§ III—17)—Conclusiveness; review.

If an award of arbitrators fails to decide on all matters referred to them, the award will be set aside by the Court, whether the omission appears on the face of the award or by affidavit. [Re Marshall and Dresser, 12 L.J.Q.B. 104, followed; see also Russell on Arbitration, 9th ed., p. 370.]

Re False Creek Flats Arbitration, 1 D.L.R. 363, 20 W.L.R. 387, 17 B.C.R. 282.

If an award of arbitrators fails to decide on all matters referred to them, the award will be set aside by the Court, whether the omission appears on the face of the award or by affidavit. [Re False Creek Flats Arbitration (No. 1), 1 D.L.R. 363, affirmed on equal division.]

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 21 W.L.R. 761.

An award made by arbitrators appointed under sec. 196 of the Railway Act, R.S.C. 1906, ch. 37, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off their rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of sec. 198 of the Railway Act, R.S.C. 1906, ch. 37, to such a case should be referred to the Court, which promise was that they (the arbitrators) should have it appear on the face of the award whether or not such section applied. [Judgment rendered at the trial affirmed by divided Court.]

Re Vancouver, Victoria and Eastern R. Co., 5 D.L.R. 722.

Where arbitrators appointed under sec. 396 R.S.B.C. 1911, ch. 170, to ascertain damages for land taken for a public street, award interest at 7 per cent. instead of 5 per cent. as allowed by statute, the Court cannot, upon the award coming before it on a motion to set the same aside, alter or amend the same to cure such error by accepting the respondent's abandonment of the excess, but must order the award set aside. [Skipworth v. Skipworth, 9 Beav. 135, followed.]

Humphreys v. City of Victoria, 5 D.L.R. 294, 21 W.L.R. 555, 17 B.C.R. 258.

Under an agreement stipulating that a builder will complete a house for occupancy "fully in keeping with the kind and quality of house as now standing" and specifying a referee to decide between the parties in case of any dispute between them as to the manner in which the house was completed, such referee has no authority to decide the matters in dispute on his personal inspection of the premises, but should provide for a hearing and the taking of evidence if either party wished to adduce evidence.

Wilkerson v. McGugan and Gaston, 2 D.L.R. 11, 20 W.L.R. 651.

IV. Submission to arbitration.

(§ IV—41)—Excess of powers of.

Under an agreement nominating a referee or sole arbitrator, and calling upon him to decide what was necessary for the contracting builder to do in order to complete a house which he had contracted to build for the other party, the referee cannot authorize the purchaser or mortgagee to complete on the builder's default, nor can he, in his award, reserve the right so to authorize, nor has he authority to provide in the award that the builder shall not be freed from his obligation to do the work thereby directed to be done by way of completion of the contract until after the referee has approved of the manner of doing such work.

Wilkerson v. McGugan and Gaston, 2 D.L.R. 11, 20 W.L.R. 651.

(§ IV—42)—Compulsory reference by Court.

When the parties to a construction contract are before the trial referee under the Mechanics' Lien Act (Ont.), for the purpose of tendering evidence at the trial of the contractor's claim in a mechanics' lien proceeding, an order cannot be made for the compulsory reference of the matters in dispute to arbitration or to compel the contractor to proceed to arbitration before going on with his action, although the contract provides that any dispute as to extras or reductions after the architect's certificate should be referred to arbitration, if an arbitration and award is not made a condition precedent to the action.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

Where, without objection by the parties to the proceeding, the Court of King's Bench made an order remitting to a single arbitrator, as provided by the charter of a city, an award of damages made by three arbitrators in a proceeding to open a public street, upon the award of such single arbitrator being set aside by the Court on motion, such proceedings before the Court constituted a sufficient submission by order of Court. (Per Perdue, J.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

Where a city charter under which proceedings were instituted to open a public street did not provide for a formal submission to arbitration of the question of compensation for the land taken, but clearly

shewed that the Court of King's Bench was to have summary jurisdiction over the proceedings, the practice provided by the Land Clauses Act is to be followed, and the appointment by such Court, under the provisions of such charter, of a single arbitrator to consider the award made by three arbitrators, will be considered a sufficient submission of the question to arbitration by order of Court. (Per Cameron, and Richards, JJ.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

(§ IV—44)—ENFORCEMENT.

A stipulation for an arbitration to determine the amount due under a building contract is subject to the provisions of the Arbitration Act, 9 Edw. VII. (Ont.), ch. 35, sec. 8, and the party invoking the same must apply to stay the action before his defence is pleaded or other step taken in the cause after entering his appearance.

Contractors' Supply Co. v. Hyde, 2 D.L.R 161, 3 O.W.N. 723, 21 O.W.R. 530.

The provisions of clause (u), sec. 6, of Victoria Waterworks Act, 1873, 36 Vict. (B.C.), ch. 20, 55 Vict., ch. 64, sec. 3, that upon default in payment of the amount awarded for land expropriated for waterworks purposes the proprietor may resume possession thereof, in which case all his rights shall revive, is intended only as an additional safeguard to secure payment of such award, and is not the exclusive remedy available to him, and he may obtain judgment on the award. [As to damages upon expropriation, see Annotation, 1 D.L.R. 508.]

Davie v. City of Victoria, 2 D.L.R. 287, 20 W.L.R. 544.

Differences having arisen as to the interest of the parties in certain lands and goods, such differences were referred to arbitration. The arbitrators found in part as follows: "That the south-east quarter of sec. 16-14-15, W. 2nd, be transferred from the name of H. Mitchell to R. Mitchell, subject to the proportion amount of the mortgage now registered against the property, said proportion being ($1,600). R. Mitchell to assume said mortgage and to pay interest owing thereon from and after the 1st day of January, 1909; also principal as it becomes due." On application an order was made to enforce the award, from which order the unsuccessful party appealed, and urged certain objections against the procedure and conduct of the arbitrators:—Held, that if a party desires to set up misconduct of the arbitrators or that the award was improperly procured, he should move to set aside the award, and such objections should not be entertained on a motion to enforce the award. (2) That the award as set out above was so uncertain as to be incapable of enforcement.

Mitchell v. Mitchell, 4 S.L.R. 406.

ARCHITECTS.

(§ I—5)—RIGHTS AND LIABILITIES.

Negligence — Counterclaim — Commission —Costs.

McDonald v. Edey, 3 D.L.R. 893, 3 O.W.N. 1514, 22 O.W.R. 664.

Right to recover fees for preparing plans --Defence of not being satisfied with plans —Payment into Court—Costs.

Maclure v. Cusack, 7 D.L.R. 835, 20 W.L.R. 611.

ARREST.

I. FOR CRIME.
A. In general.
B. Without warrant.
II. IN CIVIL CASES.

Of fugitive from justice, see Extradition.

Civil liability for, see False Imprisonment.

Inquiry into sufficiency of warrant upon application for habeas corpus, see Habeas Corpus.

Resisting officer in making, see Obstructing Justice.

I. For crime.

B. Without warrant.

(§ I B—9)—ACCUSED ON BAIL—RE-ARREST ON ORIGINAL WARRANT.

The release under bail pending an appeal under Criminal Code, sec. 797, from a conviction on summary trial for keeping a disorderly house does not prevent the rearrest and detention of the defendant under the original warrant of commitment on the conviction being affirmed.

Rex v. Durlin, 4 D.L.R. 660, 19 Can. Cr. Cas. 392, 17 B.C.R. 207, 21 W.L.R. 837.

II. In civil cases.

(§ II—15)—AFFIDAVIT FOR WRIT OF CAPIAS.

An affidavit for capias must on its face shew every element to justify the condemnation of the defendant to imprisonment, and failure to mention in the affidavit the place of origin of the alleged indebtedness is a fatal irregularity.

Larue Cloutier, Limited v. Bastien, 8 D.L.R. 497.

Where costs due upon a judgment obtained in Quebec are alleged in an affidavit to be due, but the place of the original indebtedness is not mentioned therein, such allegation regarding costs cannot justify the issue of a capias inasmuch as the judgment obtained did not operate as a novation of the debt and the costs incurred on such judgment are but an accessory of the debt. [Rocheleau v. Bessette, 3 Que. Q.B. 96, followed.]

Larue Cloutier, Limited v. Bastien, 8 D.L.R. 497.

In an affidavit for a capias it is not sufficient to name the place where the debt is payable; the place where it was contracted should also be stated.

Abrahamovitch v. Wiselberg, 13 Que. P.R. 260 (Sup. Ct.).

The clerk of a local agent of an incorporated company is competent to make the affidavit for a capias in Quebec in respect of the unpaid price of goods sold by the company through such agent. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

(§ II—20)—PROCEDURE ON ARREST BY CAPIAS.

Upon a motion by the defendant under sec. 7 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, ch. 12, for the discharge of bail put in to a writ of capias, the Judge in Chambers may go into the whole matter at large.

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261.

Objections to an order for a capias on the ground of defects in the affidavits upon which it was made cannot be taken after special bail has been put in. [Robertson v. Beers, 7 B.C.R. 76, referred to.]

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261.

An error in the name of the plaintiff or of the defendant in proceedings by way of capias in Quebec is a ground of exception to the form, and cannot be objected to by a petition to quash. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

Where goods have been sold to a purchaser in Quebec, and, while the price is still unpaid, he announces his intention of going to the United States, but does not notify the seller of such intention, and about a week before his intended departure he begins to dispose of his property, including the goods unpaid for, and pays none of the money so realized to the seller, but pays some of his other creditors, the facts are sufficient to justify the allegation in an affidavit for a capias on behalf of the seller that the purchaser is about to abscond from the Provinces of Ontario and Quebec with the intention of defrauding his creditors in general and the plaintiff in particular. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

In order that a capias may be maintained in Quebec, it is necessary to shew the intention of the defendant to leave the Provinces of Quebec and Ontario with the intention of defrauding his creditors. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

An error in the name of the plaintiff in an affidavit for a capias in Quebec, which has not misled or prejudiced the defendant, may be amended. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

An absolute rule cannot be laid down in regard to amendments of affidavits leading to the issuing a capias; each case must be considered on its own merits. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

An allegation in an affidavit for a capias in Quebec that "cette dette a été créré de la manière suivante; par un envoi d'un char de fleur vendu et délivré au défendeur, en la bille de Shawinigan Falls, dans le cours de l'automne dernier, 1911," shews sufficiently for the purpose of such an affidavit where the cause of action arose and when the debt was incurred. [Dominion Flour Mills Co., Ltd. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, Ltd., 5 D.L.R. 379.

It is beyond the jurisdiction of a Judge in Chambers in British Columbia to set aside an order for a capias after it has been passed and entered, on the ground of defects in the affidavits on which it was made. [Damer v. Busby, 5 P.R. (Ont.) 356, referred to.]

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261.

ASSAULT AND BATTERY.

I. IN GENERAL.

II. JUSTIFICATION; DEFENCES.

I. In general.

(§ I—2)—BY BICYCLIST.

Where the defendant riding a bicycle on a city street violently collided with and seriously injured the plaintiff who was crossing the street; and where it appears (a) that there was nothing to prevent the defendant from seeing the plaintiff, (b) that he was in a better position to see the plaintiff than was the plaintiff to see him, (c) that the defendant did see the plaintiff long enough before the actual collision to warn him; such circumstances disclose a prima facie case of trespass by the defendant and cast upon him the onus of proving justification or excuse in an action for damages. [Sadler v. South Staffordshire Co., 23 Q.B.D. 17, referred to.]

Woolman v. Cummer, 8 D.L.R. 835, 23 O.W.R. 504, 4 O.W.N. 371.

II. Justification; defences.

(§ II—9)—DEFENCE OF PROPERTY OR DWELLING.

In an action for damages for assault where the plaintiff as a private individual

is lawfully engaged in abating an obstruction in a river as a nuisance, and the defendant, in resisting the abatement, assaults and pushes or strikes the plaintiff, whereby he falls into the water, the defendant is liable in damages for the assault, and this, although the assault in question instantly led up to an aggravated assault upon the defendant's person by one of plaintiff's companions, who becomes liable in damages therefor. [Lorraine v. Norrie, 6 D.L.R. 122, referred to.]

McCurdy v. Norrie, 6 D.L.R. 134.

ASSESSMENT.

On unpaid subscription to stock, see Corporations and Companies.

For insurance, see Insurance, III.

Of taxes, see Taxes.

ASSIGNMENT.

I. WHAT ASSIGNABLE; VALIDITY.

II. EQUITABLE ASSIGNMENT; ORDERS.

III. RIGHTS AND LIABILITIES OF PARTIES.

For creditors, see Assignment for Creditors.

Of purchaser's interest in instalment contract for lands, see Vendor and Purchaser.

Assignment of interest in land under land titles statutes, see Land Titles.

Of negotiable paper, see Bills and Notes.

Of lease, see Landlord and Tenant.

Effect of, or right of action, see Parties.

Of securities to surety paying debt, see Subrogation.

I. What assignable; validity.

(§ I—2)—WHAT ASSIGNABLE GENERALLY.

In an action for the recovery of a physician's bill for services, where the bill had been assigned by attaching to an ordinary statement of the account a written assignment with an attesting witness of "this claim of $1,500," the assignment, however, not shewing any consideration, such an assignment is sufficient in form, no technical form being required by the laws of Quebec. [Walker v. Bradford Old Bank (1884), 12 Q.B.D. 511, referred to.]

Reader v. Calumet Metals Co., 6 D.L.R. 496, 19 La Rev. de Jur. 346.

(§ I—14)—OF CONTRACT.

Neither party to a contract of sale of lands can assign over the burden thereof, and when one party to the contract has assigned his interest therein, he remains liable to perform his part of the contract; the other party cannot sue the assignee, either for the specific performance or for damages for breach of contract, unless he has accepted the assignee as occupying the assignor's place in respect to the fulfilment of the contract. [Tolhurst v. Associated Portland Cement Mfrs., [1902] 2 K.B. 660.]

Coté v. Olson, 2 D.L.R. 392, 20 W.L.R. 690.

The claim of a real estate agent for commission due him on the disposal of property is assignable and where the claim is assigned to the wife of the agent she may sue in her own name.

Lewis v. Bucknam, 1 D.L.R. 277, 20 W.L.R. 4.

A stipulation in an agreement for sale of land that no assignment thereof by the purchaser shall be valid unless formally approved of by the vendor is effective only for the protection of the vendor, and cannot be set up by a second sub-purchaser to defeat the claim of a prior sub-purchaser whose claim had legal priority under the registry laws as between themselves, although the second sub-purchaser had obtained the original vendor's approval and the first sub-purchaser had not.

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551.

(§ I—17)—OF CLAIM FOR DAMAGES.

A claim for damages for personal injuries from a collision on the highway due to the defendant's driving on the wrong side of the road is not assignable. [McGregor v. Campbell, 19 Man. R. 38, and McCormack v. Toronto Ry. Co., 13 O.L.R. 656, followed.]

Compton v. Allward, 1 D.L.R. 107, 19 W.L.R. 783, 48 C.L.J. 109, 22 Man. L.R. 92.

II. Equitable assignment; orders.

(§ II—20)—EQUITABLE ASSIGNMENT.

An arrangement between a boarding house keeper and a company that he should charge for meals served to the company's employees, and that the company should deduct the amount owing in respect of such meals from the employees' pay checks and pay it to the boarding house keeper, is not dependent on the law of assignment, as the amount so to be deducted from wages yet to be earned would from time to time be payable to the boarding house keeper as the direct creditor of the company and would never have been legally payable to the employee, although for convenience of accounting the gross wages were placed to his credit and the boarding accounts charged against the same. [Lee v. Friedman, 20 O.L.R. 49, distinguished.]

Olson v. Machin, 8 D.L.R. 188, 4 O.W.N. 287, 23 O.W.R. 531.

(§ II—23)—SUB-CONTRACTOR.

An agreement whereby a contractor for work sub-contracts with another to do the same work at the same price as he is to receive and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, does not constitute an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property

owner, and such transaction is not an equitable assignment of a chose in action.

Fraser v. C.P.R. Co., 1 D.L.R. 678, 20 W.L.R. 530, 22 Man. L.R. 58.

III. Rights and liabilities of parties.

(§ III—27)—ASSIGNEE OF WAGES.

A claim for work done by the owner of a threshing outfit is assignable, and where the work was ordered without an agreement as to the price to be charged, the party for whom the work was done is liable to the assignee of the account for whatever sum the work is worth estimated at a fair price.

J. I. Case Threshing Co. v. Haslam Land and Investment Co., Ltd., 1 D.L.R. 282, 19 W.L.R. 883.

(§ III—28)—EQUITIES AND OFF-SET.

Where one acquires property by gift or purchase from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. [De Mattos v. Gibson, 4 DeG. & J. 282, followed.]

Rudd v. Manahan, 5 D.L.R. 565, 21 W.L.R. 929.

Where a contract for the sale of land has been cancelled by the vendor because of the non-payment by the vendee of all of the initial payment, which, however, the contract recited had been paid in full, an assignee thereof takes subject to all equities between the vendor and vendee, and can not, in the absence of allegation and proof of equitable rights as an innocent purchaser without notice, upon tender of the balance due upon the contract, obtain specific performance thereof. [Goddard v. Slingerland, 16 B.C.R. 329, distinguished; Rimmer v. Webster (1902), 71 L.J. Ch. 561, and Winter v. Lord Anson, 3 Russell 488, referred to.]

McKenzie v. Goddard, 2 D.L.R. 354, 20 W.L.R. 912.

The transferee of rights under a promise of sale can have no greater rights under such promise of sale as against the original owner than the transferor.

Lapierre v. Magnan and Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

(§ III—29)—RIGHTS OF LESSEE ON ASSIGNMENT OF LEASE—IMPLIED AGENCY.

The lessor in making an agreement with the assigns under which the rights and obligations entered into by the lessor are to be respected, acts both personally and in the quality of agent of the lessee whom he had bound himself to protect, and the lessee is therefore a party to such transfer, even though he does not personally intervene in the deed of transfer.

Authier v. Driscoll, 3 D.L.R. 797.

(§ III—30)—GIVING NOTICE OF ASSIGNMENT.

Although an assignee of the purchaser's interest in a land contract, of which a prior undisclosed assignment had been made as to part of the land without notice to him is the first to procure the original vendor in whom the legal estate is vested to become a party to the assignment by consenting thereto, his right to call for the conveyance of the legal estate over that of the person whose equitable interest while prior in point of time had not been notified to the holder of the legal estate, is controlled by the registry laws and a caveat filed by the first purchaser under the Saskatchewan Land Titles Act before the second purchaser had obtained such consent, will preserve the first purchaser's priority. [Hopkins v. Hemsworth, [1898] 2 Ch. 347, and Taylor v. London and County Banking Co., [1901] 2 Ch. 231, specially referred to.]

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551.

The transfer of a "lien note" is subject to the provincial law dealing with assignments of choses in action and with the method of giving notice to the debtor that the transfer has been made. [See also vol. 2 Can. Ten Year Digest 3427.]

Bank of Toronto v. Graham, 1 D.L.R. 36, 19 W.L.R. 879.

The notice of the transfer of a chose in action required to be given to the debtor in order to vest in the transferee a right of action in his own name under Saskatchewan laws (Con. Ord. 1898, ch. 41) is sufficient if the transfer is produced and shewn to the debtor, and the debtor is not protected by payments thereafter made to the transferor. [See also vol. 1 Can. Ten Year Digest 605-612.]

Bank of Toronto v. Graham, 1 D.L.R. 36, 19 W.L.R. 879.

Where a physician assigned to another his bill against a patient for services, and no notice of the assignment was given to the debtor, before action brought by the assignee, the service of the writ or process commencing the action, in the name of the assignee, is a sufficient notification of the transfer. [Bank of Toronto v. St. Lawrence Fire Insurance Co., [1903] A.C. 59, 2 Com. L.R. (Can.) 42, followed.]

Reader v. Calumet Metals Co., 6 D.L.R. 496, 19 La Rev. de Jur. 346.

(§ III—31)—ASSIGNMENT TO TRUSTEE WITH NOTICE.

A trustee under a marriage settlement who in pursuance thereof takes a transfer from the settlor of shares of stock in a company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, having at the time full notice of the terms of a prior option agreement made concerning such shares by the settlor, will hold the shares subject to the terms of such agreement and subject to the enforcement against him by the holders of the option of

the rights which they had acquired from the settlor.

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

(§ III—33)—ASSIGNMENT BY PURCHASER OF LAND-PURCHASE CONTRACT.

Upon the forfeiture of a contract for the sale of land, and the vacation of all instruments depending thereon, on account of the default of the vendee to pay the amount due within the time decreed by the Court therefor, the assignee of the vendee's interest in the contract will be given judgment against the latter for the amount the assignee had paid under the contract to the vendee or his agent, which had not been applied in satisfaction thereof.

Southwell v. Williams and Schank, 4 D.L.R. 1, 21 W.L.R. 771, 17 B.C.R. 209.

ASSIGNMENTS FOR CREDITORS.

I. WHAT CONSTITUTES AN ASSIGNMENT.
II. CONSTRUCTION AND EFFECT OF ASSIGNMENT.
III. ASSIGNEE OR TRUSTEE.
A. In general.
B. Rights and powers.
C. Liabilities.
IV. RIGHTS AND LIABILITIES OF ASSIGNEE'S ATTORNEY.
V. VALIDITY; TAKING EFFECT.
VI. PROPERTY INCLUDED.
VII. PREFERENCES BY INSOLVENT.
A. In general.
B. Validity of.
VIII. RIGHTS, DUTIES, AND LIABILITIES OF CREDITORS; PRIORITY AND RELEASE OF CLAIMS.
A. In general.
B. Release of claims.
IX. LIABILITY OF ASSIGNOR.

Right to prefer creditors generally, see Fraudulent Conveyances, III.

As to insolvency generally, see Insolvency.

I. What constitutes an assignment.

(§ I—1)—WHAT CONSTITUTES AN ASSIGNMENT.

One Dunn, a merchant at Red Deer, in the Judicial District of Northern Alberta, being in insolvent circumstances, executed in favour of one Robinson on the 9th of February, 1904, an absolute assignment of all his stock in trade and fixtures, the consideration being expressed as $1. Robinson was a traveller for one of Dunn's creditors, namely, Knox, Morgan & Co., of Hamilton, Ontario, having his headquarters at Calgary, which was also in the Judicial District of Northern Alberta. On February 26th, Knox, Morgan & Co., through another traveller, one Munro, effected a sale of the goods and fixtures to the defendant McClocklin at Winnipeg, and on March 9th Robinson gave McClocklin a bill of sale and delivered up possession. Although the other creditors of Dunn were not consulted in the matter, they were notified that the assignment had been taken "in the interests of all the creditors."

On March 15th, the plaintiff recovered a judgment against Dunn upon which they subsequently issued execution and caused the goods in question to be seized.

Held, per Wetmore and Scott, JJ., that the assignment to Robinson, being one for the benefit of creditors, was absolutely void, as Robinson was not a resident within the Judicial District of Northern Alberta, and that in consequence the defendants acquired no interest under their bill of sale.

Per Newlands, J., that the assignment was taken by Robinson solely on account of Knox, Morgan & Co., who acted in the premises without consulting either Robinson or the other creditors, and that it was not, therefore, an assignment for the benefit of creditors within the meaning of C. O. 1898, ch. 42, sec. 3, but was void as delaying creditors, and that as the defendants took with notice, the sale to them was void.

Per Harvey, J. (dissenting), that the onus of shewing that Robinson was not a resident of the Judicial District of Northern Alberta was on the plaintiff, and he had failed to establish that fact. Consequently the assignment to Robinson was a valid assignment for the benefit of creditors; that in any event the defendants were innocent purchasers, and the assignment, being at most voidable only by creditors, could not be impeached as against defendants, who had innocently acquired rights before proceedings were taken.

Judgment of Sifton, C.J., affirmed.

McKee v. McClocklin, et al., 7 Terr. L.R. 274; C.O. 1898, ch. 42, sec. 3.

II. Construction and effect of assignment.

(No cases.)

III. Assignee or trustee.

A. In general.

(No cases.)

B. Rights and Powers.

(§ III B2—20)—PROPERTY OR TITLE TAKEN.

The sale of book debts of an insolvent, made under authority given to the curator by the Court and under surveillance of the inspectors, deprives it of all character of the sale of litigious rights.

Neither a resolution of the creditors nor even an order of Court authorizing it is a condition precedent to a right of action for the proceeds of a sale so authorized.

To obtain the authority of the Court and consent of the inspectors or creditors, the creditors generally, as well as the one who institutes the proceedings, must have an interest therein.

In this case the Judge suspended proceed-

ings for fifteen days to enable the curator to obtain from the inspectors or creditors authority to take action.

Gervais v. Douglass, 13 Que. P.R. 421 (Sup. Ct.).

(§ III B—25)—ACTIONS BY ASSIGNEE.

Intervention by assignee for benefit of creditors—Dismissal of counterclaim—Leave to assignee to intervene.

Medland v. Naylor, 2 D.L.R. 890, 3 O.W. N. 1005.

IV. Rights and liabilities of assignee's attorney.

(No cases.)

V. Validity; taking effect.

(No cases.)

VI. Property included.

(No cases.)

VII. Preferences by insolvent.

A. In general.

(§ VII A—55)—PREFERENCE BY INSOLVENT.

An agreement by which a bank makes an advance to an insolvent customer, of the amount of a composition with his creditors, in consideration of an absolute transfer to it of securities, already held as collateral, and of his note for the surplus of his secured indebtedness to it, after payment of the composition, does not amount to an undue preference and is valid and binding.

Philie ès-qual. (intervenant, appellant) v. Coté et al. (plaintiffs, respondents), 21 Que. K.B. 128.

B. Validity of.

(§ VII B—61)—BY MORTGAGE OR BILL OF SALE.

Under sec. 42 of the Manitoba Bills of Sale and Chattel Mortgage Act, a security for a debt given to a creditor which has the effect of giving him an advantage over other creditors, will be declared void, notwithstanding that it has been secured by pressure on the part of the creditor and whether or not the creditor knew of the debtor's insolvency.

Under sec. 44 of the Act, a chattel mortgage security given to a creditor for an existing debt and also to cover fresh advances, although void as to the existing debt as being a fraudulent preference, should be held good as regards any fresh advances made to the debtor on the strength of it.

Mader v. McKinnon (1892), 21 S.C.R. 645, and Goulding v. Deeming (1888), 15 O. R. 201, followed.

Empire Sash and Door Co. v. Maranda et al., 21 Man. R. 605.

Assignment by insolvent partnership—Assets of firm—Action by assignee to make liable lands purchased by wife of partner—Fraudulent conveyance.

McPhie v. Tremblay, 2 D.L.R. 921, 3 O.W.N. 605, 21 O.W.R. 217.

VIII. Rights, duties, and liabilities of creditors; priority and release of claims.

A. In general.

(§ VIII A—65)—RIGHTS, DUTIES, AND LIABILITIES OF CREDITORS.

Where the same two partners carry on two business concerns, hotel and hardware, and fail in both; and where some of the judgment creditors realize under their executions out of the hardware assets, and others are looking to the hotel assets, and still others to both; and where one of the partners (alleging non-liability on the hotel debts through dissolution) assigns for the benefit of creditors under the Assignments Act, R.S.S. 1909, c. 142; and where there is confusion as to the liability of the insolvent for the hotel and hardware claims and as to the ranking of creditors in respect thereto, an application in the insolvent estate matter on behalf of an execution creditor to have his exact rank and rights fixed may be heard in chambers under the Assignments Act (Sask.), and a reference to the local registrar may be ordered, to examine and inquire into the exact rights and obligations of the insolvent, and the creditors, in relation to each of the partnerships, and to report thereon.

Re Crawhall, 6 D.L.R. 386, 22 W.L.R. 183.

It was held, reluctantly following Brown v. Marshall, 10 E.L.R. 146, that, under sec. 28 of the Nova Scotia Collection Act, the creditor is absolutely entitled to an assignment of the judgment debtor's property in trust for the payment of the judgment.

John A. Charlton and Jacob Vidito, 11 East. L.R. 61.

The bankruptcy rules of England were never adopted as part of the law of the Province of Manitoba, except in so far as they have been introduced in part by the Assignments Act of Manitoba, but the Chancery rules were expressly incorporated into the Manitoba law and therefore apply where there is no statutory provisions as to the valuation of securities by a creditor upon a deficiency of assets.

Box v. Bird's Hill Sand Co., 8 D.L.R. 768, 22 W.L.R. 871.

The bankruptcy rule, that where a creditor holds security and does not value it he is deemed to have surrendered it, is not in force in Manitoba, and will not be applied to a proceeding to prove a claim against an estate assigned for the benefit of creditors.

Box v. Bird's Hill Sand Co., 8 D.L.R. 768, 22 W.L.R. 871.

(§ VIII—66a)—CONTESTATION OF CREDITORS' CLAIMS.

Notice of contestation of claim—Failure of creditor to bring action within time limited by statute—Jurisdiction of Court to extend time.

Singer v. Mundell, 7 D.L.R. 774.

(§ VIII A—72)—RIGHTS ON INTERPLEADER.

The provision of the Creditors' Relief Act, 9 Edw. VII. (Ont.) ch. 48, sec. 6, which enacts that where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata in proportion to the amount of their executions to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions, confers a preferential lien upon the contributing creditors of which, in case of the debtor making an assignment for the benefit of his creditors, such contributing creditors are not deprived by the general direction of section 14 of the Assignments and Preferences Act, 10 Edw. VII. (Ont.), ch. 64, as to the precedence to be given to such assignment. [Re Henderson Roller Bearings Ltd., 24 O.L.R. 356, affirmed on appeal.]

Martin v. Fowler, 6 D.L.R. 243, 46 Can. S.C.R. 119.

(§ VIII A—74)—PRIORITIES.

A shareholder in a company incorporated under the B.C. Companies Act, R.S. B.C. 1911, ch. 39, who leaves a portion of his dividend at his credit in the company's books is not debarred from proving his claim thereto, in competition with other creditors upon the company long afterwards making an assignment for the benefit of creditors under the Creditors' Trust Deeds Act, R.S.B.C. 1911, ch. 13, where no winding-up proceedings have been taken.

Savage v. Shaw, 8 D.L.R. 910, 17 B.C. R. 343.

(§ VIII—74a)—WAGES.

Where an assignment is made for the general benefit of creditors, the wages "not exceeding three months' wages" for which (under the Wages Act (Ont.) 10 Edw. VII. ch. 72, sec. 3), a person in the employment of the assignor within a month of the assignment has a preferential claim, means, not necessarily the wages for the three months immediately preceding the assignment, but the balance of wages due him not exceeding any three months' wages.

McLarty v. Todd, 7 D.L.R. 344, 4 O.W.N. 172, 23 O.W.R. 166.

IX. Liability of assignor.

(§ IX—80)—LIABILITY OF ASSIGNOR.

A debtor at liberty who made an assignment but no curator was appointed nor contestation had for more than four months cannot demand his discharge with the consequences provided for by art. 889, C.P.Q. That article applies only to the case of a debtor under arrest.

Cinq-Mars v. Drolet, 41 Que. S.C. 302 (Sup. Ct.).

ASSOCIATIONS.

I. IN GENERAL.

II. MEMBERS.

A. In general.

B. Right to membership; expulsion.

Benevolent societies, see Benevolent Societies.

Building and loan associations, see Building Societies.

Passenger association, see Carriers.

Boycott by, see Conspiracy.

Joint business venture, liability as partners, see Partnership.

I. In general.

(§ I—3)—RIGHT TO INCORPORATION.

A certificate of incorporation under R. S.S., ch. 79, will be denied an association having for its object the promotion of honourable practice among, and the elevation of the standard of land surveyors in the province, and also the promotion and conciliation of misunderstandings between them, as well as the hearing and determination of complaints and accusations preferred by third persons against the professional conduct of land surveyors, and the imposition of punishment for misconduct, the contemplated objects of the association not being within the scope of such chapter, since the association seeks control of all surveyors within the province and not merely over the members thereof.

Re Stewart, 7 D.L.R. 503, 22 W.L.R. 192.

II. Members.

(No cases.)

ATTACHMENT.

I. WHEN LIES.

A. In general.

B. On what claims.

C. By or against non-residents or foreign corporations.

D. For fraud.

II. INTEREST ACQUIRED; LIEN; PRIORITY.

A. In general.

B. Lien; priority.

III. PROCEDURE.

A. In general; affidavits; petition, etc.

B. Bonds, liability on.

C. Dissolution; dismissal; setting aside.

As to garnishment, see Garnishment.

Writ of attachment as evidence, see Evidence.

Arrest in civil cases, see Arrest.

Sale under, see Judicial Sale.

I. When lies.

A. In general.

(§ I A—5)—IN GENERAL.

Promissory notes cannot be seized, by attachment, before maturity and placed in

judicial control in order to deduct therefrom interest taken in excess of that provided by the Money Lenders' Act, R.S.C. 1906, ch. 122, where the insolvency of the holder of the notes is not alleged in the affidavit for the writ, nor in the declaration, so as to shew that it will be impossible to reclaim such overcharge from him in an action on the notes.

Friedenberg v. Bailey and Bank of Montreal, 4 D.L.R. 711.

D. For fraud.

(§ I D—20)—FOR FRAUD.

Ross being about to leave the country executed and delivered to Patterson a bill of sale of certain goods and chattels, the consideration being expressed to be $3,100 then paid, which consideration was verified by the affidavit of bonâ fides. It also appeared that Ross procured from Patterson an agreement to permit him to redeem before a stated period, which agreement was not registered. It also appeared that Patterson sold certain of the goods before the time mentioned for redemption expired, and under circumstances giving suspicion of fraud. Palmer having brought action against Ross for debt caused a writ of attachment to issue, and seized the goods still in possession of Patterson and also such goods as had been sold by him, whereupon Patterson and those claiming through him claimed the goods and the sheriff interpleaded. On the issue claimants were plaintiffs and Palmer defendant. Palmer put in his writ of attachment, but gave no other evidence to prove his status as a creditor, and attacked the bill of sale on the ground of fraudulent preference, and that it was void as against creditors, the consideration not being truly expressed, it appearing that the true consideration was an alleged indebtedness of Ross to Patterson and in supporting this consideration Patterson gave two different accounts of how this amount was arrived at. It was also alleged that the transaction was a colourable one, and that the goods were still the goods of Ross. The trial Judge allowed the claim, holding that Palmer had not established his status as a creditor.

On appeal:—

Held, (per curiam). The writ of attachment filed by the defendant in the issue was sufficient primâ facie evidence that he was a creditor of Ross to give such defendant status to attack the sale.

2. The consideration being made up of a promissory note past due, wages owing and cash paid, and expressed as moneys paid at or before the sealing of the bill of sale was truly expressed within the meaning of the Bills of Sale Act.

3. (Per Wetmore, C.J., and Johnstone, J.) That upon the evidence the bill of sale though absolute in form was in fact intended to be a mortgage of chattels, and being such the affidavit of bonâ fides being that of a bill of sale and not of a chattel mortgage was insufficient, and the transaction was void, under the Bills of Sale Act, as against creditors.

4. (Per curiam). That on an issue such as this to determine whether or not the goods were the property of the debtor, the question of fraud can be tried. [West v. Ames Holden Co., 3 Terr. L.R. 17, followed.]

5. (Per Wetmore, C.J., and Johnstone, J.) While the transaction in question was voidable under the statute of Elizabeth as being in fraud of creditors, yet the title of Patterson thereunder being only a voidable one, and not having been voided at the time of the sale by him of the goods, he could give a good title to purchasers, and such purchasers were entitled to hold the goods against creditors.

6. (Per Newlands and Lamont, JJ.) The creditor having failed to prove that at the time of the execution of the bill of sale Ross was in insolvent circumstances or unable to pay his debts in full could not have the transaction set aside as in the fraud of creditors.

Patterson v. Palmer et al., 4 S.L.R. 487.

II. Interest acquired; lien; priority.

B. Lien; priority.

(§ II B—30)—LIEN, PRIORITY.

The proper mode of disposing of an objection by a subsequent attacher that the prior attacher's claim is barred by the Statute of Limitations is by a motion to set aside the prior writ of attachment and not by an order permitting the subsequent attacher to plead to the action brought upon the prior attacher's claim.

Gormley v. DeBlois, 8 D.L.R. 109.

(§ II B—36)—PRIORITY BETWEEN ATTACHMENT AND OTHER LIENS.

Under the plaintiff's writ of attachment against the defendant as an absconding debtor, the sheriff seized a motor cycle which the defendant had bought from the claimant and had given in payment therefor two lien notes, which were duly registered. Nothing having been paid on the notes, the claimant asserted his claim to the motor cycle, and the sheriff interpleaded:—Held, that the provisions of sec. 1 of the Act respecting lien notes had not been complied with, in that the lien notes did not contain such a description of the goods that the same might be readily and easily known and distinguished—the only description being "a motor cycle." [Aricinski v. Arnold, 4 W.L.R. 556, followed.] Also, that, as no description at all was given, the claimant should not be allowed to shew by affidavit or parol evidence that the article signed was his property. Also, that the affidavit of bona fides on the lien notes being identical with the affidavit referred to in Aricinski v. Arnold, did not comply with the statute. Therefore, that the

right of the plaintiff as an attaching creditor must prevail.

Bowser v. Goodwin, 19 W.L.R. 873.

III. Procedure.

A. In general; affidavits; petition; etc.

(§ III—40)—PROCEDURE.

The minutes of seizure describing the things seized as follows:—"13 bottles of champagne, 7 tables and 24 chairs, etc.," are sufficient to enable the bailiff to identify the objects when he is called upon to sell them.

Smith v. Shapiro, 14 Que. P.R. 160.

The absence of details is matter for a motion for particulars and not for an exception to the form.

Smith v. Shapiro, 14 Que. P.R. 160.

(§ III A—45)—PROCEDURE.

Irregular affidavit leading to issue of writ—Strict compliance with Rules of Court—Sask. Rules (1911), 545.

Fitzgerald v. Warner, 7 D.L.R. 859.

B. Bonds, liability on.

C. Dissolution; dismissal; setting aside.

(§ III C—55) — DISSOLUTION; DISMISSAL; SETTING ASIDE.

Proceedings in execution are not instances. If the plaintiff proceeds by saisie-arrêt before judgment and seizes the same property after judgment proceedings on one may be suspended or they may be consolidated, but the last will not be set aside on the plea of lis pendens.

Laing Packing & Provision Co. v. Duval, 13 Que. P.R. 349 (Sup. Ct.).

ATTAINDER.

(§ I—5)—EFFECT OF CONVICTION.

Under sec. 1033 Criminal Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a renewal of a prior lease of hotel premises will not be set aside merely because it was made by a convict while serving his term in a penitentiary.

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 3 O.W.N. 1486, 22 O.W.R. 643, 26 O.L.R. 576.

ATTESTATION.

Of deed, see Deeds.

Of will, see Wills, I.

ATTORNEY-GENERAL.

(§ I—1)—RIGHT TO BRING ACTION.

The right of the Attorney-General to take action on behalf of the public for the violation by an electric railway company of a by-law forbidding the erection of gas holders within the city without first obtaining the permission of the City Council, cannot be taken away by the city consenting to the erection of a gas holder by a company in breach of the city's own by-law. [Yabbicom v. King, [1899] 1 Q.B. 444, followed.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

The only party who can sue for the protection of the public right is the Attorney-General of the province in an action to restrain the breach of three city by-laws one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the City Council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued. [Devonport v. Tozer, [1903] 1 Ch. 759; Attorney-General, v. Wimbledon, [1904] 2 Ch. 34; and Attorney-General v. Pontypridd, [1908] 1 Ch. 388, referred to.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

ATTORNEYS.

See Barristers.

See Solicitors.

AUCTION.

Warranty by auctioneer on sale of land at auction, see Vendor and Purchaser, I.

AUDITORS.

Company auditors, see Corporations and Companies, IV.

AUTHOR.

As to contract for publication of literary work, see Contract, II.

AUTOMOBILES.

I. IN GENERAL.

II. PUBLIC REGULATION AND CONTROL; LICENSE.

III. INDIVIDUAL RIGHTS AND LIABILITIES.

- A. In general.
- B. Duty and negligence of operator.
- C. Responsibility of owner when car operated by another.
- D. Duty and liability to operator or person using.

IV. AUTOMOBILES FOR HIRE.

V. GARAGE.

- A. In general.
- B. Right of proprietor to lien.
- C. Licensing of garage.
- D. Duty to customer.

Homicide by negligent operation of, see Homicide.

Evidence as to speed, see Evidence.

Summary conviction, see Summary Conviction.

I. In general.
(No cases.)

II. Public regulation and control; licenses.

(§ II—50)—PUBLIC REGULATIONS.

A summary conviction under sec. 18 of the Ontario Motor Vehicles Act, 2 Geo. V., ch. 48, providing that if an accident occurs to any vehicle in charge of any person owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident and give in writing to anyone sustaining loss or injury, the name and address of himself and of the owner of the motor vehicle and the number of the permit, will be quashed, though the motor vehicle driven by the convicted person grazed the wheel of a passing buggy with sufficient force to loosen two spokes in its wheel, if it appeared at the trial that the person in charge of the motor vehicle did not know or have reason to know that such an injury had resulted to the buggy. [Core v. James, L.R. 7 Q.B. 135; Nicholls v. Hall, L.R. 8 C.P. 322; Reg. v. Sleep, 1 L. & C. 44; Hardcastle, Statutory Law, 3rd ed., 465, (5th ed.—the 2nd ed. of Craies-Hardcastle—468); Maxwell's Interpretation of Statutes, 2nd ed., 115 (5th ed., 157), specially referred to.]

Robertson v. McAllister, 5 D.L.R. 476, 19 Can. Cr. Cas. 441.

III. Individual rights and liabilities.

B. Duty and negligence of operator.

(§ III B—200)—IN GENERAL.

The driver of an automobile is to be considered in law as being in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation. [Fisher v. Murphy, 3 O.W.N. 150, specially referred to and applied. See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177.

While the automobile is not dangerous per se, its freedom of motion, speed, control, power and capacity for moving without noise give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways. [Fisher v. Murphy, 3 O.W.N. 150; Beven on Negligence, 3rd ed., 439, 440; Le Lievre v. Gould, [1893] 1 Q.B. 491, referred to. See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177.

(§ III B—205)—STATUTORY DUTY.

The non-observance by the driver of an automobile of a duty imposed upon him by statute is in itself evidence of negligence. [See Halsbury's Laws of England, vol. 9, p. 571.]

Stewart v. Steele, 6 D.L.R. 1, 22 W.L.R. 6.

The Saskatchewan Act to regulate the Speed and Operation of Motor Cars, R.S.S. 1909, ch. 132, is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute. [Butler v. The Fife Coal Co., [1912] A.C. 149, referred to.]

Stewart v. Steele, 6 D.L.R. 1, 22 W.L.R. 6.

(§ III B—210)—COMMON LAW DUTY.

At common law the owner of a motor vehicle is not answerable for the negligence of the driver thereof, except where the relation of master and servant exists, and where, at the time of the negligent act, the latter was acting within the scope of his employment; and such liability can be changed by statute only by the use of distinct and unequivocal words. [Arthur v. Bokenham, 11 Mod. 150, referred to.]

The B. & R. Co. v. Hugh S. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

The statutory requirements of the Motor Vehicles Act (N.B.), 1 Geo. V. ch. 19, for the public regulation and control of the use on highways of automobiles, do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends. [Beven on Negligence, 3rd ed., 440, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177.

Section 35 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, providing that the owner of a registered motor vehicle shall be liable for any violation of the provisions of the Act while operating such vehicle, is restricted to the penal liability thereby imposed, and does not alter the common law liability of the owner of a motor vehicle for the violation of the Act, either by himself or by any other person in charge of or operating such vehicle. [Mattei v. Gillies, 16 O.L.R. 558, and Verral v. Dominion Automobile Co., 24 O.L.R. 551, distinguished.]

The B. & R. Co., Ltd. v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

(§ III B—225)—DUTY WHEN HORSES ENCOUNTERED ON HIGHWAY.

Where the Motor Vehicles Act (N.B.), 1 Geo. V. ch. 19, sec. 3, sub-sec. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car, it is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened."

Campbell v. Pugsley, 7 D.L.R. 177.

Where an automobile on the highway is meeting a horse and buggy and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence suggests

and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with his horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation. [See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and under the provisions of the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 4, the motorist, violating its provision in not stopping his car, incurs a fixed penalty by way of fine for the violation, this penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence. [Beven on Negligence, 3rd ed., 439, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177.

Where an automobile is meeting a horse and buggy on the highway, it is, under the Motor Vehicles Act (N.B.), 1911, 1 Geo. V. ch. 19, sec. 4, sub-sec. 1, the motorist's duty "reasonably to turn to the left of the centre of the highway so as to pass without interference."

Campbell v. Pugsley, 7 D.L.R. 177.

Where an auto on the highway is liable to meet a horse and buggy and to frighten the horse because in that locality the auto may still be a strange and startling object to the horse, it is the motorist's duty to know this and increase his care and caution accordingly. [House v. Cramer, 134 Iowa 374; Word v. Meredith, 77 N.E. 118, 220 Ill. 66, referred to. See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177.

The automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion laterally they are much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation. [Christy v. Elliott, 216 Ill. 31; Commonwealth v. Kingsbury, 199 Mass. 542; Weill v. Kreutzer, 134 Ky. 563; Fisher v. Murphy, 20 O.W.R. 201, referred to. See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177.

A driver of an automobile who continues to advance towards horses which, by their actions, indicate that they are frightened by his car, is guilty of negligence, and is liable to the owner of the horses for injuries sustained by him while trying to hold them.

Stewart v. Steele, 6 D.L.R. 1, 22 W.L.R. 6.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side, where the embankment was. [Davies v. Mann, 10 M. & W. 546, 12 L.J. Ex. 10, 6 Jur. 954, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and fails to comply with the direct provisions against negligence enacted by the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. ch. 19, his violation constitutes evidence of negligence.

Campbell v. Pugsley, 7 D.L.R. 177.

One who was carefully driving an automobile at slow speed on a highway is not liable, under sec. 29 of the Motor Vehicles Act, B.C. 1911, for injuries sustained by a horse, where it appeared that it became frightened and unmanageable, not at the automobile, but by a steam shovel that was in operation near the road, and ran into the automobile.

Queer v. Greig, 5 D.L.R. 308.

(§ III B—260)—Duty when approaching street crossing.

To drive an automobile towards an intersecting street at a speed of ten miles per hour, although that speed may be within the maximum permitted by law, is negligence sufficient to prevent the plaintiff recovering for a collision between his own and the defendant's automobile, which approached on the intersecting street at a greater rate of speed than was permitted by law, since the speed of the plaintiff's automobile at such place was unreasonable, as he must have known the possibility of meeting other automobiles moving on the intersecting street at a rate of speed equal to his own.

The B. & R. Co., Ltd. v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

(§ III B—263)—Duty near street cars.

The plaintiff, when on his way to board a street car which had stopped at a switch point at a place where it was usual for passengers to get on the cars, was knocked down and injured by a motor vehicle driven by the defendant's chauffeur past the street car. It appeared that the chauffeur was driving at a moderate rate of speed on the proper side of the road behind a team going in the same direction, that the team when just opposite the street car turned to the right to avoid hitting the plaintiff, that the chauffeur then proceeded, thinking the road was clear, when suddenly the plaintiff appeared before him on the pavement, that he blew his horn and applied the brakes and

did all he could to avoid hitting the plaintiff, but that the latter appeared confused, took a step backward and was struck, although not run over. Held, that the circumstances and the situation were such as to require the chauffeur to exercise a more than ordinary degree of care for the safety of pedestrians and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are overcome by a sudden panic, although at other times of healthy and rational intellect, and that under the circumstances the chauffeur was guilty of such negligence that the defendants were liable for the damages suffered by the plaintiff. The trial Judge assessed the plaintiff's damages at $344, an amount within the jurisdiction of the County Court; but, being satisfied that the plaintiff's solicitor honestly believed that the plaintiff would recover an amount beyond that jurisdiction, while giving him no costs, he gave the statutory certificate, under rule 933 of the King's Bench Act, to prevent the defendant setting off any costs.

Rose v. Clark, 21 Man. R. 635.

C. Responsibility of owner when car operated by another.

(§ III C—305)—In general.

The Alberta Motor Vehicle Act (2-3 Geo. V. ch. 6) does not render the owner of a motor vehicle liable for a violation of the provisions of the Act resulting in injury to the plaintiff where the vehicle was at the time of the injury being used by another person without the owner's knowledge or consent.

The B. & R. Co. v. Hugh S. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

The fact that the owner of an automobile in Alberta has given permission to his brother to use the automobile on his own business without payment raises no presumption of agency between him and his brother, and the owner is not liable to one injured by the gross negligence of his brother while exercising such permission, even though at the time of the accident he be driving home the owner's wife at the owner's request. [Yewens v. Noakes, 6 Q.B.D. 530, referred to. See also Pollock on Torts, 7th ed., pp. 77 and 78; and Bigelow on Torts, 8th ed., p. 54.]

Lane v. Crandell, 5 D.L.R. 580, 21 W.L.R. 793.

IV. Automobiles for hire.

(No cases.)

V. Garages.

(No cases.)

AUTOPSY.

Post-mortem examination.

AUTREFOIS ACQUIT OR CONVICT.

See Criminal Law, II G.

AWARD.

By arbitrators, see Arbitration, II.

As compensation in eminent domain, see Eminent Domain.

BAGGAGE.

See Carriers, II O.

In general, see Carriers.

Discrimination in granting privilege to solicit for, see Carriers.

Innkeepers' liability for, see Innkeepers.

Proximate cause of loss of, see Proximate Cause.

BAIL AND RECOGNIZANCE.

(§ I—10)—Discharge of bail.

It is only in a very plain case that bail put in to a writ of capias under the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, ch. 12, should be discharged on the ground that the plaintiff cannot succeed upon his alleged cause of action.

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261.

(§ I—12)—Recovery back of money deposited as bail.

Where, before the granting of an order by a higher Court prohibiting a County Court hearing an appeal from a conviction by a police magistrate, which order carried $75 costs, such appeal was allowed by the County Court with costs of the same amount, upon a subsequent action being brought by the appellant to recover cash deposited as bail, a tender by the defendants to the plaintiff of the amount of the bail, less the costs of such prohibiting order, was refused, the Court declining on the ground that a counterclaim had not been filed, nor a tender pleaded, nor any money paid into Court, to consider whether the defendants were entitled to deduct the amount of such costs from the bail money.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235.

Cash deposited as bail with the attorney for the prosecution upon an appeal to a County Court from a conviction by a police magistrate may, upon an allowance of the appeal, be recovered by the appellant.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235.

In an action brought after the allowance by a County Court of an appeal from a conviction by a police magistrate, to recover cash deposited as bail, an allegation in the plaint to the effect that such money was deposited with the defendants as security for the appearance of the appellant, while in another paragraph the money was referred to as having been given as security for costs, does not embarrass or confuse defendants as to what money was claimed by the plaintiff, where the bail money was

paid to one of the defendants, since it was received by him as bail only and for no other purpose, notwithstanding that in the order allowing the appeal and requiring the money to be returned, it was referred to as having been given as security for costs.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235.

(§ I—16)—Order in habeas corpus.

Where it appears from the record on a habeas corpus application that the applicant is held in custody on a committal for trial and that the offence is one for which he should be admitted to bail, but the question of the validity of the commitment cannot be decided for failure of the applicant to produce a copy of the warrant, the Court may, nevertheless, make an order for bail.

Ex parte Aubin, 19 Can. Cr. Cas. 94, 13 Que. P.R. 27.

BAILMENT.

I. In general.
II. Rights of bailee.
III. Duty and liability of bailee.

By pledge, see Pledge.

I. In general.

(§ I—3)—Different kinds of bailments.

Where the contract of bailment calls for more than mere passive performance of a duty, i.e., where the idea of service and labour dominates that of the mere custody of the chattel, the personal element in the bailment distinguishes it from ordinary bailment so that the rule as to a gratuitous bailee's liability only extending to acts of gross negligence does not apply; but the rule delegatus non delegari does apply and the mandatory bailee is liable as for breach of trust if he contravenes it.

Wills v. Browne, 1 D.L.R. 388, 3 O.W.N. 580; 20 O.W.R. 880.

II. Rights of bailee.

(§ II—10)—Rights of bailee.

As against a wrongdoer the possession of a bailee is title, and the bailee is entitled to recover for the whole loss or deterioration of the subject of the bailment, ex. gr., a horse and buggy hired from a livery stable keeper, and the wrongdoer having once paid full damages to the bailee has an answer to any action by the bailor against him. [Re The Winkfield, [1902] P.D. 42; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, and Turner v. Snider, 16 Man. R. 81, followed; and see Beven on Negligence, 3rd ed. 1908, pages 736, 737.]

Compton v. Allward, 1 D.L.R. 107, 19 W.L.R. 783, 48 C.L.J. 109, 22 Man. L.R. 92.

III. Duty and liability of bailee.

(§ III—17)—Loss of or injury to property generally.

Plaintiff permitted defendant to have the use of a team of horses, it being understood that the horses were to be used for ploughing only, and not for roadwork. It was also found that the arrangement was that if the horses were not returned in good condition the defendant should pay for their use. The horses were in good condition when delivered, but when returned were weak, thin, and had sore mouths, backs and shoulders. Shortly after, they died. The plaintiff alleged death to be a result of improper care and use by the defendant. The defendant, however, alleged that the horses had been well fed and cared for, and it did not appear that the improper uses to which the horses were put would cause death.

In an action for damages:—

Held, that the effect of the arrangement between the parties was to constitute a gratuitous bailment liable to become a bailment for hire, and which under the circumstances as found did become a bailment for hire.

2. That a bailment for hire being constituted, the defendant was liable to the plaintiff for any injuries resulting from his negligence.

3. In fixing this damage the Court could not infer that the thin and enfeebled condition in which the horses were returned was due to the improper usage found, in the absence of direct evidence.

4. That when it is shewn by the bailee that his negligence did not produce the damage complained of, he has discharged the onus resting upon him, and is not required to shew the cause resulting in the damage complained of.

Wright et al. v. Smith, 4 S.L.R. 253.

Where a bailee in possession recovers from a wrongdoer the damage done to the subject of the bailment, the moneys received in excess of the monetary interest of the bailee in the chattel are deemed to have been received to the use of the bailor and the bailee must account to the bailor in respect thereof. [See Beven on Negligence, 3rd ed. 1908, p. 737.]

Compton v. Allward, 1 D.L.R. 107, 19 W.L.R. 783, 48 C.L.J. 109, 22 Man. L.R. 92.

An exhibition association that solicited the exhibition of the plaintiff's dogs, is not liable for their subsequent death from distemper, which developed upon their being returned to him, where it did not appear that other dogs there exhibited had such disease, and that there was ample opportunity for the plaintiff's dogs to have contracted it elsewhere, and no negligence was shewn on the part of the defendant, either in inspecting dogs admitted to the exposition, or in caring for the plaintiff's dogs while there. [Coltart v. Winnipeg Industrial Exhibition, 17 W.L.R. 372, affirmed; Connacher v. City of Toronto, 21 C.L.T. 172, distinguished.]

Coltart v. Winnipeg Industrial Exhibition, 4 D.L.R. 108, 21 W.L.R. 471.

Where goods are taken by any one as a bailee and are lost or destroyed when in

his custody, he will be liable in damages, unless he shews circumstances negativing the presumption of negligence on his part which arises from such circumstances. [Pratt v. Waddington, 23 O.L.R. 178, and Polson v. Laurie (1911), 3 O.W.N. 213, approved.]

Carlisle v. Grand Trunk R. Co., 1 D.L.R. 130, 3 O.W.N. 510, 20 O.W.R. 860, 25 O.L.R. 372.

Where in bailment the principal objects sought in the contract are service and labour and the custody of the chattel in bailment is merely incidental, the ordinary rule that in cases of gratuitous bailment the bailee is only liable for acts of gross negligence, does not apply; the element of personal trust dominates that of mere custody, and the custodian of money will be liable as for breach of trust in case of loss due to the negligence or misconduct of another person to whom he delegated the custody of the money without the owner's consent where a right of delegation is inconsistent with the gratuitous service which the bailee undertook.

Wills v. Browne, 1 D.L.R. 388, 3 O.W.N. 580, 20 O.W.R. 880.

A public warehouseman is only required to exercise the reasonable care of a prudent man in the storage of merchandise entrusted to him; he is not responsible for damage resulting from the precarious nature of the goods stored and does not occupy the relation of insurer with relation thereto. [Searle v. Laverick, L.R. 9 Q.B. 122, specially referred to.]

Roy v. Adamson, 3 D.L.R. 139.

Liability of bailee—Injury to horse hired.

Beatty v. Hodson, 7 D.L.R. 821, 19 W. L.R. 823.

(§ III—24)—Wrongful sale of goods.

An auctioneer to whom goods in bulk are entrusted by a carrier to sell for unpaid charges against them impliedly contracts with the warehousemen employing him, that he will exercise reasonable care in selling the goods. [Gagné v. Rainy River Lumber Co., 20 O.L.R. 433, specially referred to.]

Swale v. Canadian Pacific R. Co. (No. 2), 2 D.L.R. 84, 3 O.W.N. 664, 21 O.W.R. 225, 25 O.L.R. 492.

(§ III—26)—Changing place of storage.

When the place of storage is changed, the warehouseman must shew that the new premises are equally safe and suitable; if he does so then the mere change of premises will not create any liability for goods becoming damaged whilst in his keeping. [Lilley v. Doubleday, 7 Q.B.D. 510, approved.]

Roy v. Adamson, 3 D.L.R. 139.

BALLOTS.

See Elections, II.

BANKRUPTCY.

I. In general; jurisdiction; procedure.
II. Assets; their collection and administration.
III. Rights in assets; title, rights and liabilities of assignee or trustee.
IV. Claims against estate; distribution.
V. Discharge; effect.
VI. Foreign bankruptcy and discharge.

Insolvency of company, see Company, VI.

Insolvency of bank, see Bank, IV.

Assignment for benefit of creditors, see Assignment for Creditors.

Insolvency generally, see Insolvency.

I. In general; jurisdiction; procedure.

(No cases.)

II. Assets; their collection and administration.

(No cases.)

III. Rights in assets; title, rights and liabilities of assignee or trustee.

(No cases.)

IV. Claims against estate; distribution.

(No cases.)

V. Discharge; effect.

(No cases.)

VI. Foreign bankruptcy and discharge.

(§ VI—31)—Fraudulent concealment of assets.

The essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy and the appointment of a trustee, whose title relates back to the date of the adjudication, and extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of the adjudication.

United States v. Webber (No. 1), 5 D.L R. 863, 20 Can. Cr. Cas. 1.

BANKS.

I. Right to do business; powers.
II. Stockholders.
III. Officers and agents.
A. Qualifications; election.
B. Authority; ratification.
C. Liability.
IV. Banking.
A. Deposits.
B. Collections.
C. Other transactions; discounts, etc.
D. Clearing house business.
V. Insolvency.
VI. Savings bank.
VII. Crimes.

VIII. STATUTORY SECURITY TO BANKS.
- A. What banks may lend on.
- B. What banks may not lend on.
- C. Warehouse receipts, bills of lading or statutory securities.
- D. Penalties.

As purchaser of note in due course for value, see Bills and Notes.

Effect of certification of cheques by, see Cheques, III.

Gift of bank deposit, see Gifts.

Bank's title to cheque indorsed to it, see Cheques.

Presentation of negotiable paper, see Bills and Notes, IV.; Cheques, II.

Rights and liabilities as to bills of exchange, see Bills and Notes.

Interest permitted under the Bank Act, see Interest.

Procedure under Winding-up Act (Can.), see Corporations and Companies, VI.

I. Right to do business; powers.

(No cases.)

II. Stockholders.

(§ II—6)—TRANSFER OF STOCK.

The sale or transfer of shares in capital stock of a bank is perfected by the mere consent of the parties and the formalities required by secs. 43 et seq. of ch. 29 R.S.C. 1906, respecting the capacity of the transferor and the registration in the books of the bank affect only the relations between the shareholders and the bank. The acceptance by the vendor of bank stock in part payment for land sold does not constitute a dation en paiement nor involve the obligations of such an act. Shares in the capital stock of a bank have a real existence so long as the affairs of the bank are not in liquidation whatever reduction may be made in its capital or whatever may be its state of solvency. Hence, they can form the legal consideration of a contract, e.g., they may be transferred in payment of the price of a sale.

Bessette v. Brien, Q.R. 21, K.B. 132.

(§ II—9)—WHO LIABLE AS STOCKHOLDER.

Under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them, the holders of fully paid-up shares on the date of the commencement of the proceedings are liable as contributories notwithstanding a subsequent transfer by them of their shares and the fact that a judgment was obtained against the transferees by the liquidator.

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 4 O.W.N. 67.

(§ II—12)—RELEASE FROM LIABILITY.

Where a liquidator on winding up the affairs of a bank places the names of transferees of stock made after the proceedings were begun upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, instead of the names of the holders of the stock on the day the proceedings were commenced, such action upon the part of the liquidator does not constitute an election on the part of the liquidator to accept the transferees instead of the original holders as contributories, even though the liquidator had obtained a judgment against such transferees.

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 4 O.W.N. 67.

Under sec. 21 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that all transfers after the commencement of winding-up proceedings, except transfers made to or with the sanction of the liquidator under the authority of the Court, shall be void, the mere entry in the transfer book of the company of a transfer of stock, after the commencement of the winding-up proceedings, will not shift the responsibility as contributories under sec. 130 of the Bank Act, R.S.C. 1906, ch. 29, from the transferors to the transferees. (Dictum per Garrow, J.A.)

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 4 O.W.N. 67.

III. Officers and agents.

(No cases.)

IV. Banking.

A. Deposits.

(§ IV A 1—45)—DEPOSITS; NATURE OF; LIENS ON.

The relation existing between a bank and its depositors as regards the cash deposited is that of debtor and creditor.

Royal Trust Co. v. Molsons Bank, 8 D.L.R. 478, 4 O.W.N. 437.

(§ IV A 1—46)—SPECIAL.

The fact that the chartered bank incorporated by a statute of Canada, with which was deposited by statutory authority in a special account to the credit of a provincial treasurer in a branch of the bank within the province, the proceeds of the sale of the bonds of a railway company incorporated by a provincial Act for the purpose of building a railway wholly within the province, claimed an interest in the fund under an alleged assignment thereof for past and future advances made to it by a construction company to which the railway company had theretofore attempted to assign the moneys which were under the terms of both assignments to be paid out from time to time as the work was completed in accordance with statutory provisions prescribing the method of payment to the railway company, does not render invalid as conflicting with the Canada Bank Act, a subsequent provincial Act declaring the proceeds of the bonds to be part of the general revenue fund of the province as upon the railway company's default in per-

forming the construction work required upon the province's guarantee of the bonds, and ordering such proceeds to be paid forthwith by the holders thereof to the provincial treasurer.

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

(§ IV A 1—48)—LIEN.

As a general deposit in a bank is the property of the bank the bank's right to apply the same upon its contra account against the customer is one of "set-off" rather than one of "lien," the latter term being specially applicable to the right of retention of documentary securities or specific articles.

Royal Trust Co. v. Molsons Bank, 8 D. L.R. 478, 4 O.W.N. 437.

(§ IV A 1—49)—CHANGING ACCOUNT TO JOINT ACCOUNT.

A written notice to a bank by a depositor to so "arrange" the latter's savings deposit account (then standing in her own name) in the name of the depositor's daughter that the latter can draw the money, is not sufficient authority to the bank to transfer the deposit to the joint account of the mother and daughter withdrawable by either with right of survivorship.

Everly v. Dunkley, 5 D.L.R. 854, 3 O.W. N. 1607, 22 O.W.R. 820, affirmed 8 D.L.R. 839, 23 O.W.R. 415, 4 O.W.N. 406.

(§ IV A 2—50)—BANK'S CONTROL OVER; APPLICATION OF.

The Terminal City Sand and Gravel Company gave a promissory note to C. G. Johnson & Co., who indorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future. Held, (1) that defendant was liable upon his indorsement, and (2) in the circumstances in which the share certificate was deposited, it was not available in satisfaction of the claim upon the note.

Johnson v. McRae, 16 B.C.R. 473.

(§ IV A 2—53)—ON NOTE ON WHICH DEPOSITOR IS SURETY.

A bank holding notes upon which a depositor is liable as endorser may, at any time after the notes became due, apply pro tanto the money so on deposit at the credit of the endorser upon his indebtedness under the notes.

Royal Trust Co. v. Molsons Bank, 8 D. L.R. 478, 4 O.W.N. 437.

The application by a bank of a customer's credit balance on his deposit account against his indebtedness to the bank, is a complete answer to an action by the depositor against the bank for damages in refusing to honour a cheque drawn by the depositor, where, after such application by the bank, no balance remains to the credit of the depositor.

Royal Trust Co. v. Molsons Bank, 8 D. L.R. 478, 4 O.W.N. 437.

(§ IV A 2—57)—DEPOSIT BY ADMINISTRATOR.

A bank that advances money to the executor of an estate authorized by the will to borrow for the needs of its administration, but also vested with full powers of alienation and disposal, is under no obligation to take notice of the use made of such advances.

When an executor opens an account with a bank, for both himself and the estate, in the name of the latter, no presumption arises therefrom of fraudulent complicity or participation by the bank in any improper conversion he makes to his own use of the funds of the estate.

No action will lie to recover the amount of indebtedness paid through error, when it was represented by promissory notes that were surrendered in good faith, at the time of payment, and are no longer available.

No action will lie against a bank to recover moneys alleged to have been improperly paid to it by the executor of an estate, when such payment has been acquiesced in and tacitly ratified by the representatives of the estate, by dealings, renewals of notes, etc., during a period of six or seven years.

Gratton et al. (plaintiffs, appellants) v. La Banque D'Hochelaga (defendant, respondent), 21 Que. K.B. 97.

(§ IV A 3—61a)—PAYMENT OF INFANT'S CHEQUE.

The effect of secs. 47, 48 and 165 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is to constitute a cheque drawn by an infant upon an account standing in his name a complete discharge to the bank which pays it.

Freeman v. Bank of Montreal, 5 D.L.R. 418, 3 O.W.N. 1364, 22 O.W.R. 276, 26 O.L.R. 451.

(§ IV A 3—61a)—PAYMENT OF INFANT'S CHEQUE.

A cheque drawn by an infant upon a bank account standing in his name is a good discharge to the bank which pays it, and the amount of a cheque so paid cannot be recovered by the infant from the bank. [Dicta in Earl of Buckinghamshire v. Drury, 2 Eden. 60, at p. 71; Ex p. Brocklebank, 6 Ch. D. 358, at p. 359; and Burnaby v. Equitable Reversionary Interest Society, 28 Ch. D. 416, at p. 424, approved and applied; Overton v. Bannister, 3 Hare

503; and Valentini v. Canali, 24 Q.B.D. 166, followed.]

Freeman v. Bank of Montreal, 5 D.L.R. 418, 3 O.W.N. 1364, 22 O.W.R. 276, 26 O. L.R. 451.

B. Collections.

(§ IV B 1—101) — LIEN OF COLLECTING BANK.

Where a negotiable instrument is endorsed to a bank by a customer for collection, the bank is entitled to a lien thereon for all debts then payable to it by the customer, and for all debts which may become so payable while the instrument is in its possession, but the customer is entitled to take up the instrument from the bank whenever he is free from any obligations to the bank and even (semble) when he is free only from debts presently payable, though there may be debts due but not yet payable, e.g., negotiable instruments discounted by the bank which have not yet matured.

Merchants Bank of Canada v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

Where a negotiable instrument is endorsed to a bank by a customer as security for such debts as may from time to time be due by the customer to the bank, the instrument is good in the hands of the bank against the maker thereof for the amount of the indebtedness of the customer to the bank, and the fact that at some times during the bank's possession of the instrument there is no such indebtedness existing, will not deprive the bank of its rights or of its position as a holder in due course. (Per Meredith, J.A.; Maclaren, J.A., contra.) [Atwood v. Crowdie, 1 Stark. 483, followed.]

Merchants' Bank of Canada v. Thompson, 3 D.L.R. 577, 21 O.W.R. 740, 3 O.W.N. 1014.

D. Clearing-house business.

(§ IV D—120)—CLEARING-HOUSE BUSINESS.

The method of clearing-house dealings between banks whereby they form a voluntary association to adjust balances in lieu of separate presentation of maturing securities is not one of which notice is to be imputed to the public dealing with the bank, and unless there is evidence that the customer dealt with the bank subject to the usage of the clearing-house, such usages will not per se affect the customer's rights against the bank.

Sterling Bank of Canada v. Laughlin, 1 D.L.R. 383, 3 O.W.N. 643, 21 O.W.R. 221.

V. Insolvency.

(No cases.)

VI. Savings bank.

(No cases.)

VII. Crimes.

(§ VII—150)—CRIMES.

A deposit of a quantity of its own bank notes by a chartered bank to its own credit with a trust company subject to withdrawal by cheque and without any agreement for the return to the bank of the notes so deposited is not a "pledge, assignment, or hypothecation" by the bank of its own notes, the giving or acceptance whereof is an indictable offence under sec. 139 of the Bank Act.

The King v. Warren, 17 Can. Cr. Cas. 504.

(§ VII—151)—TAKING DEPOSITS WHEN INSOLVENT.

A warrant for the extradition to a foreign state of a bank officer for receiving deposits with knowledge of the insolvency of the bank may be sustained under sec. 405, Crim. Code 1906, providing that everyone is guilty of an indictable offence who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen or procures anything capable of being stolen to be delivered to any other person than himself, and under sec. 405a of the Code, sec. 6 of 7 & 8 Edw. VII. (Can.) ch. 18, making everyone guilty of an indictable offence who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud, though that part of the foreign statute pertaining to the receipt of deposits with such knowledge was amended by striking out the words: "fraudulently and with intent to cheat and defraud any person." [Rex v. Stone (1911), 17 Can. Crim. Cas. 377, applied.]

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

(§ VII—152)—FALSE RETURNS.

The fraudulent compilation and filing of bank returns is an extraditable offence, under sub-sec. 1 of sec. 153 of the Bank Act, R.S.C. 1906, ch. 29, making any wilful, false, or deceptive statements in such documents indictable.

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

VIII. Statutory security to banks.

A. What banks may lend on.

(§ VIII A—160)—STATUTORY SECURITY TO BANKS.

The advancement by a bank of money on a demand note under a contemporaneous agreement that a chattel mortgage should be given as security therefor as soon as it could be prepared, constitutes a violation of sec. 76, sub-sec. 2 (c) of ch. 29, R.S.C. (the Bank Act), which prohibits a bank, either directly or indirectly, lending money or making advances upon the security of any goods, wares, and merchandise.

Bates v. Kirkpatrick, 4 D.L.R. 395, 21 W.L.R. 607.

A chattel mortgage taken by a bank cannot be sustained under sec. 80 of ch. 29, of the Bank Act, as one given for addi-

tional security for a debt contracted in the usual course of business, where money was advanced upon a demand note under an agreement that it should be secured by a chattel mortgage as soon as it could be prepared. [Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, referred to.]

Bates v. Kirkpatrick, 4 D.L.R. 395, 21 W.L.R. 607.

Where a borrower from a bank gave his own notes for the money loaned, and at the same time and as part of the same transaction, he transferred a lien note given by a buyer of horses sold by him for the price thereof and endorsed on such lien note an assignment of his interest therein and all his right, title and interest in and to the property covered thereby, such assignment of the borrower's interest in the horses is a violation of sub-sec. 2c of sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, forbidding banks to lend money upon the security of any goods, wares and merchandise, and therefore, the bank to whom such note was assigned cannot enforce any claim against the horses covered thereby. [Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, applied.]

Alfred Thien v. The Bank of British North America, 4 D.L.R. 388, 21 W.L.R. 192.

Under paragraph (a) of sub-sec. 2 of sec. 76, and also sec. 90 of the Bank Act, a bank cannot acquire goods, or take security, by an indenture made by an executor to secure a previously unsecured debt of his testator.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

Chattel mortgage as collateral.

Bates v. Kirkpatrick (No. 2), 7 D.L.R. 806, 22 W.L.R. 386.

C. Warehouse receipts, bills of lading or statutory securities.

(§ VIII C 1—181)—In general; effect of taking securities.

Commercial documents, such as securities under the Bank Act, R.S.C. 1906, ch. 29, should not be scrutinized with the same particularity as those of the class usually prepared and examined by solicitors and executed only after having been carefully settled as to form.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

Section 90 of the Bank Act, R.S.C. ch. 29, should be construed liberally and not strictly or critically.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

(§ VIII C—184) — Goods produced from pledged goods.

Articles manufactured from lumber covered by security under secs. 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, are likewise covered by the security.

Townsend v. Northern Crown Bank, 4 D. L.R. 91, 22 O.W.R. 961, 3 O.W.N. 1105, 26 O.L.R. 291.

(§ VIII C—185)—Substituted goods.

Under sub-sec. 2 of sec. 88, of the Bank Act, R.S.C. 1906, ch. 29, which enacts that a bank which has taken a statutory security by way of warehouse receipt from a wholesale dealer in products of agriculture, the forest, mine, etc., may allow the goods covered by such security to be removed and other goods to be substituted therefor, if of substantially the same character and of the same value as, or of less value than, those for which they had been so substituted, a bank, which advanced money to a paper manufacturing company upon the security of certain sulphite which the company used in the manufacture of paper, does not lose its security by such sulphite being replaced by other sulphite in accordance with the intention of all parties.

Quebec Bank v. Craig, 6 D.L.R. 573, 3 O.W.N. 1635, 22 O.W.R. 874.

(§ VIII C—187) — Rights to proceeds when sold by receiptor.

Where lumber covered by security given to a bank under secs. 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, is used in the erection of buildings, and the building contracts are assigned to the bank, the bank is entitled to such of the money payable under the contracts as represents the lumber so used.

Townsend v. Northern Crown Bank, 4 D.L.R. 91, 22 O.W.R. 961, 3 O.W.N. 1105, 26 O.L.R. 291.

(§ VIII C—189) — Wholesale purchases, shipper, dealer.

The words "and the products thereof" in sub-sec. 1 of sec. 88 of the Bank Act, R.S.C. 1906, ch. 29, apply to all the articles previously mentioned in the sub-section, and not to live stock and dead stock only. [Dictum of Hall, J., in Molsons Bank v. Beaudry, Q.R. 11 K.B. 212, approved.]

Townsend v. Northern Crown Bank, 4 D.L.R. 91, 3 O.W.N. 1105, 22 O.W.R. 961, 26 O.L.R. 291.

One who carries on business partly as a wholesale dealer in lumber, and partly as a builder, is a wholesale dealer in lumber within the meaning of sub-sec. 1 of sec. 88 of the Bank Act, R.S.C. ch. 29.

Townsend v. Northern Crown Bank, 4 D.L.R. 91, 3 O.W.N. 1105, 22 O.W.R. 961, 26 O.L.R. 291.

(§ VIII C 2—202)—Upon written promise or agreement.

A security under sec. 88 of the Bank Act, R.S.C. ch. 29, upon some part of a larger number of similar articles is not invalid under sec. 90 of that Act because the antecedent promise or agreement in writing, in pursuance of which it is given, does not state the precise amount of the debt to be secured or identify the precise articles to be charged.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

(§ VIII C 2—203)—RENEWED OR EXTENDED.

Security under sec. 90 of the Bank Act, R.S.C. ch. 29, which, though given less than 60 days before an assignment by the giver thereof for the benefit of his creditors, is but a continuation of a former security of the like character held by the bank for the indebtedness more than 60 days before the assignment, is not given within 60 days of the assignment, so as to throw upon the bank the onus of supporting it.

Townsend v. Northern Crown Bank, 4 D.L.R. 91, 22 O.W.R. 961, 3 O.W.N. 1105, 26 O.L.R. 291.

BARRISTERS.

I. RIGHT TO PRACTISE.
- A. Admission.
- B. Disbarment.
- C. License.

II. RELATION TO CLIENT.
- A. In general; liability.
- B. Authority.
- C. Compensation; lien.
- D. Summary proceedings.

III. REMEDIES AGAINST; MOTIONS.

Champertous agreements for compensation for services, see Champerty.

I. Right to practise.

A. Admission.

(§ I A—6)—RIGHT OF WOMEN TO.

At common law a woman could not be admitted as an attorney or be called to the Bar and this disability continues in British Columbia notwithstanding the general terms of the Legal Professions Act specifying the conditions upon which "persons" may be called to the Bar.

Re Mabel French, 1 D.L.R. 80, 19 W.L.R. 847, 17 B.C.R. 1, 48 C.L.J. 159.

B. Disbarment.

(§ I B—11)—GROUNDS FOR.

The removal of a barrister from the rolls for unprofessional conduct, is justified where he entered into a contract with a man without business experience and of very moderate understanding, whereby the barrister was to receive one-third of about £500 that was due the client from an estate in Scotland, and where the barrister knew at the time such agreement was made that the money was ready for remittance, and that all the client had to do to obtain it was to execute a discharge therefor, notwithstanding which the barrister grossly exaggerated the difficulties in the way of obtaining the money, and stated that it might involve litigation, and be some time before the money could be obtained.

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450.

The fact that a barrister who was not a solicitor, was guilty of unprofessional conduct while performing work or services properly pertaining to the duties of a solicitor and not to those of a barrister, will not, under sec. 74 of the Law Society Act of Manitoba, prevent him being stricken from the rolls of barristers or being disciplined in the latter capacity. [Re J.B., an attorney, 6 Man. R. 19, distinguished; Re Hulm & Lewis, [1892] 2 Q.B. 261; Re Hurst & Middleton, 56 Sol. Jour. 520, specially referred to.]

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450.

While the fact that a barrister, who was charged with unprofessional conduct in obtaining exorbitant compensation from a client, has made restitution, will afford no defence to an application to strike him from the rolls, it may be taken into consideration in awarding punishment for his unprofessional conduct. [Re Solicitor, 62 L.T. 446; and Hands v. Law Society of Upper Canada, 16 O.R. 625, referred to.]

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450.

Where a barrister, a young man, who was found guilty of unprofessional conduct in obtaining exorbitant compensation from a client through misrepresentation of the difficulties involved in a matter entrusted to him, had made restitution, and it was his first offence, the Court, on that account, ordered that instead of striking him from the rolls, he be suspended from practice for nine months.

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450.

II. Relation to client.

C. Compensation; lien.

(§ II C—31)—AGREEMENT FOR COMPENSATION.

It does not necessarily follow that, because the senior taxing officer has, under the provisions of the recent amendment to the Manitoba Law Society Act, set aside an agreement for compensation obtained by a barrister or solicitor from his client by misrepresentation, that the conduct of the barrister or solicitor will be regarded as unprofessional, as each case must depend upon its own circumstances.

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450.

III. Remedies against; motions.

(No cases.)

BATTERY.

See Assault and Battery.

BENEVOLENT SOCIETIES.

I. IN GENERAL.
II. LOCAL LODGES.
III. CONSTITUTION, RULES, AND BY-LAWS.
IV. MEMBERSHIP; EXPULSION; LIABILITY.
V. IRREGULARITIES; DISSOLUTION.

I. In general.

(No cases.)

II. Local lodges.

(§ II—6)—RIGHTS AND POWERS OF LOCAL LODGES.

A labour organization which owes allegiance to a grand body of which it is a subordinate lodge, cannot upon secession from the association, dispose of its assets to a rival organization to which no member of the lodge could belong without forfeiting his membership in the general association, where there is a provision of the grand body that upon the dissolution of any subordinate lodge its property not theretofore disposed of by the lodge in accordance with its by-laws is to be vested in the grand body to be applied first in payment of any debts of the subordinate lodge and the balance, if any, in such manner as the grand lodge and the balance, if any, in such manner as the grand body may deem best for the general interests of the order in the province; any such attempted sale is ultra vires and void and constitutes a breach of trust, and a receiver will be appointed over the real and personal property of the subordinate lodge on the application of the grand body.

Grand Council Provincial Workmen's Association v. McPherson et al., 8 D.L.R. 672.

III. Constitution, rules and by-laws.

(§ III—10)—CONSTITUTIONS, RULES, AND BY-LAWS.

It is practicable to make binding upon a member of a mutual life and accident insurance association, who had no knowledge of an adoption of a by-law, which was passed by the association after the issue of a certificate, but not referred to on the face or back thereof as required by those provisions of sec. 197 of 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1), art. 7028, R.S.Q. 1909, by attaching a notice of the passing of such by-law, and its contents to receipts of payments of premiums or by issuing a duplicate certificate with this information upon it or if need be by requiring the assured to produce his receipts for the proper indorsement, when such a by-law has been passed.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

A member of a mutual life and accident insurance association is not bound by a by-law of the association adopted after the issuance to him of his certificate and of which he had no notice, in view of sec. 196, 8 Edw. VII. (Que.) ch. 69, now art. 7027, R.S.Q. 1909, providing that any insurance contract if signed, countersigned, issued or delivered in the Province of Quebec, or committed to the post office or to any carrier, messenger or agent to be delivered to the assured or his agent in the province, shall be deemed to evidence a contract made in the province and in view of those provisions of sec. 197, of 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1) of art. 7028, R.S.Q. 1909, providing that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument, forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso, modifying or impairing the effect of any such contract made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

Notwithstanding that the legal adoption of children is not recognized by the law of Ontario, a mutual benefit association may provide for the payment of benefits to adopted children by a rule or regulation to the effect that they may be named in certificates of insurance as beneficiaries, upon proof of their legal adoption being made to the satisfaction of the supreme secretary of the association. [Ancient Order of United Workmen of Quebec v. Turner (1904), 44 Can. S.C.R. 145, referred to.]

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 3 O.W.N. 1208, 26 O.L.R. 367, 22 O. W.R. 72.

A by-law of a Police Benefit Fund Association providing that in no case shall a member be allowed to retire who is in good health and capable of performing his duties, and that a member dismissed from the police force for cause, shall immediately cease to have any interest in the fund of the association and shall not be entitled to any benefit therefrom, does not apply to a member who was forced out of the police service by the Board of Police Commissioners without a hearing.

De La Ronde v. Ottawa Police Benefit Fund Association, 3 D.L.R. 328, 3 O.W.N. 1188, 21 O.W.R. 997.

Police benefit fund—Right to retiring allowance.

De La Ronde v. Ottawa Police Benefit Fund Association (No. 2), 6 D.L.R. 850, 3 O.W.N. 1282, 22 O.W.R. 123.

(§ III—11)—CHANGES IN.

A payment of monthly assessments due on the certificates of a mutual benefit and benevolent brotherhood is not a renewal of the contract under which the members joined it within the meaning of the word "renewed" as used in those provisions of sec. 197, 8 Edw. VII. (Que.) ch. 69, now contained in sub-sec. (1) of art. 7028 R.S. Q. 1909, and, therefore, as far as concerns those who became members of the society and received their certificates of membership before the section aforesaid was passed there can be no application of

the provisions thereof that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso, modifying or impairing the effect of any such contract made or "renewed" after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary. [Carter v. Brooklyn Life Ins. Co., 110 N.Y. 15, not followed. See also Cousins v. Moore, 6 D.L.R. 35.]

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110.

Upon a motion by the plaintiffs for an interim injunction to restrain the defendant (a fraternal benevolent society) from taking any proceedings under a certain amendment to the constitution of the defendant society, where it appeared that the amendment in question greatly increased the assessments (or premiums) on the insurance of the plaintiffs, as aged members of the society; and where its constitution required that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before a certain fixed date each year, in order that the Grand Recorder, in turn, might send a copy to each subordinate lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative; and where the constitution also provides that in all important matters the representative in Grand Lodge of a subordinate lodge has as many votes as his lodge has members; the interim injunction will be granted, where such notice has not been given to the Grand Recorder, as provided by the constitution of the society.

Cordiner v. Ancient Order of United Workmen (Ont.), 6 D.L.R. 491, 23 O.W.R. 65, 4 O.W.N. 102, affirmed 4 O.W.N. 549, 23 O.W.R. 863.

(§ III—12)—Adoption of by-laws.

Where the application for the incorporation of a Police Benefit Fund Association contained a statement that the by-laws governing such corporation and its members should be approved of at the first annual meeting of the corporation after its incorporation or at any general meeting of the members called for that purpose, a portion of a by-law offered at a meeting of the police force who were members of the association, which portion was objected to and not adopted at that or any other meeting of the association is not operative by reason of any ratification or adoption thereof by the board of trustees of the funds of the association.

De La Ronde v. Ottawa Police Benefit Fund Association, 3 D.L.R. 328, 3 O.W.N. 1188, 21 O.W.R. 997.

(§ III—13)—Reasonableness of regulations.

It is not contrary to good morals or public order, but is a reasonable regulation, for an association organized to insure the employees of a designated railway company against injury or death, to require by by-law that, in consideration of a subscription of such company to the association, there shall, before payment will be made for the death or injury of a member, be presented to the secretary of the association a valid and sufficient release executed by all persons who may legally claim thereunder, of all their demands against such railway company arising from or growing out of the death or injury of a member.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

It is a reasonable regulation, and not contrary to good morals and public order, for an association organized to insure the employees of a designated railway company against injury or death, to provide by by-law that it will pay but one-half of the amount due on the death or injury of a member caused by the default of the railway company, unless any action brought therefor against such railway company shall first be formally dismissed or withdrawn.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

IV. Membership; expulsion; liability.

(§ IV — 17a) — Disputes, withdrawal from membership.

Under the maxim "interest reipublicae ut sit finis litium," the Court will refuse to entertain a dispute between a benefit society and a member until the remedies provided by its constitution for the determination of the differences by a trial or appeal within the society itself have been exhausted. [Zilliax v. Independent Order of Foresters, 13 O.L.R. 155, referred to.]

Cordiner v. Ancient Order of United Workmen (Ont.), 6 D.L.R. 491, 23 O.W.R. 65, 4 O.W.N. 102, affirmed 4 O.W.N. 549, 23 O.W.R. 863.

A member of a mutual benefit and benevolent brotherhood issuing life accident insurance certificates though he paid his dues to the last day of the year is not a member for the period before that date extending from the time when he voluntarily withdrew in accordance with the provisions of the brotherhood's constitution on withdrawal of members, though he met with an accident resulting in his death after his withdrawal from the order and before the last day of the year.

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110.

(§ IV—18)—Liability.

A benevolent association is liable upon the certificate of a member though he died when in arrears for an assessment, where it appeared that that portion of a rule of

the order providing that a member failing for thirty days after the same was due to pay an assessment which was by another part of the rule made payable on the first day of every month, should ipso facto be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, was waived by the grand lodge of the association by permitting for years a custom on the part of the greater number of the members of a subordinate lodge to pay their assessments after the expiration of the thirty days within which it was required to be paid by the rule so long as they paid it before the fifteenth of each month, and the member whose certificate was in suit having followed this practice of paying his assessments and died suddenly on the seventh day of a certain month without having paid the assessment due on the first day of the preceding month and the assessment was paid by a friend the day after his death, and the officer of the subordinate lodge who made returns to the grand lodge, tendered the assessment with his money return and other collections to the grand lodge as if the deceased member had continued in good standing, though the grand recorder refused to receive the return in that shape and the subordinate officer, for that reason, sent in his return afterwards with an entry that the deceased member was suspended opposite his name.

Royal Guardians v. Clarke, 6 D.L.R. 12.

(§ IV—19)—SUSPENSION.

That portion of a rule of a beneficial association which provided that a member failing for thirty days after the same was due, to pay an assessment which was by another part of the rule made payable on the first day of every month, should ipso facto be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, is waived by the association where it appears that to the actual though not "official" knowledge of the executive officer of the grand lodge, the officer of a subordinate lodge who was charged with the duty of preparing a statement of collection of assessments and the money collected and delivering the same to another officer of the lodge so that it could be sent to the grand lodge and reach it on or before the 15th of each month, had followed the custom for years of making the return himself to the grand lodge on the 15th of the month and, before making it, of receiving from the members payment of their assessments shortly before the 15th so that it became the custom of the greater number of the members of the lodge to pay their assessments after the expiration of the thirty days, that is to say, in the first half of the month following that in which the assessments were payable.

Royal Guardians v. Clarke, 6 D.L.R. 12.

Where the officer of a subordinate lodge of a beneficial association whose duty it was to prepare statements to be forwarded to the grand lodge of collections of assessments which were due upon the first day of every month and the non-payment of which within thirty days thereafter caused the suspension of the defaulting member and the avoidance of his certificate in accordance with the rule of the order, had for years to the knowledge of the grand lodge followed the custom of receiving from members the assessments due on the first of every month up to the 15th of the following month thus permitting them to pay at a time when by a strict application of the rule they were suspended, a member who had followed such practice of paying his assessments and who had died suddenly on the seventh day of a certain month without paying his assessment due on the first day of the month preceding, it being paid on the day after his death by a friend, should not be deemed to have been a suspended member who had forfeited all his rights within the meaning of another rule of order providing that "any suspended member who has forfeited all his rights by reason of non-payment of assessments" might be reinstated, if alive, at any time within a certain period from the date of the suspension upon certain conditions, so that a member during the first month of his suspension had an absolute right to be reinstated by the payment of all assessments and of all dues to date, and further providing that the death of a member while so suspended should debar him from being reinstated by the payment of any assessments and that his beneficiary could not claim any rights if the member should die before being reinstated and that the payment or tender by his personal representative in no case should be held to restore the suspended member to good standing in the order.

Royal Guardians v. Clarke, 6 D.L.R. 12.

V. Irregularities; dissolution.

(§ V—21)—STATUTORY CONDITIONS.

Those provisions of sec. 197 of ch. 69, 8 Edw. VII. (Que.), now contained in subsec. (3), art. 7028, R.S.Q. 1909, that. instead of all of the terms or conditions of a contract of insurance issued by a mutual association being sent out in full in the certificate of membership or other instrument of contract, as required by the provision in sec. 197, now contained in sub-sec. (1) of art. 7028 aforesaid, they may be indicated by particular reference to those articles or provisions of the constitution, by-laws, or rules which contain all of the material terms of the contract not inserted in the instrument of insurance itself, and that a copy of the constitution. by-laws and rules referred to in such contract shall, at the time of the delivery of the certificate, be delivered to the assured, are of the nature of matters of public order and security, and as such, cannot be waived by special agreement between an assured and such an association. [Hargrove v. Royal Temp-

lars, 2 O.L.R. 79, specially referred to; Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, not followed.]

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

BETTING.

See Disorderly House.

BIGAMY.

(§ I—12)—MENS REA; INTENT; BELIEF IN DIVORCE.

An honest belief on the part of the defendant that he was divorced constitutes no defence to the charge of bigamy either at common law or under secs. 16 and 307 of the Criminal Code (1906). [R. v. Brinkley, 14 O.L.R. 434, followed; R. v. Sellars, 9 Can. Cr. Cas. 153, disapproved.]

The King v. Beiler, 1 D.L.R. 878, 21 W. L.R. 18, 19 Can. Cr. Cas. 249.

BILLS AND NOTES.

I. NATURE; REQUISITES AND VALIDITY.
- A. In general.
- B. Validity generally; delivery.
- C. Consideration.
- D. Negotiability.

II. ACCEPTANCE.

III. INDORSEMENT AND TRANSFERS.
- A. In general.
- B. Liability of indorsers.
- C. Discharge of indorser.
- D. Transfers without indorsement.

IV. PRESENTMENT; DEMAND; NOTICE; PROTEST.
- A. In general; necessity.
- B. Sufficiency.
- C. Notice of protest; certificate.
- D. Damages for non-acceptance, non-payment and protest.

V. RIGHTS AND LIABILITIES OF TRANSFEREES.
- A. Extent of rights and protection generally.
- B. Who are protected as bona fide purchasers.

VI. ACTIONS AND DEFENCES; MATURITY; EXTENSION AND RENEWAL.
- A. In general; right of indorser to sue.
- B. Maturity; extension; renewal.
- C. Defences.

VII. RECOVERY BACK OF PAYMENT MADE.

As to cheques, see Banks, II; Cheques.
Foreign corporation's right to sue on, see Corporation.
Admissibility of note in evidence, see Evidence, IV.
Parol evidence as to, see Evidence, VI.
Fraud as to, see Fraud and Deceit, VI.
Liability of married woman on, see Husband and Wife.
Surety on, see Principal and Surety.

I. Nature; requisites and validity.

A. In general.

(§ I A—2)—WHAT ARE.

What are—Document in writing—Conditional sale of implement—Absence of absolute and unconditional promise.

Molsons Bank v. Howard, 5 D.L.R. 875, 3 O.W.N. 661, 21 O.W.R. 278.

(§ I A—4a)—FILLING IN BLANKS.

A vendor may, after the execution and delivery of a lien note from which his name was omitted, given for personalty purchased at an auction sale, the terms of which required such a note to be given, insert his name in the blank spaces intended therefor.

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408.

B. Validity generally; delivery.

(§ I B—5)—VALIDITY GENERALLY; DELIVERY.

Where a promissory note that was void as to its purported maker, a non-existent company, began "we promise" and was signed by two persons who added the words "president" and "manager" to their respective signatures thereto, such designations will be disregarded and the signers held individually liable thereon under sub-sec. 2 of sec. 52 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, which requires that the "construction most favorable to the validity of an instrument shall be adopted." [Fairchild v. Ferguson, 21 Can. S.C.R. 484; Watling v. Lewis [1911] 1 Ch. 414, and Chapman v. Smethurst, [1909] 1 K.B. 927, specially referred to.]

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

(§ I B—8)—BY INTOXICATED PERSON.

One, who, when so drunk as to be incapable of knowing what he is doing, signs an application for life insurance on his children and a note for the premium thereon, and subsequently, when sober enough to know the nature of his actions, signs an amended application, and knows that the children are being medically examined for insurance, and, when informed by his wife that the policies had been sent to the house, makes no objection, and does nothing until payment of the premium note is demanded, will be deemed to have ratified his action when drunk, and will be estopped from raising the defence of incapacity in an action on the premium note, and from saying that there is no contract of insurance upon which he is liable, but he will not necessarily be held to have ratified everything contained in the original application.

Imperial Life Assurance Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372.

C. Consideration.

(§ I C—15)—CONSIDERATION.

Defence that note given as evidence of debt and for accommodation of plaintiff

—Onus—Failing to prove facts—Absence of consideration.

Pettit v. Barton, 4 O.W.N. 200.

(§ I C—27)—Forbearance to sue.

Delay in enforcing a claim against co-partners and permitting them to transfer the assets of the firm to a company formed by them to take over their business, is a sufficient consideration for a promissory note to hold the makers liable, where the note was void as to the company purporting to be its maker, which was executed by the co-partners as president and manager thereof. (Per Perdue and Cameron, JJ.A.)

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

D. Negotiability.

(§ I D—31)—Effect of blanks.

Liability of maker—Blank note filled up and used for unauthorized purpose.

Brown v. Chamberlain, 2 D.L.R. 918, 3 O.W.N. 569, 20 O.W.R. 962.

(§ I D—32)—Certainty as to parties.

Persons who sign a promissory note made ostensibly by a company, as president and manager thereof, warrant that such company actually exists. (Per Richards and Perdue, JJ.A.)

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

(§ I D 2—42)—Certainty as to amount generally.

The liability of persons who sign a promissory note as president and manager of a non-existing company, thereby warranting the existence of such company, is not to be measured by what the holder of the note could have obtained after the subsequent incorporation of the company upon the settlement of its affairs in bankruptcy. (Per Richards, J.A.)

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

II. Acceptance.

(No cases.)

III. Indorsement and transfers.

A. In general.

(§ III A—59)—Liability of indorser.

Where a promissory note which was payable to the order of the payee, was indorsed to the plaintiff in the name of the payee per the name of another party who was a stranger to the note, the plaintiff cannot recover thereon without shewing that such person was duly authorized by the payee to indorse the note for him.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

B. Liability of indorsers.

(§ III B—60)—Liability of indorser.

Where one who has witnessed the signatures to a promissory note signs a guarantee of the payment thereof, upon the back of the note, and adds, after his signature, the word "witness," his signature is complete before the addition of the word "witness," which is thus mere surplusage, and he is liable as an "aval" upon the note.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

The Terminal City Sand and Gravel Company gave a promissory note to C. G. Johnson & Co., who endorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future. Held, (1) that defendant was liable upon his endorsement, and (2) in the circumstances in which the share certificate was deposited it was not available in satisfaction of the claim upon the note.

Johnson v. McRae, 16 B.C.R. 473.

(§ III B—63)—Accommodation indorsers.

Mental condition of endorser—Inability to appreciate transaction—Knowledge of holders of notes—Fraud and undue influence of maker of notes—Counterclaim—Moneys applied by bank on indebtedness of maker—Evidence.

Bank of Ottawa v. Bradfield, 1 D.L.R. 904.

(§ III B—64)—Effect of endorsement cancelled without authority.

The fact that the endorsation on the original note has been erased after a renewal has been given does not result in novation and does not release such endorser from liability thereon in the event of non-payment of the renewal, when such cancellation has been made unintentionally or without the authority of the holder (e.g., by an assistant manager of a bank acting without instructions).

Bank of British North America v. Hart, 2 D.L.R. 810.

(§ III B 2—65)—Endorsement at or before delivery.

In Quebec, one who puts his name on the back of a note before its delivery or endorsement by the payee is an endorser "pour aval," and is liable without notice of protest or dishonour. [Paterson v. Pain, 1 L.C.R. 219; Merrit v. Lynch, 3 L.C.J. 276; Pariseau v. Ouellette, M. Cond. R. 69; Narbonne v. Tétreau, 9 L.C.J. 80, and Pratt v. MacDougall, 12 L.C.J. 243, referred to.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

(§ III B 3—70) — RESTRICTIVE ENDORSEMENTS.

Signing a negotiable instrument in a representative or descriptive character does not per se exempt from personal liability; to escape personal liability an individual must sign in such a way as absolutely to negative his personal liability, and if, through carelessness or otherwise, he fail to do this, he must pay the penalty by being held personally liable. [Wakefield v. Alexander, 17 T.L.R. 217, referred to. See also Falconbridge on Banking and Bills of Exchange, p. 471 et seq.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

C. Discharge of endorser.

(§ III C—75)—DISCHARGE OF ENDORSER.

When a bank draft is purchased from the holder by another bank which forwarded it to the place of payment and delivered it to the paying bank and permitted the latter bank to stamp it as their property in the course of settling balances at the clearing-house, the purchasing bank has, by so dealing with it, lost recourse against the party from which it purchased the draft upon his endorsation thereof, and will be held to have surrendered the draft and to have accepted the liability of the paying bank for the clearing-house adjustment, although such liability was not in fact met by reason of the insolvency of and suspension of payment by the paying bank on the same day on which the draft was cleared through the clearing-house.

Sterling Bank of Canada v. Laughlin, 1 D.L.R. 383, 3 O.W.N. 643, 21 O.W.R. 221.

Where a renewal note endorsed by the same endorser as the earlier note is altered by a change in the time it was to run made after its endorsation and without the endorser's consent, the endorser is discharged from liability on the earlier note as well as on the renewal note.

Bank of British North America v. Hart, 2 D.L.R. 810.

IV. Presentment; demand; notice; protest.

A. In general; necessity.

(§ IV — 80) — PRESENTMENT; DEMAND; NOTICE; PROTEST.

Presentation of a promissory note is not necessary to hold the maker, and the holder may sue the maker, without presenting it, but if it appears that there were funds available at the place of payment the costs may be awarded against the plaintiff in an action on the note. [Freeman v. Canadian Guardian Life Ins. Co., 17 O.L.R. 296, followed; Bills of Exchange Act, R. S.C. (1906) ch. 119, sec. 183; Robertson v. North-west Register Co., 13 W.L.R. 613; Jones v. England, 5 W.L.R. 83, referred to.]

Union Bank v. MacCullough, 7 D.L.R. 694.

Where a promissory note matures payable at a branch bank, which is then the holder thereof, its only duty is to hold the note at the place of payment ready for surrender to the maker upon payment, or to charge it to his account if there is to his credit at such branch bank enough money to pay it.

Union Bank v. MacCullough, 7 D.L.R. 694.

(§ IV A—85)—IN GENERAL; NECESSITY.

In an action by the payee of a note against the maker it appeared that the plaintiff had previously endorsed the note to his solicitor for collection, and that the note had never been presented for payment. Held, that the action was properly brought in the plaintiff's name. Held, further, that the note not having been presented for payment, the action could not be maintained, but that the defendant was not entitled to costs inasmuch as he had not shewn that he had money at the bank where the note was payable from the time the note fell due until the commencement of the action.

Jones v. England, 7 Terr. L.R. 440.

V. Rights and liabilities of transferees.

A. Extent of rights and protection generally.

(§ V A 1—105)—EXTENT OF RIGHTS AND PROTECTION GENERALLY.

A bank taking a promissory note, in the regular course of business, as collateral for an overdraft and without notice of any arrangement between the maker thereof and the payee, who is the depositor of the bank, is entitled to recover on the note from the maker; although as between the original parties to the note there could be no recovery against the maker by the payee by reason of failure of consideration. [Glegg v. Bromley (1912), 81 L.J.K.B. 1081, and Bank of Commerce v. Wait, 1 A.L.R. 68, distinguished.]

Bank of Nova Scotia v. Harvey, 8 D. L.R. 476.

(§ V A—112)—TRANSFER BY RESTRICTIVE ENDORSEMENT.

The holder of a note to whom it was transferred in breach of a condition written on its back that it would be held by the secretary of the payee until due, occupies no superior position to that of the payee and cannot enforce payment of the note if it was fraudulently obtained from the maker. [Canadian Bank of Commerce v. Gillis, 3 O.W.N. 359, affirmed on appeal.]

Canadian Bank of Commerce v. Gillis, 2 D.L.R. 250, 3 O.W.N. 646, 21 O.W.R. 224.

(§ V A—112a)—TRANSFER WITHOUT ENDORSEMENT.

One who, before maturity, took a promissory note as security for a loan made the payee, is not a holder in due course for value without notice, where, at the request of the latter, the note was not endorsed to him until after maturity; the effect of the

transaction was that such note was in the hands of such holder, subject to all equities between the maker and the payee.

Lilly v. Robertson, 4 D.L.R. 852, 21 W. L.R. 585.

(§ V A 1—113a)—FAILURE OF CONSIDERATION.

An overdraft in a depositor's bank account is a sufficient consideration to constitute the bank a "bona fide purchaser without notice" of promissory notes payable to its customer and transferred by the latter to the bank as collateral security for such overdraft.

Bank of Nova Scotia v Harvey, 8 D. L.R. 476.

B. Who are protected as bona fide purchasers.

(§ V B—132)—RELIANCE ON SECURITY.

The fact that the assignment of property covered by a lien note transferred to a bank, as security for money borrowed from the bank by the payee thereof, was invalid, would be no bar to the right of the bank to recover on the note itself. [National Bank of Australasia v. Cherry, L.R. 3 P.C. 299, specially referred to.]

Alfred Thien v. The Bank of British North America, 4 D.L.R. 388, 21 W.L.R. 192.

(§ V B—137)—TAKEN FROM TRUSTEE.

Promissory note—Equity attaching to, in hands of holder acquiring after maturity—Renewals—Advance—Notice of claim—Evidence.

Binder v. Mahon, 1 D.L.R. 924.

VI. Actions and defences; maturity; extension and renewal.

B. Maturity; extension; renewal.

(§ VI B—158)—EXTENSION AND RENEWAL.

An agreement set up by the maker of a promissory note that both the original payee and the plaintiff endorsee had agreed before the note was given to grant a renewal thereof at maturity, but not evidenced by any writing, does not disclose a defence entitling the defendant to proceed to trial, where the plaintiff's claim has been verified in the manner required for summary judgment.

Union Bank v. MacCullough, 7 D.L.R. 694.

When a note is renewed the fact of such renewal does not operate as a novation and it is immaterial whether the holder sues on the original note or on the renewal note; the remedy on the original note is merely suspended until the maturity of the new one. [See Annotation to this case.]

Bank of British North America v. Hart, 2 D.L.R. 810.

(§ VI C—164)—PAYMENT OR EXTINGUISHMENT.

When a debtor, in account current with his creditor, informs him that he will be unable to meet a note about to mature, and the creditor obtains from a third party, indebted, or about to be indebted, to the debtor on a contract between them, a note of the same amount, and uses it to take up the maturing note, and it is paid in due course, the operation amounts to a payment made, if not by the debtor, for him and with his money, and the rule of art. 1161, etc., that imputation of it should be made upon the oldest debt due, applies to it. Hence, if the indebtedness from the note taken up with the proceeds of the other is the oldest in the account, it is extinguished.

Craik et al. (appellants) v. Macfarlane & Co., Limited (respondents), 21 Que. K.B. 10.

C. Defence.

(§ VI C—167)—WANT OR FAILURE OF CONSIDERATION.

Where a promissory note is given in payment of a premium upon the admission of the maker into a partnership in the business of the payee, and a partnership between them is in fact created, but no term for its duration is agreed upon, the subsequent dissolution thereof, or even the wrongful expulsion therefrom of the maker of the note, does not give rise to a total failure of consideration for the note, so as to make it unenforceable in the hands either of the payee or of a holder, though the maker may be entitled as against the payee to a return of a proportion of his premium. [Judgment of a Divisional Court, Merchants Bank of Canada v. Thompson, 23 O.L.R. 502, reversed; Lindley on Partnership, 7th ed., p. 625 et seq., specially referred to.]

Merchants Bank of Canada v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

Where a promissory note is given for shop fixtures purchased from the assignee of a tenant, and the lease does not clearly entitle the landlord to the fixtures at the expiration of the term, but it appears that the landlord could obtain reformation of the lease so as to entitle him, there is a failure of consideration for the note, even though no claim for reformation has been made by the landlord.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

(§ VI C—169)—SIGNING NAME OF NON-EXISTING COMPANY.

The fact that the defendants, who executed a promissory note in the name of a non-existing company, added the words "president" and "manager" to their respective personal signatures below the name of the alleged company is not sufficient to absolve them from personal liability thereon under sec. 52 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, which relieves from liability one who signs an instrument in a manner indicating that he did so on behalf of a principal or in a representative capacity, the mere addition of descriptive

words to the signer's name not being sufficient for that purpose. [Crane v. Lavoie, 19 W.L.R. 580, affirmed on appeal.]

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

VII. Recovery back of payment made.

(No cases.)

BILLS OF EXCHANGE.

In general, see Bills and Notes.

Parol evidence to shew relation of parties to, see Evidence.

BILLS OF LADING.

(No cases.)

BILLS OF SALE.

I. In general.

II. Statutory requirements.

A. Registration.

B. Seizure.

III. Subject matter of bills of sale.

A. In general.

B. Chattels, capable of complete delivery.

C. Fixtures.

D. Machinery.

E. Grantor not owner.

F. After acquired chattels.

IV. Rights and liabilities of parties.

A. Rights of grantor.

B. Rights of grantee.

C. Transfer.

Bill of goods, see Sale.

Chattel mortgage or bill of sale as security, see Chattel Mortgage.

Bill of sale given as security only, see Chattel Mortgage.

Bill of Sale in evidence of sale of goods, see Sale.

Bill of Sale in evidence of gift or donation, see Gift.

I. In general.

(§ I—1)—In general.

Held, that a bill of sale, the expressed consideration of which was a present payment, but of which the real consideration was partly a present payment and partly a past indebtedness, was void under the Bills of Sale Ordinance, sec. 11.

Hennenfest v. Malchose, 7 Terr. L.R. 404.

II. Statutory requirements.

III. Subject matter of bills of sale.

F. After acquired chattels.

(§ III F—40)—After-acquired chattels.

The Bills of Sale Act, R.S.N.S. 1900, ch. 142, does not by registration protect the grantee as to property to be acquired by the grantor after the making of the bill of sale and which the latter thereby purports to transfer in advance of his obtaining title thereto. [Thomas v. Kelly, 13 A.C. 519, referred to.]

Whynot v. McGinty, 7 D.L.R. 618.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained bona fide and without notice. [Reeves v. Barlow, 12 Q.B.D. 436, commented on; Holroyd v. Marshall, 10 H.L.C. 191, applied.]

Whynot v. McGinty, 7 D.L.R. 618.

IV. Rights and liabilities of parties.

(§ IV—45)—Rights and liabilities of parties.

A simple contract creditor cannot make an attack upon a chattel mortgage under the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, ch. 11. [Parkes v. St. George, (1884), 10 A.R. 496, and Hyman v. Cuthbertson (1885), 10 O.R. 443, followed.]

Empire Sash and Door Co. v. Maranda et al., 21 Man. R. 605.

BOARD OF EDUCATION.

See Schools.

BOARD OF HEALTH.

See Health, I.

BONDS.

I. In general; for private obligations.

II. For indemnity and security.

A. In general.

B. For fidelity of employees or corporate officers.

C. By public officers.

D. By public depository.

III. Commercial and municipal.

A. Corporate bonds.

B. Municipal bonds.

On appeal, see Appeal, III.

As to bail bonds, see Bail and Recognizance.

For costs, see Costs.

Of municipal corporations, authorization of, see Municipal Corporation.

BOOK DEBTS.

Transfer of book debts, see Assignment.

Preferential transfers on insolvency, see Bankruptcy.

BOOMS.

As to booms, see Waters, 20.

BOUNDARIES.

I. National, provincial or municipal.

II. Of private property.

A. In general; rules for fixing.

B. By highway or passageway.

C. By waters.

As to encroachment, see Encroachment.

I. National, provincial or municipal.

(§ I—2)—OF STATE OR NATION GENERALLY.

The right to navigation of the Rainy river is free and open to the use of the subjects of both Canada and the United States, as provided by the terms of the Ashburton Treaty of the ninth of August, 1842, entered into between Great Britain and the United States, by which the said river was established as an international waterway, its thalweg constituting the boundary line between the Dominion of Canada and the United States of America. [Namakan v. Rainy Lake River Boom Corporation, 132 N.W. Rep. 259, specially referred to.]

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

II. Of private property.

A. In general; rules for fixing.

(§ II A—5)—IN GENERAL; RULES FOR FIXING.

When a bornage has been made between adjoining owners one of whom, refusing to accept it, brings an action to have it declared erroneous and a new bornage made and the other defends on the ground that it is correct, demands acte of the acceptance which he has always been ready to make and asks for dismissal of the action, the Court, finding the claim of the plaintiff ill founded should dismiss, each party paying his own costs as the defence was useless.

Mathieu v. Morin, 42 Que. S.C. 484 (Ct. Rev.).

Fences—Evidence.

Dickie v. Chichigian, 6 D.L.R. 911, 4 O. W.N. 303.

(§ II A—7)—TREE ON LINE.

A tree growing on the line between two adjoining proprietors is the common property of both, and if the tree is cut down by one without the sanction of the other the one cutting will be responsible to the other in damages. There was evidence to shew that in 1885 the line between the adjoining proprietors ran to and from an oak tree and that for a period of about twenty years the line so marked had been acquiesced in by the respective owners. Held, that under these circumstances the finding of the jury in plaintiff's favour could not be disturbed.

Peters v. Dodge, 45 N.S.R. 33, 9 E.L.R. 237.

(§ II A—9b)—DUTY OF VENDOR TO DISCLOSE LOCATION OF.

The vendor is not obliged to shew the [illegible] where the line is, it is for the buyer [illegible]ain in this.

[illegible]v. Magnan and Viens, 2 D.L.R. S.C. 59.

B. By highway or passageway.

(§ II B—10)—BY HIGHWAY OR PASSAGEWAY.

Allowance for road—Encroachment—Failure to prove—Erection of fence—Removal—Injunction—Dedication—Estoppel.

Lake Erie Excursion Co. v. Township of Bertie, 6 D.L.R. 853, 4 O.W.N. 111, 23 O. W.R. 94.

C. By waters.

(§ II C—16)—RIVER OR CREEK.

Where the water used for power in two adjoining mill properties belonging to different owners but once held by the same person was discharged into the same tail-race through a short channel from each mill, one of which ran on a slanting line past the other mill so as to cut off a triangular piece of land which would have been part of the land on which such other mill was situated had the admitted boundary between the two mills been extended in a straight line back of them, and the earliest conveyances of the land in parcels contained no description by metes or bounds and the water rights appurtenant to each parcel were always transferred therewith, and it appeared from the conduct and dealings of the owners of the two properties and their predecessors in title and from the acquiescence for years by the respective proprietors in everything that was done by his neighbour that the piece of land so cut off was considered and treated as equal and common ground in which each proprietor had equal privileges and equal rights, the respective owners are entitled in common to the use of such piece of land but only in such a way as not to infringe upon each other's rights. [Davey v. Foley-Reiger, 2 O.W.N. 1284, varied on appeal.]

Davey v. Foley-Reiger Co., 2 D.L.R. 479, 21 O.W.R. 408, 3 O.W.N. 856.

BREACH.

Of contract generally, see Contracts, IV.

Of covenant or condition, see Covenants and Conditions, II.

Of promise of marriage, see Breach of Promise.

BREACH OF PROMISE.

I. IN GENERAL.

II. DEFENCES; WHAT WILL EXCUSE BREACH.

Breach of marriage contract, see Contracts.

As to breach of promise, see Husband and Wife.

BRIBERY.

(§ I—3)—ATTEMPT TO BRIBE.

It is an indictable offence under Criminal Code, sec. 158 (f), to offer a sum of money to a defeated candidate for the legislature who has influence with the Government of the province in respect of the appointment

of gaoler, to obtain his assistance and recommendation for the position.

The King v. Youngs, 19 Can. Cr. Cas. 98, 20 O.W.R. 696, 3 O.W.N. 411.

BRIDGES.

I. In general.
II. Defects; injuries on.
III. Toll bridges.

On highways, see Highway.

(§ I—7)—Cost of construction and maintaining.

A bridge is more than 100 feet in width within the meaning of section 616 of the Consolidated Municipal Act, 1903, and should be built, kept and maintained in repair by the county municipal corporation in which it is situate, where the water crossed by it, though normally less than 100 feet wide, rises in the spring of each year, and occasionally at other times, to such an extent as to be more than 100 feet wide and to overflow the road at each end of the bridge. [Village of New Hamburg v. County of Waterloo, 22 Can. S.C.R. 296, followed.]

Re Village of Caledonia and County of Haldimand, 6 D.L.R. 267, 3 O.W.N. 1654, 22 O.W.R. 961.

Municipal law—Bridges and water courses—Procès-verbal under C.M. 758—Jurisdiction—C.M. 758, 761, 858 and 878.

Corporation of Holy Sacrament v. Laberge, 18 Rev. de Jur. 280.

(§ I—8)—Duty to erect.

Where a municipality, to which the plaintiff had agreed to sell land for a highway as soon as he had acquired title thereto, constructed such road, and then an adjoining municipality, under section 516 of the Municipal Act, R.S.M. 1902, ch. 116, constructed a ditch along the side of the highway, the plaintiff is not, apart from negligent construction of the ditch, entitled to damages from the latter municipality because he could not cross such ditch with teams and vehicles without the construction of a bridge.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881.

(§ I—8)—Duty to erect.

Section 37 of North-West Irrigation Act, 61 Vict. (Can.) ch. 35, providing that any person or company constructing an irrigation works should during such construction keep open for safe and convenient travel "all public highways theretofore publicly travelled as such," when they are crossed by such works, and shall, before the water is diverted into, conveyed or stored by any such works, extending into or crossing such highway, construct, to the satisfaction of the Minister of the Interior, a substantial bridge, not less than a certain number of feet in breadth, with proper and sufficient approaches thereto, over such works, and always thereafter maintain every such bridge and approaches thereto, has, of course, no application to road allowances as in its own words it deals only with "all public highways theretofore publicly travelled as such."

Rex v. Alberta Railway and Irrigation Co., 7 D.L.R. 513.

(§ I—8)—Duty to erect.

Where an irrigation company had received, under the North-West Irrigation Act, 61 Vict. (Can.) ch. 35, now R.S.C. 1906, ch. 61, a license to take water to use in its business in the North-West Territory and obtained authority to cross with its works road allowances not yet used as public highways reserved from its lands by the Crown for future use as public highways, such company is itself bound, it being the party for whose convenience and profit the road allowances had been interfered with, to build bridges when the road allowances afterwards become public highways on both sides of the works constructed across them by the company, even though it had never stipulated that it would maintain the necessary bridge or bridges at the points indicated in an accompanying plan, where their works crossed road allowances or public highways as provided by sub-sec. (b), sec. 11, of the said Irrigation Act, now sub-sec. 1 (b), sec. 15, R.S.C. 1906, ch. 61, which it did in an application required of every applicant for license under the Act to file with the Commissioner of Public Works for the North-West Territories, by the aforesaid sub-section for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works. [Rex v. Alberta R. and Irrigation Co., 3 Alta. L.R. 70, affirmed on appeal; Alberta R. and Irrigation Co. v. The King, 44 Can. S.C.R 505, reserved on appeal.]

Rex v. Alberta Railway and Irrigation Co., 7 D.L.R. 513.

BROKERS.

I. Stock brokers.
II. Real estate brokers.
A. In general; authority and liability of.
B. Compensation.
III. Business and general brokers.

I. Stock brokers.

(§ I—1)—Stock broker.

Where a stock broker is given a limited authority to sell certain company shares on terms requiring a deposit of ten per cent. in cash and he receives a lesser deposit with an application for the shares, he is not warranted in forwarding such deposit to his principal, and will himself be liable to the prospective purchaser for its return.

[McPherson v. Fidelity Trust and Savings Co., 17 B.C.R. 182, judgment of Hunter, C.J., at trial, affirmed on appeal.]

McPherson v. Fidelity Trust and Savings Co., Ltd., 6 D.L.R. 530, 17 B.C.R. 182.

Where, on three occasions during the period of three years, a broker delivered to his client certificates of stock transactions, known as "bought and sold notes," signed by one of his employees on his behalf, the client is justified in the belief that the employee has proper authority from the broker for that purpose, and the broker is responsible and bound towards the client by a subsequent irregular or false certificate, of the same nature, signed in a similar manner.

Bolton v. MacDougall, Q.R. 20 K.B. 544.

(§ I—2)—MARGINS; CLAIM TO STOCK.

Purchase by customer on margin—Contract—Terms—Failure to keep up margin—Re-sale by broker.

Gray v. Buchan, 3 D.L.R. 899, 3 O.W.N. 1620, 22 O.W.R. 830.

Purchase of shares on margin—Contract—Terms—Failure to keep up margin—Re-sale by brokers—Findings of fact—Appeal.

Gray v. Buchan (No. 2), 6 D.L.R. 875, 4 O.W.N. 220, 23 O.W.R. 210.

(§ I—3)—TRANSFER OF SECURITIES.

Stocks held for re-sale on customer's account.

Long v. Smiley, 6 D.L.R. 904, 4 O.W.N. 229.

II. Real estate brokers.

A. In general; authority and liability of.

(§ II A—5)—REAL ESTATE BROKERS.

To prove that a person was appointed by the owner as his agent for the sale of land there must appear in some shape an offer upon the one hand and an acceptance on the other, out of which there grew a contract establishing the mutual rights and responsibilities of the relation of principal and agent. (Per Garrow, J.A.)

Maybury v. O'Brien, 6 D.L.R. 268, 22 O.W.R. 677, 3 O.W.N. 1546, 26 O.L.R. 628.

Where real estate agents, while acting in a fiduciary relation to the property owner, become aware of a change of circumstances affecting the property, but not known to the owner, which would make wholly inadequate the price at which the owner had previously authorized them to sell, they are bound as agents to disclose the fact to their principal and to advise him to seek independent advice before taking from him an option of purchase in their own names at the price he had named. [See also 1 Halsbury's Laws of England, p. 189.]

Laycock (plaintiff) v. Lee & Fraser (defendants), 1 D.L.R. 91, 19 W.L.R. 841, 17 B.C.R. 73.

Real estate broker—Sale of land—Commission—Time limit to agency—Lapse of authority—Evidence—Production of plaintiffs' diary—Alteration in—Findings of fact by trial Judge—Duty of Appellate Court.

Currie v. Hoskin, 4 O.W.N. 492, 23 O.W.R. 676.

Sale of land—Broker's commission—Evidence.

Chapman v. McWhinney, 4 O.W.N. 417, 23 O.W.R. 834.

(§ II A—6)—OPTION TO PURCHASE OR SELL.

The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property does not constitute him the vendor's agent.

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

Where an agent for the sale of land, who also holds an option to purchase the property, agrees for a re-sale at an advanced price, he cannot exercise his option until he has divested himself of his character as agent, and, in order so to divest himself, he must disclose his contract for re-sale. [Bentley v. Nasmith, 3 D.L.R. 619, 46 Can. S.C.R. 477, followed.]

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

Where a real estate agent in the ordinary course of his business listed certain property for sale on commission at the request of the owners and afterwards, without severing his relation as agent, secured from the latter an option "to purchase or sell" the same, which also provided for a commission to the agent "in the event of a sale being made," and he found a purchaser willing to pay a price much greater than the figure placed on the property by the owners plus the agent's commission and gave him a receipt for his deposit, which stated that it was "given by the undersigned as agent and subject to the owner's confirmation," he continued to be the agent of the owner and was bound to disclose all information he had of circumstances that pointed to an enhanced price for the property, and he is not entitled to specific performance of the option. [Nasmith v. Bentley, 16 B.C.R. 308, 19 W.L.R. 273, reversed.]

Bentley v. Nasmith, 3 D.L.R. 619, 22 W.L.R. 209, 46 Can. S.C.R. 477.

Where the owner of land wrote a listing letter to a real estate broker saying, "I hereby give you the right to sell the above property" (having described it), and no other words or phrases in the letter modify or restrict the ordinary meaning of the word "sell," the agent would have authority to sell and enter into a contract binding upon the owner in the absence of any conduct by the parties or evidence shewing a modified meaning of the said word.

Schaefer v. Miller et al. (The Battleford Realty Co.), 8 D.L.R. 706, 22 W.L.R. 745.

Where a listing letter is sent to a real estate broker by the owner of land, describing it and containing the words, "I

hereby give you the right to sell the above property," and the broker arranges for the sale of said land with the plaintiff, and the plaintiff acted thereupon in a bona fide manner, the owner is not entitled to reform the contract between the broker and plaintiff where, as a matter of law, the words quoted did give authority to the broker to sell.

Schaefer v. Miller et al. (The Battleford Realty Co.), 8 D.L.R. 706, 22 W.L.R. 745.

(§ II A—7)—FIDUCIARY RELATIONSHIP.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

Miller v. Hand, 8 D.L.R. 465, 4 O.W.N. 245, 23 O.W.R. 288.

A real estate broker with whom the owner of land had listed the same for sale at a price net to the owner at a certain amount per acre plus the broker's commission at a certain figure per acre, secured, without informing the owner, a purchaser through a third person at a higher price per acre than the net price to the owner plus the owner's commission, and agreed to give the third person such excess for his commission, and was paid a cash price from which he subtracted his commission and the excess over the net price of the whole of the land, the owner of the land sold, in an action brought by her for the balance of the cash payment less the commission she promised the broker, is entitled to recovery.

Cram v. Biehn, 5 D.L.R. 572, 21 W.L.R. 937.

The fact that, without the knowledge of the vendor, commissions he had agreed to pay to a real estate agent upon the sale of property the latter had an option to purchase, were paid by such agent to a person who, in the negotiations for the purchase ostensibly acted as agent for the person to whom the property was conveyed, but really purchased it for his own benefit, will not make him the vendor's agent, or create a fiduciary relation between them.

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is entitled to recover any commission which has been paid by him to the agent before the discovery of the fraud. [See also Andrews v. Ramsay, 72 L.J.K.B. 865; Manitoba & North-West Land Co. v. Davidson, 34 Can. S.C.R. 225, and Hutchison v. Fleming, 40 Can. S.C.R. 134.]

Stapleton v. American Asbestos Co., 6 D.L.R. 340.

Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is not only entitled to recover from the agent the amount of such commission, but is released from his obligation to pay a commission to the agent, and is entitled to recover the secret commission received by the latter.

Stapleton v. American Asbestos Co., 6 D.L.R. 340.

A real estate agent purchasing from his principal the lands which the latter has listed with him for sale is bound to disclose to the latter that he is the purchaser; and, although the sale may be fair and reasonable in other respects, yet if the vendor has not been made aware that the real purchaser is his agent, such a sale cannot be supported unless the principal chooses to ratify it after knowledge of such fact. [McPherson v. Watt, 3 A.C. 254, 263, followed; Edgar v. Caskey, 4 D.L.R. 460, reversed.]

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

Where the plaintiff, a stranger in the locality, went to the defendant under the impression that he was in the real estate business and discussed with him the advisability of buying land in that locality, and a certain lot was mentioned upon which the defendant fixed a price which the plaintiff agreed to pay, whereupon he paid to the defendant a deposit and later a further sum on account and received an agreement of sale from the defendant to himself; and it appeared that the defendant in the meantime had purchased the lot at a much lower price than that at which he had agreed to sell it to the plaintiff, and thereafter the plaintiff complained to the defendant that he had sold him his own property when he thought he was only an agent, and the defendant made him an offer of his money back, which the plaintiff did not at that time accept, but on afterwards writing the defendant that he would take back his money the defendant refused to refund it; the defendant is not, by these circumstances, shewn to have been the plaintiff's agent so as to entitle the plaintiff to have the land at the price paid therefor by the defendant, nor to owe any fiduciary duty to the plaintiff to disclose, at or prior to the sale to the plaintiff, the price at which he (the defendant) had bought from the owner.

Stevenson v. Sanders, 3 D.L.R. 790, 20 W.L.R. 787.

(§ II A—8)—EMPLOYMENT OF SUB-AGENT.

The business of selling real estate is one in which the right of an agent to employ another to dispose of the lands listed with him may reasonably be presumed.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

Commission—Real estate agent—Transaction closed by principal—Employment of

sub-agents—Absence of authority or ratification.

Westaway and Greaves v. Close, 7 D.L.R. 849, 21 W.L.R. 582.

B. Compensation.

(§ II B—10)—Compensation.

The fact that real estate brokers after their employment by the landowner take to themselves an option from the owner to sell to them at the price fixed, does not preclude them from claiming the commission originally agreed upon, if the option was not intended to be in substitution for the previous agreement, but was given for the express purpose of satisfying a prospective purchaser of the agent's right to sell. [For cases on the general law of options, see Labatt's Law of Options, 36 Can. Law Journal 521.]

Nixon v. Dowdle (No. 1), 1 D.L.R. 93, 19 W.L.R. 775.

Where a purchaser of land enters into a contract with a real estate agent, whereby the purchaser is to furnish the purchase money less the commission payable to the real estate agent, and the profits on a resale of the property are to be divided equally between them, this does not create a partnership between the parties, and the real estate agent acquires no title or interest in the land in question.

Donough v. Moore, 2 D.L.R. 525, 20 W.L.R. 334, 22 Man. L.R. 79.

Where the owner of farm lands authorizes an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale.

Lewis v. Bucknam, 1 D.L.R. 277, 20 W.L.R. 4.

Plaintiff, a real estate agent, applied to the defendants for authority to sell defendants' land, and prices were quoted; but it was explained that this was not an exclusive listing. Plaintiff sold one parcel on terms to which defendants agreed, and forwarded a deposit, stating balance would be forwarded in a few days. Before this balance was forwarded, the defendants advised him that the land was no longer available, and returned the deposit. It was not shewn that in fact the land had been previously sold by defendants. Shortly afterwards the plaintiff sold another parcel on the terms quoted, and forwarded cash payment. This was also returned, with an intimation, which was the fact, that the land had already been sold. In an action for the commission:—Held, that as to the first parcel, the plaintiff having made a sale on terms satisfactory to the defendants, and it not being shewn that the land was not available at the time of sale, he was entitled to his commission. (2) That, while the plaintiff had not remitted the whole cash payment as to this parcel, yet, as he was advised before a reasonable time had elapsed that it would not be accepted, he was excused from forwarding the balance. (3) As to the second parcel, the plaintiff having accepted the agency understanding that the listing was not an exclusive one, and the defendants having shewn a prior sale, the plaintiff could not recover.

Hammans v. D. H. McDonald & Co., 4 S.L.R. 320.

An agent is not entitled to his commission where by the term of the contract he was to procure a purchaser by a certain hour of the day, unless the purchaser is brought in within the time fixed; and this is true notwithstanding that the principal later negotiated with the person introduced by the agent after the expiration of the time limit. [Sibbitt v. Carson, 5 D.L.R. 193, 26 O.L.R. 585, affirmed.]

Sibbitt v. Carson (No. 2), 8 D.L.R. 791, 4 O.W.N. 114, 27 O.L.R. 237.

Where an agent was to procure a purchaser for his principal he cannot recover commission where he introduces a person who is not willing to buy on his own account but to take a share only upon a syndicate being formed to buy the property, although the person so introduced finally joins with another party, brought in by himself and not through the agent, in buying the property from the owner direct. (Per Clute, J.)

Sibbitt v. Carson (No. 2), 8 D.L.R. 791, 4 O.W.N. 114, 27 O.L.R. 237.

Plaintiffs, being real estate agents, were employed by the defendants to sell a certain property at a stated price and within a limited time, for which they were to receive a commission of $1,000. It was apparent, however, that the payment of commission was conditional upon the vendors securing their price, as the whole price was raised to provide an increased commission for the agent. It was also apparent that the time was limited, as when the first date mentioned for sale expired a new agreement was entered into extending the time. The agents mentioned the property to a probable purchaser, but failed to complete the transaction within the time limited. Later the party to whom the agents mentioned the property purchased direct from the principal on terms different from those upon which it was originally listed. There was no evidence of any fraud or attempt to deprive the agents of their commission. The agents demanded payment of the commission, and this being refused, brought action upon the contract. At the trial the plaintiffs applied for leave to amend by pleading quantum meruit, which was refused. The action being dismissed, plaintiffs appealed:—Held, that in order to establish a right to recover upon a quantum meruit there must not only be a casual, there must also be a contractual relation between the principal and agent, between the introduction and the ultimate conclusion

of the sale; and here, the nature of the contract being of a most special character, the contractual relation was determined upon the date fixed, and no relation thereafter existed upon which such a claim could be based. Boyle v. Grassick (1905), 2 W.L.R. 284, explained. (2) That where there is a contract in express terms between parties, no agreement which is inconsistent with these terms can be implied from the conduct of the parties, and the parties here having entered into a contract providing in express terms as to time of sale and remuneration, no contract inconsistent therewith should be implied.

Blackstock et al. v. Bell et al., 4 S.L.R. 458.

A claim for the value of services rendered as agent in buying and selling land does not come under the law relating to summary procedure. The plaintiff in such case will be allowed to amend on payment of the costs of the exception to the form.

Lamaire v. Charbonneau, 14 Que. P.R. 60 (Sup. Ct.).

In an action by a real estate agent for a commission on a sale, it is for the jury to say whether the contract was or was not brought about by the agent by his introduction or intervention; the test is, was the sale brought about in consequence of the introduction and is it traceable thereto; and if it resulted directly from the continuation of the negotiations begun by the agent, the latter is entitled to compensation. [Morson v. Burnside, 31 O.R. 438; Wolf v. Tait, 4 Man. L.R. 59, and Re Beale, Ex p. Durrant (1888), 5 Morrell 37, specially referred to. See also Leake on Contracts, 6th ed., 366, 367; Phipson on Evidence, 5th ed., 75.]

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

In the circumstances set out in the statement following, it was held, on appeal, affirming the decision of Murphy, J., at the trial (Irving, J.A., dissenting), that plaintiff had earned only $800 of the commission claimed.

Beveridge v. Awaya Ikeda & Co., Ltd., 16 B.C.R. 474.

(§ II B—11)—Acting for both parties; compensation from both; collusion.

If a real estate agent entrusted to find a purchaser of property directly or indirectly colludes with the purchaser and so acts in opposition to the interests of the principal, he is not entitled to any commission. [Andrews v. Ramsay [1903] 2 K.B. 635, applied; see also vol. 1, Halsbury's Laws of England, p. 196, sec. 416.]

Canadian Financiers, Ltd. (plaintiffs) v. Hong Wo (defendants), 1 D.L.R. 38, 19 W.L.R. 843, 17 B.C.R. 8.

A real estate agent employed by a prospective purchaser for the purpose of buying a property is not, in the absence of a special contract to that effect, entitled, after the sale has been concluded, to claim a commission on the purchase price from the vendor who did not retain his services, any custom obtaining amongst real estate brokers notwithstanding. [Carroll v. O'Shea, 18 N.Y. Supp. 146, approved.]

Lemieux v. Seminary of St. Sulpice, 3 D.L.R. 639.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit.

Edgar v. Caskey, 4 D.L.R. 460, 21 W.L.R. 444.

Where in an agreement for the sale of land by the plaintiff to the defendant, the former agreed to act as agent in its sale, and to subdivide it into lots and advertise them for sale, for which he should receive one-half of the net profits from the sale thereof after repaying to the defendant the purchase money, and where, on the failure of the plaintiff to perform such covenant the defendant did not terminate his agency in the manner required by the agreement, nor proceed to do what the plaintiff should have done, but sold the land en bloc without any subdivision into lots, the plaintiff is entitled in the absence of any provision to the contrary in the agreement, to the agreed proportion of the profits obtained by the sale en bloc.

Cruikshank and Brien v. Irving, 6 D.L.R. 237, 21 W.L.R. 172.

(§ II B—12)—Sufficiency of broker's services.

In an action by the plaintiff as real estate agent for commission for alleged sale of lands setting up a written authority to them from the owner with a provision worded as follows:—"In case you find such a purchaser, or in case you bring the property directly or indirectly to the attention of any one who becomes a purchaser upon any terms whatsoever, you are to be paid by me a commission of five per cent."; such a provision means that the agents must bring the property, directly or indirectly, to the attention of some person who shall thereby become a purchaser; and where the plaintiffs actually brought the property to the attention of a third party who, however, did not thereupon agree to buy, but on the contrary gave up all idea of buying, yet subsequently took the matter up afresh with another agent and purchased, the plaintiffs, as a matter of law, had nothing to do with effecting such sale and are not entitled to any commission. [See also annotation, 4 D.L.R. 531.]

Herbert et al. v. Bell ("The Locators" v. Bell), 8 D.L.R. 763, 22 W.L.R. 884.

Where a broker was authorized to find a purchaser by the lessee of a hotel for the unexpired lease and the chattels contained

in the building, and he found one who was willing to buy at the terms laid down by the principal, and a deposit was made on the purchase price and a receipt therefor issued by the principal setting forth the terms of the sale, but the sale was not consummated because the lessor of the premises refused to consent to an assignment of the lease unless the lessee carried out the terms of a previous arrangement with him, whereby the lessor was to get a certain percentage of the purchase price in the event of a sale of the unexpired term, which arrangement was not disclosed to the broker or the prospective buyer, the broker has found a purchaser, ready, willing, and able, and is entitled to his commission. [As to claims of brokers to commission generally, see Haffner v. Grundy, 4 D.L.R. 529, and annotation, 4 D.L.R. 531.]

Herbert v. Vivian, 8 D.L.R. 340, 22 W.L.R. 676.

The defendant, the owner of land in a city, on the 14th September agreed with the plaintiffs, who were land agents, that they should endeavour to procure a purchaser for the land at $45,000 before the end of September, and to leave it in their hands for that purpose until that time, and to pay them the regular commission if they did procure a purchaser. The plaintiffs spent time and money in advertising and in bringing the property to the notice of probable purchasers. The defendant on the 27th September revoked the plaintiff's authority; but before that the plaintiffs had introduced the property to M., who was able to buy it at the price and on the terms mentioned. M., before the revocation, had made up his mind to buy the property and had told the plaintiffs' manager that he believed he would buy it, and requested him to call again, and the manager understood that M. intended to buy, but he had not definitely agreed to do so before the revocation. After the revocation, later on the same day, M. definitely agreed to buy and gave the plaintiffs a cheque for $500 as a deposit on the purchase, and was at that time ready, able and willing to complete the purchase at the price and on the terms mentioned, within the time limited by the defendant. It was held, that the plaintiffs were entitled to a quantum meruit on the basis of compensation for services, fixed at one-half the regular commission. Aldous v. Swanson, 20 Man. L.R. 101, 21 Man. L.R. 559, 14 W.L.R. 186, 15 W.L.R. 292, followed. The judgment of Mathers, C.J.K.B., 17 W.L.R. 230, was affirmed on appeal.]

Aldous v. Grundy, 20 W.L.R. 550.

Where there has been an oral contract of employment of the real estate agent by the owner without a limitation of time, or stipulation of the price to be obtained other than that the agent shall obtain a satisfactory offer, the owner must pay the agent's remuneration in respect of a sale which the owner makes directly to the prospective purchaser at a price which the latter has offered the agent, but at which the agent does not submit a written offer because of instructions from the owner to demand a higher price. [Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, specially referred to.]

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

Where the prospective purchaser with whom the agent is negotiating goes to the vendor direct and buys at a price lower than the limit given by the owner to the agent, the agent is entitled to a commission based upon the price at which the property was sold. [Stratton v. Vachon, 44 Can. S.C.R. 395, followed.]

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

A real estate agent is entitled to a commission from the person who employs him to sell his property, if his introduction of the parties was the foundation of the negotiations which resulted in a sale being made by the principal to the buyer even at a lower price than that which the agent was authorized to accept. [Green v. Bartlett (1863), 14 C.B.N.S. 681; Stratton v. Vachon, 44 Can. S.C.R. 395; Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, followed.]

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

An introduction by an agent for the sale of land of one who does not in fact purchase the land, but himself introduces a purchaser to the owner, though it may be a causa sine qua non, is not the causa causans of the sale, and the agent is not entitled to commission. [Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished; see also Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614.]

Imrie v. Wilson, 3 D.L.R. 826, 21 O.W.R. 962, 3 O.W.N. 1145.

If a real estate agent is employed by the owner to sell his property and brings it to the notice of a prospective purchaser, the owner, who subsequently makes the sale himself to the same purchaser without knowing that the purchaser came to him through the agent, is liable to pay the agent's commission if there has been no revocation of the agent's authority, and the contract of employment specified no time limit. [Locators v. Clough, 17 Man. L.R. 659, doubted; Wilkinson v. Alston, 48 L.J.Q.B. 733, approved; Burchell v. Gowrie, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, and Sagar v. Sheffer, 2 O.W.N. 671, specially referred to.]

Rice v. Galbraith, 2 D.L.R. 859, 3 O.W.N. 815, 21 O.W.R. 571, 26 O.L.R. 43.

Agent's commission on sale of land.

Imrie v. Wilson, 3 D.L.R. 883, 3 O.W.N. 1378.

Where the defendant, a woman, refused to give the plaintiff an exclusive right to sell a piece of property for her, but, on the representations of the plaintiff that she would still have the right to sell it without becoming liable to him for commissions, she was induced to sign a written agreement prepared by the plaintiff which in fact gave him for thirty days the exclusive right of selling the property for an agreed compensation, the plaintiff cannot, upon the defendant making a sale of the property within such period, recover the agreed compensation where all he did towards making a sale was to advertise the property in a newspaper. [Hart-Parr v. Eberle, 3 Sask. L.R 386, referred to.]

Cadwell v. Stephenson, 3 D.L.R. 759, 21 W.L.R. 199.

The defendant, the owner of property that he had placed for sale in the hands of the plaintiff, a real estate agent, is not liable to the latter for commissions where the agent found a purchaser for the property on terms he had no authority to offer, and which the defendant refused to accept, notwithstanding that the proposed purchaser testified at the trial that he had been and was ready and willing to buy upon the defendant's terms, which fact he had not until then communicated to either the plaintiff or the defendant.

Haffner v. Grundy, 4 D.L.R. 529, 21 W.L.R. 460.

Where a vendor and the agent who sold land for him agreed that the agent's commission should be paid him in instalments, as the payments of the vendee fell due, the latter is not entitled to credit for payments made to the agent, to apply on his commission, when made without authority from the vendor.

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

The plaintiff, a real estate agent, in whose hands the defendant had placed property for sale, but not exclusively, cannot recover commissions from the latter on a quantum meruit where a purchaser was found by another broker purporting to act independently of and without the plaintiff's assistance, although the attention of the other broker, to whom a commission had been paid by the defendant for effecting the sale, had been called to the property by the plaintiff, but without notice from the latter to the owner that such other broker had been referred to the property by him, was paid a commission by the defendant on the sale being made.

Scott v. Moachon, 4 D.L.R. 372, 21 W.L.R. 864.

An action by an agent for commissions for sales of land against the owner will be dismissed where the plaintiff claims that there was an agreement between him and the defendant whereby the plaintiff was entitled to a certain commission on all sales of certain lands, whether such sales were effected through the plaintiff or not, which agreement the defendant denied, and it appeared that the plaintiff had been paid his commission for lands actually sold by him and made no claim to the payment of other commission until after the relationship of principal and agent had been severed by the defendant and the defendant's books which contained entries of the commissions received by the plaintiff for sales actually made by him contained no entries of the commissions claimed in the suit and the plaintiff's memory in giving his testimony as to what was said on the occasion when the alleged agreement was entered into was defective as to nearly every important event.

Wright v. MacLachlan, 4 D.L.R. 354, 20 W.L.R. 646.

Where the plaintiff, a real estate agent, procured a written offer from a person to purchase land owned by the vendor, which the latter accepted, and where the only agreement shewn as to the payment of the plaintiff's commission was a stipulation in such offer that it was to be paid out of the purchase money, the agent is not entitled, upon the refusal of the purchaser to complete the purchase, to recover a commission from the vendor, unless the latter is at fault in not carrying out the purchase.

Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262.

An agreement to pay "five per cent. commission on purchase price," if a purchaser was found for property the owner was willing to sell for forty thousand dollars, is a contract to pay commission upon whatever the property was sold for, although less than the sum mentioned, since it was an agreement to find a purchaser only, and the terms of sale and of payment were to be agreed on by the owner and the purchaser, as the agent did not have authority to conclude the contract. [Bridgman v. Hepburn, 42 Can. S.C.R. 228, distinguished; see also Burchell v. Gowrie, [1910] A.C. 614, 80 L.J.P.C. 41; Stratton v. Vachon, 44 Can. S.C.R. 395; Singer v. Russell, 1 D.L.R. 646, and Rice v. Galbraith, 2 D.L.R. 859.]

George v. Howard, 4 D.L.R. 257.

A real estate broker was not entitled to any commission for the sale of certain land by the owner through another agent where it appeared that the first mentioned broker, who had neither an option nor the exclusive agency for the sale of the land, his contract of agency calling upon him to "bring" a purchaser to the owner, in his efforts to sell, gave a person who had seen his advertisement of the property, full particulars thereof, but failed to keep an engagement on the next day at such person's office for the purpose of discussing the proposed deal, and such person communicated the information he had from the broker to another agent with whom he had done business for years, and who succeeded in actually bring-

ing together the owner and the prospective purchaser, with the result that the land was sold, no information being communicated to the owner by the second agent and the purchaser as to the meeting of the first agent and the purchaser or concerning what passed between the latter and the second agent, the owner remaining in entire ignorance of these transactions. [See annotation to Haffner v. Grundy, 4 D.L.R. 531-560.]

Spenard v. Rutledge, 5 D.L.R. 649, 22 W.L.R. 12.

A real estate agent cannot recover a commission if, notwithstanding the original introduction of a purchaser by him, his act is not the real and efficient cause of the sale. [Gillow & Co. v. Lord Aberdare (1892), 9 Times L.R. 12, affirming 8 Times L.R. 876, followed. See also annotation to Haffner v. Grundy, 4 D.L.R. 531-560.]

Travis v. Coates, 5 D.L.R. 807, 3 O.W.N. 1651, 22 O.W.R. 917, 27 O.L.R. 63.

Where land was listed with an agent to sell at a price net to the owner, the agent to receive for his services anything he could obtain over that amount, and the agent found a purchaser ready, willing and able to purchase for a price at a slight advance over the net price and on the terms given by the owner to the agent, and the owner refused to sign an agreement for sale for the reason that the price was not enough, the agent is entitled to recover on a quantum meruit the difference between the net price to the owner and the price the purchaser was willing to pay. [Bagshawe v. Rowland, 13 B.C.R. 262, specially referred to.]

Wrenshall v. McCammon, 5 D.L.R. 608, 21 W.L.R. 842.

A real estate agent is entitled to a commission if the relation of buyer and seller was really brought about by his act, however trifling, though the actual sale was not effected by him. [Green v. Bartlett, 14 C.B.N.S. 681, at p. 685, and Steere v. Smith (1885), 2 Times L.R. 131, referred to.]

Travis v. Coates, 5 D.L.R. 807, 3 O.W.N. 1651, 22 O.W.R. 917, 27 O.L.R. 63.

A real estate agent is not entitled to any commission, upon the ground that while his services were a causa sine qua non they were not a causa causans, where it appeared that he communicated with a prospective purchaser and went to the owner and asked her if she would sell her house and she authorized him to obtain a purchaser upon the usual terms as to commission, and finally an agreement of sale was entered into between the owner and the prospective purchaser, who signed nothing, and could, not, therefore, be compelled to carry out the contract, and he afterwards repudiated the contract, and the owner went to the agent she had first employed, and he, after having been approached by the wife of the purchaser aforesaid, finally brought about a sale of the property to him. [Imrie v. Wilson, 3 D.L.R. 826, 3 O.W.N. 1145, affirmed, 3 D.L.R. 833, 3 O.W.N. 1378; Barnett v. Isaacson (1888), 4 Times L.R. 645; Taplin v. Barrett (1889), 6 Times L.R. 30, specially referred to; Wilkinson v. Alston (1879), 48 L.J.Q.B. 733, 41 L.T.R. 394, distinguished. See also annotation to Haffner v. Grundy, 4 D.L.R. 531-560.]

Travis v. Coates, 5 D.L.R. 807, 3 O.W.N. 1651, 22 O.W.R. 917, 27 O.L.R. 63.

The right to a commission on the part of a real estate agent is not lost by his discharge and the withdrawal of the lands from his hands before the sale if his acts were the efficient cause of the sale. [Wilkinson v. Martin (1837), 8 C. & P. 1; Lumley v. Nicholson (1885), 2 Times L.R. 118, per Lord Chief Justice Coleridge, at p. 119, referred to.]

Travis v. Coates, 5 D.L.R. 807, 3 O.W.N. 1651, 22 O.W.R. 917, 27 O.L.R. 63.

A real estate broker exclusively employed for a specified time is not entitled to any commission upon a sale by his principal after the expiration of the agency to two persons, of whom one (the other having had no negotiations with the agent) verbally agreed to take some interest in a syndicate to be formed to purchase the property and in a subsequent dispute between himself and the agent as to the amount of such interest finally withdrew from the agreement and declined to have anything whatever to do with the agent and immediately put himself into communication with the principal for the purpose of buying the property. [Burchell v. Gowrie and Blockhouse Collieries, Ltd., [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, and Rice v. Galbraith, 2 D.L.R. 859, 26 O.L.R. 43, distinguished. See also Singer v. Russell, 1 D.L.R. 646, and annotation to Haffner v. Grundy, 4 D.L.R. 531.]

Sibbitt v. Carson, 5 D.L.R. 193, 3 O.W.N. 1491, 22 O.W.R. 640, 26 O.L.R. 585.

Where an agent claims commissions under a contract for negotiating the sale of lands, the determining principle is that he must have brought the vendor and purchaser together, not necessarily a personal introduction, but one through which the purchaser knew that the land of the vendor was for sale; and the absence of that element is fatal to the claim.

St. Germain v. L'Oiseau, 6 D.L.R. 149, 22 W.L.R. 125, 48 C.L.J. 711.

Although it is clearly the law that an agent may not be disentitled to the commission on a sale of lands merely because the actual sale takes place without his knowledge, if his acts really brought about the relation of buyer and seller; yet, in a case in which the agent fails to shew that some act of his was the causa causans or an efficient cause of the sale, he cannot recover. [Burchell v. Gowrie, [1910] A.C. 614, specially referred to.]

St. Germain v. L'Oiseau, 6 D.L.R. 149, 22 W.L.R. 125, 48 C.L.J. 711.

Where two actions are brought by two

separate land agents, each claiming, as against the vendor, commission on the same sale of the same property, the right to commission is his who was causa causans or the efficient cause of the sale to the exclusion of the other agent so claiming. [Burton v. Hughes, 1 Times L.R. 207, specially referred to.]

Walker and Webb v. MacDonald; Graham v. MacDonald, 6 D.L.R. 501, 4 O.W.N. 1, 22 O.W.R. 964.

Employment of agent to sell land—Purchaser procured by agent refusing to carry out purchase—Right to commission—Contract—Scope of—Finding—Appeal.

Robinson v. Reynolds (No. 2), 6 D.L.R. 855, 4 O.W.N. 111, 23 O.W.R. 144.

In order to entitle a real estate agent to commission, he must have been the "efficient cause" of the sale; it is not enough that there was an introduction and that such introduction was a causa sine qua non. [Burchell v. Gowrie, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, followed; Boyle v. Grassick, 6 Terr. L.R. 232; Miller v. Radford, 19 Times L.R. 575, referred to.]

Strayer v. Hitchcock, 7 D.L.R. 689, 22 W.L.R. 469.

Sale of land—Commission—Quantum meruit—Termination of employment—Offer to purchase on own behalf.

Westergaard v. Weyl, 7 D.L.R. 847, 21 W.L.R. 403.

Where the plaintiffs and the defendants are real estate agents, and the defendants to the knowledge of the plaintiffs hold a restricted special contract from the option-holders of certain lands under which the defendants are to receive not a variable percentage commission, but the lesser lump sum of $1,000 for negotiating at a stipulated price and terms a sale of the lands, and where the defendants agree to pay to the plaintiffs $500 as one-half of the lump sum for negotiating the sale at the price and terms so fixed, and where, under that agreement, the plaintiffs introduce to the option-holders a proposed purchaser, who, however, fails to agree definitely with the option-holders upon the terms or to make the purchase, but instead purchases a few days later directly from the owners at the same price on terms undisclosed in the evidence, the plaintiffs cannot, under such a restricted special contract, recover any compensation.

Cairns v. Buffet, 8 D.L.R. 53, 22 W.L.R. 402.

Although vendors of lands may sometimes be held liable to real estate agents where the vendors themselves proceed to sell to parties introduced by those agents on terms other than those on which the agents were instructed to procure purchasers, upon the ground that a vendor may not, after making such a sale and taking the benefit of the agent's services, refuse to pay therefor, such a principle cannot apply in an action by a real estate agent as against his employer, another real estate agent, who derives no benefit whatever and is no party to the change in the terms of sale.

Cairns v. Buffet, 8 D.L.R. 53, 22 W.L.R. 402.

Where real estate agents agree for a lump sum under a restricted special contract of agency to negotiate at a stipulated price and terms the sale of certain lands, and under the agreement procure a purchaser ready and willing to buy at the price but not on the terms so fixed, this is not such a fulfilment of the contract as will entitle the agents to any compensation whatever.

Cairns v. Buffet, 8 D.L.R. 53, 22 W.L.R. 402.

C., the owner of a piece of land, approached one R. with a view to the sale to him of such land, but failed to come to terms. Subsequently he listed the land for sale with defendants. The plaintiff, finding that R. desired to purchase the property, approached defendants, who agreed that in the event of plaintiff making a sale he was to receive one-half the commission. Thereupon the plaintiff continued his negotiations with R., submitting various offers to C., all of which were refused. It did not appear that R.'s name was mentioned to C. during these negotiations. Subsequently C. met R. and made a sale on the terms of the last offer made through plaintiff, and which was then refused. In an action for the plaintiff's commission:—Held, that as it did not appear that C. was aware that R. was the proposed purchaser who was negotiating with defendants for the purchase of the property, or that either of the parties to the action was the causa causans of the sale being effected, or that either of them was the efficient cause of the sale, the plaintiff could not recover. Stratton v. Vachon (1911), 44 S.C.R. 406, distinguished.

Dicker v. The Willoughby Sumner Co., 4 S.L.R. 251.

Defendant employed plaintiffs to find a purchaser for certain property. Plaintiffs introduced one Gabb as a purchaser, and an agreement was concluded for the sale, defendant taking in exchange certain lands represented by plaintiff as being worth $25 per acre, the agreement being, however, subject to inspection of the land by defendant. Defendant, upon inspecting the lands, found that they had been grossly misrepresented by plaintiffs, and thereupon defendant repudiated the contract and revoked the agent's authority. Subsequently she sold the property to Gabb, but for different consideration. In an action by the agent for commission:—Held, that the plaintiffs, by reason of their misconduct in misrepresenting the lands, were not entitled to any commission for their services. (2) The defendant, having properly repudiated the first sale, did not by subsequently sell-

ing the same property to the purchaser originally introduced by the plaintiff become liable in any way to the plaintiff for commission, the sale not being in any way brought about by the plaintiff's intervention, and the circumstances under and the manner in which the agent's authority had been revoked excluding all question of collusion or intention of depriving the agent of commission.

The Northern Colonization Agency v. McIntyre, 4 S.L.R. 340.

The agreement by which a property owner nominates a person as his sole agent, for three years, to sell his immovables on payment of a commission and expenses is a mandate and not a hiring of services, and is, therefore, revocable at any time, subject to liability for damages in case of revocation without cause or reason.

Hudon v. Cool, 42 Que. S.C. 228 (Sup. Ct.).

The defendant listed with the plaintiff, a real estate broker, for sale, a half-section of land on the terms that the plaintiff should be paid a commission on the amount of such sale. The amount of the sale price was not stated, but the plaintiff was not to sell for less than $10 per acre without the defendant's consent. P. having through his agent G. applied to the plaintiff for a statement of farms he had for sale, the plaintiff furnished G. with a number of statements, including one respecting the defendant's farm, quoting the price at $10 per acre. P. was aware, from other sources, that the defendant's farm was for sale, and had at different times been over the defendant's farm, but nevertheless he, shortly after receiving the statement furnished by the plaintiff to G., went out and inspected the defendant's farm, informing the defendant that the plaintiff had sent him there and shewed to the defendant the statement furnished to G. by the plaintiff. P. did not then purchase the farm, but subsequently negotiations were renewed directly with the defendant, resulting in a sale to P. for $2,600. At the trial P. testified that he was influenced to go out and inspect the defendant's farm by the information supplied by the plaintiff to G. Held, that the plaintiff was entitled to recover the reasonable value of his services, what he had done having led to the sale.

Fitzsimon v. Walker, 7 Terr. L.R. 204.

Plaintiff at one time obtained an option on defendant's ranch, with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission basis, $100,000 being the purchase price, and his commission or profit to be made by adding $5,000 thereto. He endeavored to effect a sale in various quarters, and ultimately introduced H. to the defendant, telling the former that the price was $105,000 and asking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid. Held, on appeal, affirming the verdict of the jury at the trial (Galliher, J.A., dissenting), that plaintiff was entitled to recover the commission of $5,000 from the defendant (vendor).

Langley v. Rowlands, 46 Can. S.C.R. 626, affirming Rowlands v. Langley, 16 B.C.R. 72.

(§ II B—13a)—EFFECT OF PRINCIPAL'S FRAUD; PURCHASER'S MISREPRESENTATIONS.

One who, in dealing with an agent for the sale of land, acts as the owner thereof and as the person liable for commission, cannot, in the event of a sale, escape liability for such commission on the ground that he is not in fact the owner. [Jones v. Littledale, 6 A. & E. 490, referred to.]

Imrie v. Wilson, 3 D.L.R. 826, 21 O.W.R. 964, 3 O.W.N. 1145.

Where a purchaser of real estate, in assuming to be making the deal entirely without the intervention of the vendor's agent, misrepresents to the vendor that the vendor's agent has earned no commission on the sale, and thereby misleads the vendor and induces him to lower his price by the amount of the commission which would otherwise be payable, in an action subsequently brought by vendor's agent against the vendor (adding the purchaser as a third party) establishing the claim for commission, the purchaser may be held bound to make good to the defendants the amount of such commission.

Walker and Webb v. MacDonald; Graham v. MacDonald, 6 D.L.R. 501, 4 O.W.N. 1, 22 O.W.R. 964.

(§ II B—14)—AMOUNT OF COMPENSATION.

Where a broker obtains an option in his own name and thereby puts himself in the relation of purchaser as regards the owner, he is not entitled to claim remuneration, in the absence of a special agreement to that effect, in respect of a sale afterwards made by the owner without reference to the option to a prospective purchaser whom the broker had introduced within the time limit of the option, the option itself not having been taken up by the broker.

Sutherland v. Rhinhart, 2 D.L.R. 204, 20 W.L.R. 584.

(§ II B—14a)—TAKING OPTION TO HIMSELF.

Where an agent, employed to sell property on commission, joins himself with a third person in purchasing, the vendor is not bound to enquire into the relationship between his agent and the third person in respect of the purchase, or to inform the third person of the existence of the agency or of the payment of the commission, but may pay his agent the stipulated commission without losing his right to specific per-

formance or rendering the transaction liable to rescission.

Hitchcock v. Sykes, 3 D.L.R. 531, 3 O.W.N. 1118.

A real estate agent who had been attempting to sell a certain tract of land for the owner, and who afterwards took from the latter an option for its purchase made in his own favour, which contained no stipulation that if the agent produced another purchaser to take his place under the instrument the agent was to have a commission for the sale of the land to the substitute, and there was no other contemporaneous agreement to that effect, cannot claim any commission after the transfer of the property to a new purchaser, especially where it is shewn that the owner, upon being so requested, refused to stipulate in his contract of sale with the substituted purchaser that the agent should have a commission, and the latter then abandoned his claim rather than have the sale fall through. [Nixon v. Dowdle, 1 D.L.R. 93, reversed on the facts.]

Nixon v. Dowdle (No. 2), 2 D.L.R. 397, 20 W.L.R. 749.

A real estate agent who without disclosing that he is a real estate agent obtains in his own name a contract of sale of a property at a fixed price and disposes of it to a third party is not entitled to charge the vendor with any commission on the sale of such property inasmuch as there is no contract of agency whatsoever. Stratton v. Vachon, 44 Can. S.C.R. 395, referred to; and see Haftner v. Grundy, 4 D.L.R. 529, and annotation, 4 D.L.R. 531.]

Besner v. Levesque, 8 D.L.R. 494, 18 Rev. de Jur. 60.

(§ II B 2—15) — FAILURE TO COMPLETE TRANSACTION.

As the information contained in a list of property listed for sale with a real estate exchange and sold by it to brokers, who made sales therefrom, is held out and guaranteed by the exchange to be correct, and their subscribers are invited to act thereon, it is immaterial, in an action for the loss of commissions on a sale of property improperly listed by the exchange, that a long time elapsed between the listing and the sale by the plaintiff where it appeared that before the latter acted he was informed by the exchange that the property was still for sale.

Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 921.

(§ II B—16)—DEFAULT OF PRINCIPAL—REVOCATION OF AUTHORITY.

Where a real estate agent procures a written offer of purchase made in good faith by a person able and willing to carry out the same, of which written offer the owner signs an acceptance, and the offer contains a stipulation that the owner shall pay a certain percentage "provided he accepts the offer," the agent's mandate is fulfilled and the commission earned, although the owner declines to carry out the sale; so far as concerns the agent's right of action for his commission, the signing of the agreement under private signature is an acceptance of the offer, although his principal refuses to complete the sale. [Lightball v. Caffrey, 6 L.N. 202; Thomas v. Merkley, 32 L.C. Jur. 207; Gohier v. Villeneuve, R.J.Q. 6 S.C. 219; Brown v. McDonald, R.J.Q. 6 S.C. 491; and Massicotte v. Lavoie, R.J.Q. 40 S.C. 258, specially referred to.]

Brotman v. Meyer, 1 D.L.R. 371, 41 Que. S.C. 433.

(§ II B 2—17)—DEFAULT OF OTHER PARTY.

Where a real estate agent was employed to "sell" certain property and he found a purchaser and obtained an agreement of sale to be entered into between such purchaser and his principal, a subsequent written agreement between the agent and his principal whereby it was stipulated that the latter should pay the agent a stated percentage as commission "for selling my property" is to be construed as contemplating merely an agreement of sale with a person of substance against whom it might be enforced; and the commission will be payable although the sale was not completed by reason of the purchaser's default in carrying it out and the dishonour of his cheque given for the deposit. [Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262, distinguished; Mackenzie v. Champion, 12 Can. S.C.R. 649, referred to; see also annotation on commission agreements generally, 4 D.L.R. 531.]

Smith v. Barff, 8 D.L.R. 996, 27 O.L.R. 276, 4 O.W.N. 236.

III. Business and general brokers.

(§ III—30)—BUSINESS AND GENERAL BROKERS.

It is the duty of an insurance broker to the client by whom he is employed to place the latter's fire insurance, to see that any policy which he obtains for his client appears to be in valid form, and that it is in conformity with the class of risk which his client has submitted; so, therefore, if the policy is issued with a wrong specification of the concurrent insurance the broker will be liable in damages where he fails to discover the error through neglect to inspect the policy when received, and the client not becoming aware of the discrepancy is compelled to accept a lesser amount from the insurer than he would otherwise have received.

Rudd Paper Box Co. v. Rice, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979.

Where the licensee of a license transferable only with the consent of the license commissioners agrees to sell this license to a purchaser, the negotiations being carried on by a real estate agent, and where the transfer cannot be effected owing to the refusal of the license commis-

sioners to approve the same, there is no sale at all for lack of object to the contract, and the agent who negotiated the transaction is not entitled to any commission. [See annotation to Haffner v. Grundy, 4 D.L.R. 531.]

Lepage v. Bouchard, 8 D.L.R. 395.

Where a mining prospector at the request of a prospective purchaser of mining property examines a mine and reports favourably thereon, he is not entitled, if the purchaser buys such mine, to remuneration on the basis of a commission on the purchase price in the absence of an agreement to that effect; the custom existing in the Cobalt district which allows mining commissions to "grub-stakers" who discover and stake out for another a claim on land of the government open for discoveries does not extend to such a case.

Lee v. Jacobs, 8 D.L.R. 447.

BUILDER'S LIEN.

See Mechanics' Lien.

BUILDING AND LOAN ASSOCIATIONS.

I. In general.
II. Stock; advance dues.
III. Loans; mortgages.
A. In general.
B. Premiums.
C. Usury.
D. Foreclosure.
IV. Dues and fines.
V. Powers generally.
VI. Withdrawals.
VII. Termination; insolvency; winding up.
VIII. Foreign associations.

I. In general.

(No cases.)

II. Stock; advance dues.

(No cases.)

III. Loans; mortgages.

A. In general.

(§ III A—14)—Right to interest where borrower has elected to retire shares.

Section 6 of the Interest Act, R.S.C., ch. 120, prevents the recovery of any interest where a mortgage to a loan company contains a covenant for monthly payments of interest at the rate of 12 per cent. per annum, and also a proviso giving to the mortgagor the option of making certain monthly payments on account of shares in the company, subscribed for by him, which shall be accepted in full payment of principal and interest, and the proviso does not shew what is the rate of interest per annum if the method of payment thereby allowed be adopted, nor does the covenant for interest shew that the rate thereby provided for is the same, and in fact it is not the same in result as the payment under the proviso, and the mortgagor has adopted the method of payment allowed by the proviso.

The Colonial Investment Co. v. Borland, 6 D.L.R. 211, 22 W.L.R. 145.

IV. Dues and fines.

(No cases.)

V. Powers generally.

(No cases.)

VI. Withdrawals.

(No cases.)

VII. Termination; insolvency; winding up.

(No cases.)

VIII. Foreign associations.

(No cases.)

BUILDING CONTRACTS.

Construction of, see Contracts.

As to mechanics' liens on building, see Mechanics' Liens.

BUILDINGS.

I. Statutory and municipal regulations.
A. In general.
B. Fire escapes.
II. Private rights.

As to building contracts, see Contracts, II.

Restrictions as to, in covenant, see Covenants and Conditions.

Fixtures in, see Fixtures.

Lien on, see Mechanics' Lien.

Negligence as to condition of, generally, see Negligence, I.

As to walls, see Party Walls.

I. Statutory and municipal regulations.

A. In general.

(§ I A—5)—Distance from street line.

If the wall of a building which supports the superstructure and its roof is not nearer than fifty-five feet to the centre line of a certain specified street, there is no violation of a building restriction requiring the main wall of buildings on such street to be no nearer than such distance to its centre, though the wall of the bay-windows of the building is nearer to the centre of the street than fifty-five feet.

Holden v. Ryan, 4 D.L.R. 151, 3 O.W.N. 1585, 22 O.W.R. 767.

A municipal by-law passed under the authority of the Municipal Amendment Act, 4 Edw. VII. ch. 22, sec. 19, regulating the distance from the street line at which buildings on a residential street may be built, need not be confined to such buildings as

front on the residential street, and a prohibition in such a by-law against the erection of any building within the given distance from the street line is therefore valid. [City of Toronto v. Shultz, 19 O.W.R. 1013, dissented from, and question referred to a Divisional Court.]

Dinnick v. City of Toronto, 3 D.L.R. 310, 3 O.W.N. 1061, 21 O.W.R. 897.

(§ I A—7)—Building permits.

Where a statute gives a municipality the right to prohibit the location of apartment houses on certain streets and a by-law is passed pursuant to this statute and revoking former permits, the municipality is not estopped where the only acts that were done under the former permit and prior to the passage of the by-law were the preparation of the plans and specifications from enforcing the new by-law as to the property covered by such permit. [City of Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished.]

City of Toronto v. Williams (No. 2), 8 D.L.R. 299, 4 O.W.N. 58.

A refusal on the part of a municipal officer to grant a building permit before a written application is made therefor, pursuant to a by-law, does not excuse the necessity for a tender of such written application as a condition precedent to the applicant's right to compel the issuance of the permit.

Frankel v. City of Winnipeg, 8 D.L.R. 219. 22 W.L.R. 597.

The application for a permit provided for in paragraph 9 of the building by-law of the city of Winnipeg (by-law No. 4283) before a permit will issue, means a written application.

Frankel v. City of Winnipeg, 8 D.L.R. 219, 22 W.L.R. 597.

A city has a right to charge a moderate fee for the issuing of a building permit. [City of Montreal v. Walker, Montreal L.R. 1 Q.B. 469, followed.]

Frankel v. City of Winnipeg, 8 D.L.R. 219, 22 W.L.R. 597.

Where applicants for a building permit were not acting bona fide in respect of their building, but were following out a system of selecting lots of land in portions of the city where high class residences prevailed, and threatening to build apartment blocks on such lots, with a view to being bought out by the residents of the neighbourhood, such a course of conduct, though it might be termed reprehensible from a strictly moral point of view, is nevertheless within their legal rights. (Dictum per Galt, J.)

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

In a mandamus proceeding to compel the issuance of a building permit, the onus is upon the applicant to shew that he is in all respects entitled to the permit in question. [As to the subject generally of "Municipal regulation of building permits," see annotation, 7 D.L.R. 422.]

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

On a motion for a mandamus to compel the issuing of a building permit, where the applicants are asserting a purely legal right, their motives cannot be inquired into. (Dictum per Galt, J.).

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

The purpose of a city by-law under the Municipal Act, 1903 (Ont.), sec. 541a, as amended by 4 Edw. VII. ch. 22, sec. 19, is to protect residential districts in cities from being disturbed by proximity of buildings in which general business is actively carried on and goods kept for sale, or wares are bought and sold, or machinery or other commodities are manufactured, repaired, or otherwise generally dealt in. [City of Toronto v. Foss, 5 D.L.R. 447, 3 O.W.N. 1426, Century and English Imperial Dictionaries sub voce "store," and Hall on North American Vocabularies, referred to.]

Re Hobbs and City of Toronto, 6 D.L.R. 8, 4 O.W.N. 31, 23 O.W.R. 8.

Under a by-law based on the Municipal Act, 1903 (Ont.), sec. 541a, as amended by 4 Edw. VII. ch. 22, sec. 19, a city corporation may properly issue a permit for a building as a place for the storage of commodities, providing that machinery or other articles which may be stored therein shall not be repaired, refurbished, painted, traded in, bought or sold, as would ordinarily be done in a repair shop, salesroom, or factory.

Re Hobbs and City of Toronto, 6 D.L.R. 8, 4 O.W.N. 31, 23 O.W.R. 8.

Where a building permit is regularly granted to an applicant by the city architect of a municipal corporation for an apartment house and subsequently, owing to certain building restrictions affecting his title, the owner is compelled to deviate substantially from the original plans, and applies to the city architect for his assent to the alterations, such later application being for a building substantially different from that originally proposed, although in form an application for leave to alter the plans of the original building, is in truth a fresh application for a building permit, and the architect may legally apply to such fresh application the civic by-laws and regulations in force at its date, including those passed in the interim since the date of the first permit. [City of Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished.]

Re Ryan and McCallum, 7 D.L.R. 420, 4 O.W.N. 193, 23 O.W.R. 193.

An applicant for a building permit within a municipal corporation who regularly obtains same from the city architect of the municipality and proceeds to erect and partially completes his building pursuant to the permit, acquires a vested right only

sub-agents—Absence of authority or ratification.

Westaway and Greaves v. Close, 7 D.L.R. 849, 21 W.L.R. 582.

B. Compensation.

(§ II B—10)—Compensation.

The fact that real estate brokers after their employment by the landowner take to themselves an option from the owner to sell to them at the price fixed, does not preclude them from claiming the commission originally agreed upon, if the option was not intended to be in substitution for the previous agreement, but was given for the express purpose of satisfying a prospective purchaser of the agent's right to sell. [For cases on the general law of options, see Labatt's Law of Options, 36 Can. Law Journal 521.]

Nixon v. Dowdle (No. 1), 1 D.L.R. 93, 19 W.L.R. 775.

Where a purchaser of land enters into a contract with a real estate agent, whereby the purchaser is to furnish the purchase money less the commission payable to the real estate agent, and the profits on a resale of the property are to be divided equally between them, this does not create a partnership between the parties, and the real estate agent acquires no title or interest in the land in question.

Donough v. Moore, 2 D.L.R. 525, 20 W.L.R. 334, 22 Man. L.R. 79.

Where the owner of farm lands authorizes an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale.

Lewis v. Bucknam, 1 D.L.R. 277, 20 W.L.R. 4.

Plaintiff, a real estate agent, applied to the defendants for authority to sell defendants' land, and prices were quoted; but it was explained that this was not an exclusive listing. Plaintiff sold one parcel on terms to which defendants agreed, and forwarded a deposit, stating balance would be forwarded in a few days. Before this balance was forwarded, the defendants advised him that the land was no longer available, and returned the deposit. It was not shewn that in fact the land had been previously sold by defendants. Shortly afterwards the plaintiff sold another parcel on the terms quoted, and forwarded cash payment. This was also returned, with an intimation, which was the fact, that the land had already been sold. In an action for the commission:—Held, that as to the first parcel, the plaintiff having made a sale on terms satisfactory to the defendants, and it not being shewn that the land was not available at the time of sale, he was entitled to his commission. (2) That, while the plaintiff had not remitted the whole cash payment as to this parcel, yet, as he was advised before a reasonable time had elapsed that it would not be accepted, he was excused from forwarding the balance. (3) As to the second parcel, the plaintiff having accepted the agency understanding that the listing was not an exclusive one, and the defendants having shewn a prior sale, the plaintiff could not recover.

Hammans v. D. H. McDonald & Co., 4 S.L.R. 320.

An agent is not entitled to his commission where by the term of the contract he was to procure a purchaser by a certain hour of the day, unless the purchaser is brought in within the time fixed; and this is true notwithstanding that the principal later negotiated with the person introduced by the agent after the expiration of the time limit. [Sibbitt v. Carson, 5 D.L.R. 193, 26 O.L.R. 585, affirmed.]

Sibbitt v. Carson (No. 2), 8 D.L.R. 791, 4 O.W.N. 114, 27 O.L.R. 237.

Where an agent was to procure a purchaser for his principal he cannot recover commission where he introduces a person who is not willing to buy on his own account but to take a share only upon a syndicate being formed to buy the property, although the person so introduced finally joins with another party, brought in by himself and not through the agent, in buying the property from the owner direct. (Per Clute, J.)

Sibbitt v. Carson (No. 2), 8 D.L.R. 791, 4 O.W.N. 114, 27 O.L.R. 237.

Plaintiffs, being real estate agents, were employed by the defendants to sell a certain property at a stated price and within a limited time, for which they were to receive a commission of $1,000. It was apparent, however, that the payment of commission was conditional upon the vendors securing their price, as the whole price was raised to provide an increased commission for the agent. It was also apparent that the time was limited, as when the first date mentioned for sale expired a new agreement was entered into extending the time. The agents mentioned the property to a probable purchaser, but failed to complete the transaction within the time limited. Later the party to whom the agents mentioned the property purchased direct from the principal on terms different from those upon which it was originally listed. There was no evidence of any fraud or attempt to deprive the agents of their commission. The agents demanded payment of the commission, and this being refused, brought action upon the contract. At the trial the plaintiffs applied for leave to amend by pleading quantum meruit, which was refused. The action being dismissed, plaintiffs appealed:—Held, that in order to establish a right to recover upon a quantum meruit there must not only be a casual, there must also be a contractual relation between the principal and agent, between the introduction and the ultimate conclusion

of the sale; and here, the nature of the contract being of a most special character, the contractual relation was determined upon the date fixed, and no relation thereafter existed upon which such a claim could be based. Boyle v. Grassick (1905), 2 W.L.R. 284, explained. (2) That where there is a contract in express terms between parties, no agreement which is inconsistent with these terms can be implied from the conduct of the parties, and the parties here having entered into a contract providing in express terms as to time of sale and remuneration, no contract inconsistent therewith should be implied.

Blackstock et al. v. Bell et al., 4 S.L.R. 458.

A claim for the value of services rendered as agent in buying and selling land does not come under the law relating to summary procedure. The plaintiff in such case will be allowed to amend on payment of the costs of the exception to the form.

Lamaire v. Charbonneau, 14 Que. P.R. 60 (Sup. Ct.).

In an action by a real estate agent for a commission on a sale, it is for the jury to say whether the contract was or was not brought about by the agent by his introduction or intervention; the test is, was the sale brought about in consequence of the introduction and is it traceable thereto; and if it resulted directly from the continuation of the negotiations begun by the agent, the latter is entitled to compensation. [Morson v. Burnside, 31 O.R. 438; Wolf v. Tait, 4 Man. L.R. 59, and Re Beale, Ex p. Durrant (1888), 5 Morrell 37, specially referred to. See also Leake on Contracts, 6th ed., 366, 367; Phipson on Evidence, 5th ed., 75.]

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

In the circumstances set out in the statement following, it was held, on appeal, affirming the decision of Murphy, J., at the trial (Irving, J.A., dissenting), that plaintiff had earned only $800 of the commission claimed.

Beveridge v. Awaya Ikeda & Co., Ltd., 16 B.C.R. 474.

(§ II B—11)—ACTING FOR BOTH PARTIES; COMPENSATION FROM BOTH; COLLUSION.

If a real estate agent entrusted to find a purchaser of property directly or indirectly colludes with the purchaser and so acts in opposition to the interests of the principal, he is not entitled to any commission. [Andrews v. Ramsay [1903] 2 K.B. 635, applied; see also vol. 1, Halsbury's Laws of England, p. 196, sec. 416.]

Canadian Financiers, Ltd. (plaintiffs) v. Hong Wo (defendants), 1 D.L.R. 38, 19 W.L.R. 843, 17 B.C.R. 8.

A real estate agent employed by a prospective purchaser for the purpose of buying a property is not, in the absence of a special contract to that effect, entitled, after the sale has been concluded, to claim a commission on the purchase price from the vendor who did not retain his services, any custom obtaining amongst real estate brokers notwithstanding. [Carroll v. O'Shea, 18 N.Y. Supp. 146, approved.]

Lemieux v. Seminary of St. Sulpice, 3 D.L.R. 639.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit.

Edgar v. Caskey, 4 D.L.R. 460, 21 W.L.R. 444.

Where in an agreement for the sale of land by the plaintiff to the defendant, the former agreed to act as agent in its sale, and to subdivide it into lots and advertise them for sale, for which he should receive one-half of the net profits from the sale thereof after repaying to the defendant the purchase money, and where, on the failure of the plaintiff to perform such covenant the defendant did not terminate his agency in the manner required by the agreement, nor proceed to do what the plaintiff should have done, but sold the land en bloc without any subdivision into lots, the plaintiff is entitled in the absence of any provision to the contrary in the agreement, to the agreed proportion of the profits obtained by the sale en bloc.

Cruikshank and Brien v. Irving, 6 D.L.R. 237, 21 W.L.R. 172.

(§ II B—12)—SUFFICIENCY OF BROKER'S SERVICES.

In an action by the plaintiff as real estate agent for commission for alleged sale of lands setting up a written authority to them from the owner with a provision worded as follows:—"In case you find such a purchaser, or in case you bring the property directly or indirectly to the attention of any one who becomes a purchaser upon any terms whatsoever, you are to be paid by me a commission of five per cent."; such a provision means that the agents must bring the property, directly or indirectly, to the attention of some person who shall thereby become a purchaser; and where the plaintiffs actually brought the property to the attention of a third party who, however, did not thereupon agree to buy, but on the contrary gave up all idea of buying, yet subsequently took the matter up afresh with another agent and purchased, the plaintiffs, as a matter of law, had nothing to do with effecting such sale and are not entitled to any commission. [See also annotation, 4 D.L.R. 531.]

Herbert et al. v. Bell ("The Locators" v. Bell), 8 D.L.R. 763, 22 W.L.R. 884.

Where a broker was authorized to find a purchaser by the lessee of a hotel for the unexpired lease and the chattels contained

of the city building inspector, and of his own architect that the walls were sufficiently braced for the changed conditions. [Dalton v. Angus, 6 A.C. 740; Jolliffe v. Woodhouse, 10 Times L.R. 553; Valiquette v. Fraser, 39 Can. S.C.R. 1, applied; Ainsworth v. Lakin (Mass.), 57 L.R.A. 132, approved; and see 3 Halsbury's Laws of England, p. 315.]

McNerney v. Forrester, 2 D.L.R. 718, 22 Man. L.R. 220, 20 W.L.R. 732.

BURDEN OF PROOF.

Instruction as to, see Appeal; Trial.

In general, see Evidence, II.

BY-LAWS.

Of benefit associations, see Benevolent Societies.

Of corporation, see Corporations and Companies.

Of municipality, see Municipal Corporations.

CALLS.

Calls (locative), see Boundaries.

On stock, see Corporations and Companies.

CAMERA.

Taking evidence in, see Secrets.

CANADA TEMPERANCE ACT.

See Intoxicating Liquors.

Jurisdiction of Parish Court Commissioner in N.B., see Courts, II.

CANCELLATION OF INSTRUMENTS.

Of contracts generally, see Contracts, V.

Of contract by corporation, see Corporations and Companies.

Cancellation of subscription to corporate stock, see Corporations and Companies.

Of deed, see Deed.

Of will, see Wills.

(§ I—1)—Fraud.

Where the evidence shews that the alleged vendor under a contract for the sale of land signed the agreement of sale on the representation of one of the alleged vendees, whom she hired as agent to sell the land, that it was an agreement in blank to be used by him in the event of obtaining a purchaser for the land, while as a matter of fact the agent wrote his own name and that of another in the agreement as vendees, the vendor is entitled on discovering the facts to have the agreement in question delivered up for cancellation and to an order for the removal from the register of the caveat and any lis pendens filed by the vendees.

Hess v. Ross et al., 8 D.L.R. 798, 22 W.L.R. 742.

Deed—Alleged forgery by deceased grantee—Evidence.

Deevy v. Deevy, 4 O.W.N. 555, 23 O.W. R. 895.

(§ I—5)—Grounds for.

The purport of the words "saving the rights of creditors who contract in good faith," which were introduced by an amendment in 1904 to article 1301 C.C. (Que.), is to authorize the Courts to distinguish between the creditors who unwittingly and in good faith violate the terms of art. 1301, and those who violate it in bad faith, and to protect only the creditors of the former class from the nullification of their security.

Lebel v. Bradin, 7 D.L.R. 470.

Where a person lends a sum of money and accepts as security a mortgage on an immoveable belonging to the borrower's wife, by means of a deed of sale of the property secured with right of redemption or otherwise, he has no action against the wife for the recovery of the money loaned, and the wife can have the deed set aside as being in violation of art. 1301 C.C. (Que.), which makes void any obligation contracted by the wife with or for her husband otherwise than as being common as to property, saving the rights of creditors who contract in good faith.

Lebel v. Bradin, 7 D.L.R. 470.

A transfer of land and a certificate of title issued to the grantee therein upon the registration thereof by him will be cancelled because of his fraud in obtaining them, where it appeared that the devisee under his father's will of the land transferred, which was the south quarter of a certain section of land homesteaded by the testator, upon his completion of the homestead duties in respect thereto, received a certificate of recommendation that a patent issue to him and thereafter he entered into a contract to sell the land and in accordance therewith made an assignment of the land to the purchaser, which could not be registered then because no patent for the land had been issued, it being issued nearly ten years after such sale to his mother, the executrix under the will, and it was registered in the land titles office, and where it also appeared that the devisee aforesaid sold, two months before the issue of the patent, the north-west quarter of the same section, of which he was also devisee under the same will, and the grantee in the transfer of that section, found six years after such sale to him in a solicitor's office, a transfer of the south-west quarter mistakenly executed by the executrix aforesaid, which transfer, without paying consideration therefor, the purchaser of the north-west quarter fraudulently removed and had registered in the land titles office, getting thereby a certificate of title to the quarter section herein described.

Annable v. Coventry, 5 D.L.R. 661.

Where a signature to a promissory note, antedated and overdue at the time of signing, has been obtained from a person unaccustomed to business affairs by a representation that the giving of the note is part

of a scheme to obtain by legal proceedings a sum of money for a company in which the maker is a shareholder, and, though there was no intention on the part of the payee to defraud, the scheme and proceedings were in fact visionary and impracticable, and the maker received no benefit from the giving of the note, the Court may order the payee in whose hands it remains to deliver it up for cancellation.

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O.W. N. 966, 22 O.W.R. 979.

(§ I—6)—FALSE REPRESENTATION OF LAW.

A false representation as to a matter of law is sufficient to have a document signed under such misrepresentation annulled.

Lamoureux v. Craig, 2 D.L.R. 148.

CARRIERS.

I. WHO ARE COMMON CARRIERS; RELATION TO PUBLIC.

II. CARRIERS OF PASSENGERS AND OTHER PERSONS.
- A. In general.
- B. Rules and regulations.
- C. Who are passengers.
- D. Abuse of passenger.
- E. Assault.
- F. Arrest; false imprisonment.
- G. Measure of care required; negligence generally.
- H. Ejection of passenger or trespasser.
- I. Leaving at destination; stopover.
- J. Disabled or incompetent passengers.
- K. Getting on or off.
- L. Safety of stations, approaches, and platforms.
- M. Tickets; conditions; fare.
- N. Blackboard announcements as to trains.
- O. Baggage or property of passenger.
- P. Corpse.
- Q. Connecting carriers.

III. CARRIERS OF FREIGHT.
- A. In general; powers of agents.
- B. Duty to receive and transport.
- C. Loss of, or injury to, property.
- D. Delivery by carrier; delay.
- E. Liability and lien for freight charges; rates.
- F. Carrying live stock.
- G. Stipulations as to liability.
- H. Contract or duty to furnish cars.
- I. Demurrage on cars.
- J. Connecting carriers.
- K. Criminal transportation.

IV. GOVERNMENTAL CONTROL; RATES; DISCRIMINATION; DUTY AS TO STOPPING PLACES.
- A. In general.
- B. Compulsory connection and interchange of business; discrimination between carriers, hackmen, etc.; through rates.
- C. Rates; discrimination between passengers or shippers; rebates; passes.
- D. Duty as to depots; stopping trains; duty to run trains.

As to agreements fixing tariffs and tolls in restraint of trade, see Monopoly, II.

As to action against railway, independent of carrier liability, see Railway.

As to bills of lading, see Bills of Lading.

I. Who are common carriers; relation to public.

(No cases.)

II. Carriers of passengers and other persons.

A. In general.

(§ II A—12a) — DUTY TO TRANSPORT GENERALLY.

A railway company cannot lawfully carry passengers over a road that has not been opened for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, except labourers employed in the construction thereof.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

B. Rules and regulations.

(§ II B—26)—AS TO TICKETS OR FARES.

In a special passenger tariff filed with the Board of Railway Commissioners specifying that the tolls to be charged persons attending a convention would be a one-way fare plus twenty-five cents, it is unnecessary to state that the twenty-five cents is a "fee" and is charged for the purpose of defraying the expenses in viséing the railway certificates entitling such persons to a return trip without the payment of a return fare.

Canadian Fraternal Association v. Canadian Passenger Association, 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

D. Abuse of passenger.

(§ II D—55)—ABUSE OF PASSENGER.

Held, common carriers are liable, for insulting language and conduct of their servants to their passengers, in damages measured by circumstances, such as the sex and social standing of the party aggrieved, and the nature and gravity of the offence. Hence, when a railway conductor, in a controversy with a lady passenger, as to the fares of her children, says he does not believe her, and persists in speaking to her, though told to desist, and, when she moves away, follows her with the annoyance, the company will be condemned to pay her $100, the full amount of her action.

Tudor v. Quebec and Lake St. John R. W. Co., 41 Que. S.C. 19, 13 Can. Ry. Cas. 387.

F. Arrest; false imprisonment.

(§ II F—65).

No action to recover damages for false

arrest will lie in favour of a party who pleads guilty to a charge of trespass preferred against him when arrested.

Mignault v. Grand Trunk R.W. Co., 40 Que. S.C. 475, 13 Can. Ry. Cas. 52.

G. Measure of care required; Negligence generally.

(§ II G—100)—Towards holder of ordinary ticket entering Pullman.

A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an opened vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

McDougall v. Grand Trunk R. Co., 8 D. L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

(§ II G 1—111)—Electric cars.

Whether there had been proper inspection and rebuilding of a defective controller of a car under the management of the defendant carrier so as to negative want of due care on its part in an action for resulting injuries to a passenger, are proper questions for a jury.

Fleming v. Toronto R. Co., 8 D.L.R. 507, 4 O.W.N. 323, 23 O.W.R. 385.

K. Getting on or off.

(§ II K 1—210)—Failure to open vestibule door at station.

Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger in his efforts to get off the train went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to get off, and such course on his part was not contributory negligence. [Keith v. Ottawa and New York R. Co., 5 O.L.R. 116, applied.]

McDougall v. Grand Trunk R. Co., 8 D. L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

(§ II K 1—212)—Allowing time to alight.

Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable.

McDougall v. Grand Trunk R. Co., 8 D. L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

L. Safety of stations, approaches and platforms.

(§ II L—240)—Safety of stations, approaches and platforms.

Railway—Breach of statutory duty—Neglect to furnish suitable accommodation for passengers at station—Absence of station house—Exposure of passenger to cold—Railway Act (Dom.) secs. 284, 427—Measure of damages—Jurisdiction of Railway Board—7, 8 Edw. VII. ch. 60, sec. 10—Right of action—Remoteness of damage.

Morrison v. Pere Marquette R. Co., 4 O. W.N. 544, 27 O.L.R. 271, affirming judgment of Britton, J., 4 O.W.N. 186.

M. Tickets; conditions; fare.

(§ II M 2—287) — Requirements as to stamping return part.

The charge made by a passenger association formed by the principal railway and steamship companies of Canada for viséing railway certificates entitling persons attending a convention who had paid a one-way fare to a return trip without payment of a return fare is a "toll" within the meaning of 7 and 8 Edw. VII. (Can.) ch. 61, sec. 9, defining "toll" or "rate" to mean and include "any toll, rate, charge or allowance charged or made either by the company . . . or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers," though in a special passenger tariff filed with the Board of Railway Commissioners such charge was stated to be a "fee" and to be made for the purpose of defraying the expenses of viséing the certificates.

Canadian Fraternal Association v. Canadian Passenger Association, 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

(§ II M 3—295)—Passes.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction, it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of the deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case, the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff. Held, that there was a presumption that deceased was lawfully on the passenger car, and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused

to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a fellow-servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law. [Judgment appealed from, 16 B.C.R. 113, affirmed; Nightingale v. Union Colliery Co., 35 S.C.R. 65, distinguished.]

British Columbia Electric R.W. Co. v. Wilkinson, 45 S.C.R. 263, 13 Can. Ry. Cas. 382.

(§ II M 3—296)—LIMITATION OF LIABILITY IN.

Deceased was employed in the defendants' workshops, and travelled to and from his work on a pass. The condition on the back of the pass, exempting the company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the company unless given transportation. The jury found as a fact that deceased was travelling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial Judge. Held, per Macdonald, C.J.A., and Galliher, J.A.:—That the finding as to want of knowledge of the condition on the pass should not be interfered with. Per Irving, J.A.:—That the finding was against the weight of evidence. Deceased, while travelling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow-servants in the employment of defendant company, but there was no other evidence of negligence. Held, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible. Appeal allowed, and verdict set aside.

Farmer v. The British Columbia Electric Railway Company, Limited, 16 B.C.R. 423.

(§ II M 6—317)—SHIPPER OF STOCK.

A contract exempting entirely a railway company from liability in respect of the death or injury of a passenger who is the holder of a ticket issued by the railway company, which ticket was sold at a reduced rate good for passage on a train conveying live stock belonging to the passenger, does not destroy all the liability of the railway company in "respect of the carriage of any traffic" and is therefore not a contravention of sec. 340, sub-sec. 1 of the Railway Act (Can.), where the exemption contracted for is restricted to the transportation of the passenger and not to the transportation of the live stock. [The Railway Act, R.S.C. 1906, ch. 37, secs. 2 (31) and 340, considered.]

Heller v. Grand Trunk R. Co., 2 D.L.R. 114, 3 O.W.N. 642, 21 O.W.R. 219, 25 O. L.R. 488.

O. Baggage or property of passenger.

(§ II O 5—365)—LIMITATION OF LIABILITY.

Where baggage is checked without extra charge upon an ordinary railway ticket and would ordinarly be forwarded upon the next passenger train, but the passenger who might have travelled by that train purposely delays his journey until a later train in the expectation that his baggage will have preceded him, the railway company is a gratuitous bailee and liable only for gross negligence as regards its custody of the baggage at the point of destination, after the time when it should have been claimed by the passenger, had he taken the earlier train. [See MacMurchy and Denison's Law of Railways, 1911 ed., p. 443 et seq.]

Carlisle v. Grand Trunk R. Co., 1 D. L.R. 130, 3 O.W.N. 510, 20 O.W.R. 860, 25 O.L.R. 372.

Q. Connecting carriers.

(§ II Q—369z)—CONNECTING CARRIERS —

A carrier by land, who receives goods to be forwarded by other carriers, is not liable, in the absence of notice of special cause for delivery within a given time, for damage arising from delay caused by congestion of traffic in the hands of the next succeeding carrier. [Clarke v. Holliday, Q.R. 39 S.C. 499, followed.] A stipulation in a bill of lading, by a carrier of goods to be forwarded by him and other carriers, limiting his liability to loss or injury caused by his own negligence, is valid and binding, though the shipper's attention is not specially drawn to it.

Ram v. Boston and Maine R. Co., 41 Que. S.C. 68, 13 Can. Ry. Cas. 370.

III. Carriers of freight.

A. In general; powers of agents.

(§ III A—370)—IN GENERAL — POWERS OF AGENT.

Plaintiff company, a British Columbia concern, sought from the defendant company's agent at Seattle, Wash., U.S.A., information as to the rate on plaster from a point in Kansas and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant company's contention) or to Vancouver, B.C.

(according to plaintiff company's contention), but a letter from an official of defendant company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shewn in giving the information. Held, on appeal, reversing the finding of the trial Judge, that an action of deceit did not lie in the circumstances. Held, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates. Held, further, that to entitle plaintiff company to succeed, the wrong complained of, having been committed in the State of Washington, must be shewn to be actionable in British Columbia as well. [Urquhart Co. v. Canadian Pacific R.W. Co., 2 Alta. L.R. 280, 12 Can. Ry. Cas. 500, disapproved of.]

Gillis Supply Co. v. Chicago, Milwaukee, and Puget Sound R.W. Co., 13 Can. Ry. Cas. 35, 16 B.C.R. 254.

B. Duty to receive and transport.

(§ III B—380) — DUTY TO RECEIVE AND TRANSPORT.

Application directing the respondent to furnish an adequate supply of cars suitably equipped for the carriage of fresh meat and packing house products and to disallow the increase in rates. The respondent neglected to supply cars with cross pieces in the top so that the shipper might hang his meat to hooks inserted in them. On the 3rd October, 1910, the respondent issued a tariff effective on 10th October, granting certain commodity rates on the commodities in question. This tariff remained in effect until 1st August, 1911, when a supplement was filed more than doubling the rates and raising the minimum C.L. weight from 17,000 to 20,000 lbs. It was said that these charges were made in error and that they should have been upon a mileage basis at 9 cents per 100 lbs. Held, 1. That suitable accommodation for carrying the traffic under section 284 of the Act included furnishing cross pieces in the top of the car for the shipper to put his hooks in for his meat. 2. That the tariff of 1st August, 1911, should be cancelled and the tariff of 10th October, 1910, reinstated and should remain in effect for at least one year, and during that time if the respondent can shew that the tariff is not fair or remunerative, an opportunity will be given it to increase the rates. 3. That the Board had no jurisdiction to order a refund.

Vancouver-Prince Rupert Meat Co. v. Great Northern Ry. Co., 13 Can. Ry. Cas. 15.

(§ III B—384)—RAILWAY IN COURSE OF CONSTRUCTION.

A railway company may rightfully carry as freight over a road that is in course of construction, for an independent contractor, who was building it, ordinary construction and camp supplies necessary to such work and, as passengers, it may also carry labourers for employment thereon. notwithstanding the road has not been opened for general traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

C. Loss of, or injury to, property.

(§ III C—385)—LOSS OF, OR INJURY TO, PROPERTY.

Plaintiffs having carried on business for over twenty-five years, and having shipped live stocks frequently, should have known of the conditions mentioned in the company defendant's bill of lading, and plaintiffs having failed to prove any fault or negligence on the part of the company defendant, the latter must be declared relieved of any responsibility for the loss of live stock in transit, under the terms of the bill of lading duly signed by plaintiffs.

Hatte et al. v. The Grand Trunk R. Co., 18 Rev. de Jur. 320.

The liability of common carriers under article 1674 C.C. begins only from the time of delivery of the goods, and when a shipper, for his own convenience, puts them himself on board the cars of a railway company, on a siding near his warehouse, the delivery to the company takes place when it seals the cars, or otherwise takes charge of them, and hands the shipper a bill of lading. It incurs no liability for loss from pilfering, etc., that occurs before that.

Spedding v. Grand Trunk R.W. Co., 13 Can. Ry. Cas. 46, 40 Que. S.C. 463, 10 East. L.R. 369.

(§ III C—387)—BY FREEZING.

Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a prima facie case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

Albo v. Great Northern R. Co., 2 D.L.R. 290, 20 W.L.R. 844, 17 B.C.R. 226.

(§ III C—388)—BY LACK OF PROPER REFRIGERATION.

Shipment of perishable goods in box car —Shipper's omission to order refrigerator car at higher rate.

Lessard v. Canadian Pacific R. Co., 7 D. L.R. 901.

D. Delivery by carrier; delay.

(§ III D 3—410)—MISDELIVERY—WRONGFUL DELIVERY.

A station-master, employed by the Crown

in the operation of the Intercolonial Railway, who. in the course of his employment, delivers goods to a stranger upon the mere assertion of ownership by the latter, without requiring any bill of lading or other satisfactory evidence of ownership, is guilty of negligence, damages for the loss of which is recoverable by the owner from the Crown in an action on the case, independent of any contract on which the cause of action is based, in any provincial Court having jurisdiction to the said amount by virtue of the Government Railway Small Claim Act, 9-10 Edw. VII. (Can.) ch. 26, sec. 2.

Williams v. Govt. Ry. Managing Board, 11 E.L.R. 10.

Where a shipper entrusted goods to a carrier for delivery to a consignee and the consignee refuses to accept the goods and on being informed thereof by the carrier, the shipper acquiesces in such refusal and instructs the carrier to return the goods immediately, the carrier is responsible for the value of such goods if he deliver them to another party, even if he does so on the consignee's order presented by a third party who holds himself out as the shipper's agent.

Zimmerman v. Canadian Pacific R. Co., 8 D.L.R. 990.

(§ III D 4—421)—INJURIES DUE TO DELAY.

Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

Albo v. Great Northern R. Co., 2 D.L.R. 290, 20 W.L.R. 844, 17 B.C.R. 226.

F. Carrying live stock.

(§ III F—439)—LIABILITY TO CARETAKER.

Where the general form of a shipping contract has been approved by the Board of Railway Commissioners of Canada and it provides for exemption of the railway from liability for personal injuries through negligence of the railway of a shipper of live stock under a ticket issued by the railway at half fare, permitting him to ride on the train on which the live stock was being carried for the purpose of looking after the same while in transit, such exemption will apply notwithstanding that the shipper signed the contract without reading the same over or knowing its contents.

Heller v. Grand Trunk R. Co., 2 D.L.R. 114. 3 O.W.N. 642, 21 O.W.R. 219, 25 O. L.R. 488, affirming Heller v. Grand Trunk R. Co., 25 O.L.R. 117, 13 Can. Ry. Cas. 363.

G. Stipulations as to liability.

(§ III G—441)—ASSENT BY SHIPPER; REDUCED RATE.

One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train at all, cannot be heard to deny that he is travelling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company. [Dicta in Goldstein v. C.P.R., 23 O.L.R. 536, followed; Robinson v. Grand Trunk R. Co., 5 D.L.R. 513, reversed.]

Robinson v. Grand Trunk R. Co., 8 D.L. R. 1002, 27 O.L.R. 290, 4 O.W.N. 309.

(§ III G 3—455)—AS TO AMOUNT.

The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Railway Commissioners of Canada, exercising governmental powers of supervision over common carriers.

Wilkinson v. Canadian Express Co., 7 D.L.R. 450, 4 O.W.N. 290.

H. Contract or duty to furnish cars.

(No cases.)

I. Demurrage on cars.

(§ III I—476)—REASONABLENESS OF CHARGE.

Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

Robinson v. Canadian Northern R. Co., 5 D.L.R. 716. 21 W.L.R. 916.

(§ III I—482)—UNDUE DETENTION.

Application by the Canadian Freight Association to revise the charges provided by the Car Service Rules with reference to refrigerator cars. The association proposed to leave the charge, as at present, for the first two days at $1.00 per car per day after the expiration of the 48 hours free time; but to charge for the next two days $3.00 per car per day or fraction thereof;

and for each succeeding day thereafter $4.00 per car per day or fraction thereof. With the object of obtaining the benefit of the cold or warm storage at the nominal charge of $1.00 per car per day until the contents of cars were disposed of, consignees have been holding perishable freight loaded in refrigerator cars very frequently from 10 to 15 days, commonly 20 days, and in various cases over a month. The said charge of $1.00 was cheaper than that in any other cold storage warehouse in Winnipeg or any other city in the west. Held, 1. That cars were transportation facilities, not a portion of the warehousing premises of the consignee leased from a railway at a nominal rental. 2. That such undue detention of cars for storage purposes was contrary to the public interest and a hardship where refrigerator cars were required. 3. That section 6 of the bill of lading in use by carriers should be sufficient to enable them to deal with the matter. 4. That though it appeared that a grievance existed, the Board should not take any action or make any direction until it was affirmatively shewn that the matter could not be adequately dealt with under the said section.

Canadian Freight Association v. Winnipeg Board of Trade and Canadian Manufacturers' Association, 13 Can. Ry. Cas. 122.

J. Connecting carriers.

(§ III J—486) — EQUIPMENT OF FREIGHT CARS.

Notwithstanding that sec. 261 (1) of the Railway Act requires every railway company to provide cars with couplers coupling by impact, that can be uncoupled without the necessity of men going between the ends of cars, the fact that a car, which in the interchange of traffic, under sec. 317 of the Railway Act, was received from and was owned by a railway company operating in the United States, had an operating lever on its coupling device which was shorter than those on cars owned by the defendant, is not a defect so as to render the defendant liable for injuries sustained by a brakeman while attempting to couple it, since cars with short levers were constantly being received and passed in the ordinary course of inspection.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

(§ III J 1—499)—RIGHT TO BENEFIT OF SHIPPER'S CONTRACT WITH OTHER CARRIER.

A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and re-forward it by express may claim damages for its loss in transit while in their custody as upon the company's common law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in terms made between the express company and the railway company only and its provisions were not communicated to the owner of the baggage. [But see Edwards v. Sherratt, 1 East. 604; Lohden v. Calder, 14 Times L.R. 311; Hayward v. Canadian Northern R. Co., 6 Can. Ry. Cas. 411; Mercer v. C.P.R., 8 Can. Ry. Cas. 372.]

Wilkinson v. Canadian Express Co., 7 D.L.R. 450, 4 O.W.N. 290.

IV. Governmental control; rates; discrimination; duty as to stopping places.

A. In general.

(§ IV A—518b)—EQUIPMENT OF CARS.

Sub-sec. 5 of sec. 264 of the Railway Act which requires "all box freight cars of [a railway] company" to be equipped with outside ladders on the ends and sides thereof, applies only to cars owned by the defendant company and not to those of a railway company operating in the United States, that were received by the defendant in interchange of traffic under sec. 317 of the Railway Act.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

A railway company, as carriers, must furnish equipment reasonably suitable for carrying the traffic of the shipper. In each case it is a question of fact whether the particular equipment is or is not suitable for carrying the particular traffic that is offered. And in this case, where the complaint was, that a sufficient number of suitable cars were not furnished for the shipping of meat, the board found as a fact that "suitable accommodation" included the furnishing of cars with crosspieces at the top for the shippers to put their hooks on for their meat; and that the complaining shippers were not furnished with enough cars of that kind; and an order was made requiring the company to provide cars accordingly. If the carrier is required, under the law, to furnish a higher or more expensive class of equipment for carrying a certain kind of traffic than for another, the law intends that the extra expense shall be provided for in the rate that is obtained. On the 3rd October, 1910, the railway company issued a tariff of rates upon shipments of meat; the tariff went into effect and traffic moved under it. It remained in effect from October, 1910, until the 1st August, 1911, when a supplementary tariff was filed, under which the rates were more than doubled. It was held, upon a complaint of shippers, that, as the railway company had not given any evidence to shew that the old tariff was not remunerative, an order should be made cancelling the new tariff, and directing the railway company

to reinstate the old one, which should remain in effect for at least a year. The board has no jurisdiction to order rebates of any kind.

Vancouver and Prince Rupert Meat Co. v. Great Northern R. Co., 20 W.L.R. 625.

(§ IV A—519)—Board of Railway Commissioners—Jurisdiction — Orders.

It is within the power of the Railway Board under the provisions of the Railway Act, R.S.C. ch. 37, to authorize a contract relieving the company from liability to one travelling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise.

Robinson v. Grand Trunk R. Co., 8 D.L.R. 1002, 27 O.L.R. 290, 4 O.W.N. 309.

Power of Board of Railway Commissioners—Construction and location of railway—Condition as to compensating abutting owners—Ultra vires—Rescission of order of board.

Grand Trunk Pacific R. Co. v. Landowners, etc., Fort William, [1912] A.C. 224, 1911 C.A.D., col. 389.

Upon the proper construction of subsection 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Ontario Railway and Municipal Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the railways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit. (Per Magee, J.A.; Meredith, J.A., contra.)

Re City of Toronto and Toronto R. Co., 3 D.L.R. 561, 3 O.W.N. 1021, 21 O.W.R. 723.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on the application under section 226 of the Railway Act (R.S.C. 1906, ch. 37), to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. [Blackwoods Limited v. The Canadian Northern Railway Co. (44 Can. S.C.R. 92), applied, Duff, J., dissenting.]

Clover Bar Coal Co. v. Humberstone, Grand Trunk Pacific R.W. and Clover Bar Sand and Gravel Cos., 13 Can. Ry. Cas. 162, 45 Can. S.C.R. 346.

Where, under sub-section 6, of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch., 30, the Railway and Municipal Board makes an order declaring that section 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and, in fact, made.

Re City of Toronto and Toronto R. Co., 3 D.L.R. 561, 3 O.W.N. 1021, 21 O.W.R. 723.

Where a railway company had been carrying passengers over a newly constructed road that had not been opened for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, the Board will refuse to make any order directing the company to open the road for traffic on that account, but will forbid the company from continuing to carry passengers except under the provisions of the Railway Act.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

The Board of Railway Commissioners cannot compel a railway company to open and operate for passenger and freight traffic a newly constructed road, as the determination as to when it shall be opened for traffic rests solely with the railway company.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

A special order of the Board of Railway Commissioners, under sub-sec. (g) of sec. 30, ch. 37, R.S.C. 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C.P.R., is not abrogated by a subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab.

Clark v. Canadian Pacific R. Co., 2 D.L.R. 331, 20 W.L.R. 877.

A general order of the Board of Railway Commissioners, under sub-sec. (g), sec. 30, ch. 37, R.S.C. 1906, providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate

the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C.P.R. to maintain its stand pipes at a lesser distance. [Kutner v. Phillips, [1891] 2 Q.B. 267, specially referred to.]

Clark v. Canadian Pacific R. Co., 2 D.L.R. 331, 20 W.L.R. 877.

Upon evidence brought before the Board of Railway Commissioners, it was held, that the applicant had been overcharged 60 cents upon a shipment of goods; but the board had no jurisdiction to order a refund, and could do no more than find that an overcharge had been made. The board declined to order the railway company to reimburse the applicant the expense that he had been put to in coming before the board and establishing the overcharge; but intimated that it might be necessary at some future time to make a precedent, if railway companies do not take steps to rectify palpable errors.

Currie v. Canadian Pacific R. Co., 20 W.L.R. 638.

The board has no jurisdiction to order a reduction in rates for the carriage of oil or other goods from initial points in the United States. [Discussion of question of discrimination in commodity rates.]

Continental Oil Co. v. Canadian Pacific R. Co., 21 W.L.R. 633.

B. Compulsory connection and interchange of business; discrimination between carriers, hackmen, etc.; through rates.

(§ IV B—520)—SIDE-HAUL TOLL—DISCRIMINATION.

Wylie Milling Co. v. C.P.R., 8 D.L.R. 953.

(§ IV B—521)—CONNECTION SWITCHES—INTERCHANGE OF TRAFFIC.

The Railway Commission may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipment no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

Marchand Sand Co. v. Canadian Pacific R. Co., 8 D.L.R. 73, 22 W.L.R. 448.

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, does not apply to a railway owned by a municipal corporation. (Per Magee, J.A.)

Re City of Toronto and Toronto R. Co., 3 D.L.R. 561, 3 O.W.N. 1021, 21 O.W.R. 723.

Sub-section 4 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30. applies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways.

Re City of Toronto and Toronto R. Co., 3 D.L.R. 561, 3 O.W.N. 1021, 21 O.W.R. 723.

(§ IV A—521a) — CONSTRUCTION OF SIDE TRACKS.

Distance apart — Convenience of shipper —Hardship on railway—Order of Board of Railway Commissioners.

Re Pheasant Point Farmers and Canadian Pacific R. Co., 7 D.L.R. 887, 21 W.L.R. 381.

(§ IV B—522)—THROUGH RATES.

The Board of Railway Commissioners is without jurisdiction to require carriers of express from points within the United States to Canadian points to join with a Canadian express carrier in the establishment of joint through tariffs on traffic originating in such foreign country.

Stockton and Mallinson v. Dominion Express Company, 3 D.L.R. 848.

The Board of Railway Commissioners cannot, without the concurrence of the foreign express company, require the re-establishment of a joint through tariff on express traffic between points in the United States and Canadian points.

Stockton and Mallinson, v. Dominion Express Company, 3 D.L.R. 848.

(§ IV B—524)—BETWEEN HACKS, CARRIAGES, ETC.

Application directing the respondent to order its agent at South Saskatchewan to cease unjust discrimination against the applicant in preventing him, by placing obstacles in his way, from soliciting and obtaining passengers for his bus line. The respondent's station agent had refused to allow the applicant to back up to the station platform so as to meet passengers conveniently, particularly in the wet weather, even when he had made arrangements to meet certain parties. The applicant was convicted as a trespasser for creating a noise and disturbance on the platform shouting for passengers and disobeying the orders of the station agent. The respondent had made an exclusive contract with the Saskatoon Forwarding Company to carry incoming passengers from its South Saskatoon station to Saskatoon. The assistant solicitor of the respondent wrote to the board that the railway company insisted that the applicant keep off their railway premises as soon as he had delivered his passengers for outgoing trains. Held, (1) That under sec. 317 of the Railway Act all railway companies were required to afford to all persons reasonable and proper facilities for receiving traffic (passengers). (2) That it was the right and duty of the respondent to make reasonable regulations respecting the conveyance of passengers to and from its trains and platforms. (3) That the re-

spondent had absolute control over the conduct of people on its platforms and on its grounds and to direct where conveyances should stand awaiting passengers. (4) That it was not open to the respondent to enter into an exclusive contract for the conveyance of passengers from its station. (5) That the applicant must be granted substantially equal privileges with any other cab or hack driver for receiving traffic from incoming trains. (6) That the respondent should be restrained from unjustly discriminating in favour of the Saskatoon Forwarding Company or any other transportation agency as against the applicant. [South Western Produce Distributors v. Wabash R. Co., 20 Interstate Commerce R., 458; Donovan v. Pennsylvania R. Co., 199 U.S. 279, distinguished.]

Purcell v Grand Trunk Pacific R. Co., 13 Can. Ry. Cas. 194, 21 W.L.R. 638.

C. Rates; discrimination between passengers or shippers; rebates; passes.

(§ IV C—527)—POSTING OR FILING RATES.

A uniform charge of twenty-five cents included in a tariff of passenger tolls as a special charge to be added to single first-class fare on the sale of excursion or return tickets at single fare plus twenty-five cents, sold in connection with conventions and payable on viséing the tickets for free return, is not objectionable as a discrimination because of such extra charge being payable in respect of transportation for any distance within the excursion radius, and, where the total charge to the passenger is less than the authorized tariff allows for regular rates, the Board of Railway Commissioners will not interfere to annul or vary the visé charge.

Canadian Fraternal Association v. Canadian Passenger Association, 5 D.L.R. 171. 13 Can. Ry. Cas. 178.

Notwithstanding sec. 336 of the Railway Act requires joint tariffs to be filed covering all traffic carried from foreign countries into Canada, the Board of Railway Commissioners cannot require the initial carrier to file such tariffs.

Stockton and Mallinson v. Dominion Express Company, 3 D.L.R. 848.

(§ IV C—529)—OVERCHARGE REFUND.

Application for a refund of an overcharge on the transportation by water of a shipment of carbide from Vancouver to Alberni, B.C., and for a reimbursement of expense in obtaining redress. Held, 1. That the Board had jurisdiction under section 7 of the Act, over the charges for transportation by water when such transport is under the control of a railway company. 2, That the Board could only declare the overcharge illegal, having no jurisdiction to order a refund in a case of mistake. 3. That the Board has not set a precedent by ordering reimbursement of expense in obtaining redress, but that means should be adopted by railway companies to rectify plain and palpable errors leading to overcharges and that if this is not done it may be necessary for the Board to compel railway companies to reimburse those incurring expense in similar cases.

Currie v. Canadian Pacific Ry. Co., 13 Can. Ry. Cas. 31.

(§ IV C 2—530)—POWER TO FIX RATES; MILEAGE CHARGES.

The railway companies for many years had had, in effect, special tariffs covering the weighing of car-load traffic, containing provisions for the benefit of shippers whereby certain allowances were made from the weight recorded by the track scales. By new tariffs filed, the railway companies proposed to do away with allowances for blocking, dunnage and temporary racks used in connection with the bulk of the freight shipments in cars covered by these tariffs. Shippers objected to these proposals; and the board heard evidence directed to the questions whether it was fair that the railway companies should modify these regulations in whole or in part, and whether the working thereof in the past had operated reasonably, or whether, under existing conditions, undue burdens were placed upon the carriers by reason of these provisions:—It was held, that the allowances should be revised; but before the board would attempt to express an opinion as to what practice should be established and what allowances made, there should be a conference between the shippers and carriers; when these revisions were made by the carriers, it was without discussion with the shippers and without notice to them; if the matters could not be adjusted, the board would, either upon the material now before it, or upon further hearing and evidence, dispose of all matters that the parties themselves should be unable to adjust. The track scale allowances made by the railway companies in the past were upon a liberal scale; and the board would expect the shippers to deal liberally and fairly with the railway companies in any reasonable attempt made by the latter to put these allowances upon a fairer basis. But some arrangement must be made with reference to allowances for snow and ice other than that suggested by the companies. The board made an order postponing the effective date of the British Columbia tariff until the shippers there should have an opportunity of presenting their views to the board.

Canadian Manufacturers' Association v. Canadian Freight Association, 20 W.L.R. 614.

Application directing the respondents to continue the allowances for blocking, dunnage and temporary racks and that the railway companies' weighmen should not be allowed to estimate by guesswork the allowances to cover the weight of accumulated ice, snow or refuse, which may be in or

upon the car. The respondents, who had for many years made certain allowances from track scale weights to rectify any variation in the tare of cars or increased weight thereof caused by reason of the absorption of moisture and the accumulation of snow, ice and refuse, filed new tariffs doing away with the former allowances for blocking, dunnage and temporary racks. The question for consideration was whether these regulations should be modified by the carriers, and whether in the past they had been reasonable or burdensome upon them. Held, 1. That although the weighing system had been much improved, if some arbitrary allowance could not be agreed upon between the parties for the accumulation of snow, ice and refuse, some other system would have to be devised than that proposed. 2. That before the proposed tariffs were made effective the applicants and respondents should have a further conference and then the Board would dispose of all matters the parties had been unable to adjust.

Canadian Manufacturers,' Canadian and Montreal Lumbermen's Associations v. Canadian Freight Association and Railway Companies, 13 Can. Ry. Cas. 3.

Gramophones and graphophones are "musical instruments" and therefore may be shipped over Canadian railways in mixed car load lots with pianos and other musical instruments at the general carload rate applicable to musical instruments generally under the tariff of tolls fixed by the Canadian freight classification with the approval of the Railway Commission.

Re The Berliner Gramophone Co., 3 D.L.R. 496.

As a railway company is entitled to earn a fair and reasonable return upon the money invested in it, the Board of Railway Commissioners will not reduce the freight and passenger tolls where the results would be an annual deficit to a company, whose net earnings under existing tolls, permitted a dividend of but one per cent. upon its outstanding stock.

Dawson Board of Trade v. White Pass and Yukon R. Co., 2 D.L.R. 532, 21 W.L. R. 7.

Improper inflation of the stock of a railway company, which is all held by the original builders of the road, may be taken into consideration by the Board of Railway Commissioners in determining whether a reduction of its freight and passenger tolls would permit fair and reasonable earnings upon the money actually invested.

Dawson Board of Trade v. White Pass and Yukon R. Co., 2 D.L.R. 532, 21 W.L. R. 7.

The fact that, in the past, the stockholders of a railway company have received back in stock and cash dividends all of their original investment will not justify a reduction by the Board of Railway Commissioners of the freight and passenger tolls which would, with its present earnings, result in a deficit.

Dawson Board of Trade v. White Pass and Yukon R. Co., 2 D.L.R. 532, 21 W.L. R. 7.

The Board of Railway Commissioners is without jurisdiction to extend a formerly existing tariff on express traffic between points in the United States and Canada so as to apply to points in the United States to which it was not formerly applicable.

Stockton and Mallinson v. Dominion Express Company, 3 D.L.R. 848.

Power of Board of Railway Commissioners to fix express rates—Revising local tariff on cream—Former orders.

Re Dominion and Canadian Northern Express Co., 7 D.L.R. 868, 22 W.L.R. 36.

An agreement between a provincial railway company and a shipper for a rebate of tolls for carrying the latter's goods is only a contravention of art. 5172, R.S.Q. 1888 (art. 6607 et seq. R.S.Q. 1909) if it involves an advantage or undue privilege. Hence, if it is given on special conditions, for example, that the shipper shall give to the company for carriage all the goods he manufactures himself paying the charges both of loading and discharging, etc., the agreement will be deemed valid until it is proved that an injustice results therefrom. The directors of the company have power to enter into such an agreement without special authorization from the shareholders.

Kennedy v. Quebec and Lake St. John Railway Co., Q.R. 21 K.B. 85, reversing 39 S.C. 344.

The Board of Railway Commissioners has no authority under the Railway Act, R.S.C. 1906, ch. 37, to compel a railway company issuing tickets at special rates to 300 people or more to offer such privilege to a less number.

Canadian Fraternal Association v. Canadian Passenger Association. 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

The Board of Railway Commissioners has no jurisdiction to compel railway companies to make special excursion rates.

Canadian Fraternal Association v. Canadian Passenger Association, 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

(§ IV C 3—535) — REASONABLENESS OF RATES.

Notwithstanding the Board of Railway Commissioners cannot require a foreign express company to file or concur in a joint tariff on traffic originating in the United States for Canadian points, if they do concur with a Canadian express carrier in a joint through tariff that is fair and reasonable, the latter may be required to file it.

Stockton and Mallinson v. Dominion Express Company, 3 D.L.R. 848.

The Board of Railway Commissioners

cannot require the re-instatement of a joint through tariff that formerly existed on express traffic from points in the United States to Canadian points, so as to apply to points in Canada to which it was not formerly applicable, where the reasonableness of the rate to the new point is not shewn and the foreign carrier did not concur therein, as, in order to do so, it would be necessary to impose the cost of the additional haul upon the Canadian carrier, which would be unfair, as no portion thereof could be imposed by the Board upon the foreign carrier.

Stockton and Mallinson v. Dominion Express Company, 3 D.L.R. 848.

Application under section 323 of the Railway Act to disallow the proposed increase in the tolls on hay shipped from Ontario and Quebec to certain points in the United States. The respondent had increased the toll 2 cents per 100 lbs. making the local and export tolls equal. The respondent submitted that the old tariff was not fairly remunerative when the nature of the service and the conditions under which it was rendered was taken into account and that the following conspicuous peculiarities distinguish this from other traffic: (1) movement spasmodic, not capable of being foreseen and not occurring with any regularity as to volume; (2) movement affected by usages of the trade and lack of terminal facilities at the chief markets of the United States, resulting in extreme detention of cars and their diversion to remote places. It was also submitted that there had been a great and unforeseen increase in the cost of construction and operation. Held, 1. That the points urged were factors that might properly be considered in making commodity rates but were not reasons for increasing the rates already established with the knowledge possessed by the framers of traffic conditions. 2. That the volume of general traffic had increased almost pari passu with the increase in the cost of construction and operation. 3. That the present tolls were fairly remunerative and all that the traffic can bear. 4. That all the tariff increases should be disallowed, the respondents not having justified them.

Montreal Hay Shippers' Association v. Canadian Freight Association, 13 Can. Ry. Cas. 142.

Dominion Railway Board ordered that the freight rate on binder twine, from Auburn, in U.S.A. to points in Canada, less two cents, should be the maximum rate to Welland, the present rate being unreasonable.

Welland v. Canadian Freight Association, 13 Can. Ry. Cas. 140, 22 O.W.R. 260.

(§ IV C 3—537) — EXPERIMENTAL TOLLS — DEVELOPMENT OF BUSINESS.

It is not the function of the Railway Board to order experimental tolls, against the objection of the carrier, with a view to develop business, but the Board is to deal with the reasonableness of the transportation charges, recognizing the right of the carrier to a reasonable profit. [Florida Fruit Co. v. A.C.L. R. Co., 17 I.C.C.R. 560, specially referred to.]

British Columbia News Co. v. Express Traffic Association, 4 D.L.R. 239, 21 W.L.R. 5.

(§ IV C 4—540)—DISCRIMINATION; REBATE; PASSES.

Application that the tolls charged were unjustly discriminatory and that they should be reduced, being unreasonable per se. The applicant submitted that the existing commodity or fifth-class rate from Auburn in the United States to points in Canada, less two cents, should be the maximum subject to the qualification that when the rates from Welland, Ontario, to shorter distance points were less than the Auburn rate they should apply as maxima. It was alleged by the respondent and admitted by the applicant that there was no movement of binder twine from Auburn into Canada. Held, 1. (Mr. Commissioner McLean):—That since the rate from Auburn was only a paper rate there could be no competition and no unjust discrimination. 2. Held, however (the Chief Commissioner and Mr. Commissioner Mills):—That the toll was unreasonable and the Auburn rate less two cents should be applied.

Town of Welland v. Canadian Freight Association, 13 Can. Ry. Cas. 140, 22 O.W. R. 260.

Complaint of unjust discrimination against the respondent, alleging that the tolls for export from Routhier and other points north of Nomining to Montreal are excessive and bear a higher proportion to the locals from points north of Nomining than from points south of it. Held, that the export tolls at Montreal from Loranger, Hebert and Campeau must be reduced to 5 cents and from Routhier and Mont Laurier to 6 cents and a tariff to that effect filed. [Canadian Lumbermen's Association v. Grand Trunk and Canadian Pacific Ry. Cos. [Export Tolls on Lumber (No. 2)], 11 Can. Ry. Cas. 344, referred to.]

Cox & Co. v. Canadian Pacific Ry. Co., 13 Can. Ry. Cas. 20, 10 East. L.R. 379.

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondent was, in effect, that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust dis-

crimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada:—Held, that the facts mentioned are circumstances and conditions, within the meaning of the Railway Act to be considered by the Board of Railway Commissioners in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion. [Cf. The Montreal Park and Island R.W. Co. v. The City of Montreal, 43 Can. S.C.R. 256; Regina Board of Trade v. Canadian Pacific and Canadian Northern R.W. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 380, affirmed.]

Canadian Pacific and Canadian Northern R. Cos. v. Regina Board of Trade, 13 Can. Ry Cas. 203, 45 Can. S.C.R. 321.

Express companies applied for leave to withdraw and cancel sec. D of the Can. Ry. Classification No. 2, on the ground that shippers of other classes of goods were unjustly discriminated against in favour of shippers under above sec. D, and for an order extending sec. D to any weight up to $10 in value. Section D was framed by the applicants to meet competition of the Post Office parcel post rate. The respondents contended that sec. D should apply to any weight up to $10 in value, although the P.O. Department only competed up to 5 lbs. in weight. Dominion Railway Board held that by conference between officials of Canadian and American express companies sec. D had been placed upon the international classification applying to traffic between Canada and United States and vice versa, and it should not be removed without affirmative evidence that it was not profitable to the express companies. That there was no undue discrimination because it was not caused by any initiative of the express companies, but if sec. D were removed there might be injury to shippers in Canada by very much lower rate being charged on traffic originating in U.S.A. and coming into Canada in the same cars as used by Canadian shippers. That the Board has no jurisdiction to order express companies to compete with the P.O. Department, that matter is optional on the part of the express companies.

Express Traffic Association v. Canadian Manufacturers Association and Boards of Trade of Toronto, Montreal and Winnipeg, 13 Can. Ry. Cas. 169, 22 O.W.R. 262.

Application to withdraw and cancel section D of Canadian Railway Classification (C.R.C.) No. 2, on the ground that shippers of other classes of commodities were unjustly discriminated against in favour of the shippers of commodities under section D and application by the respondents that section D should be extended to any weight up to $10 in value. The applicants framed section D of C.R.C. No. 2 to meet the competition of the Post Office Department upon a large quantity of commodities. The respondents submitted that section D should apply to any weight up to $10 in value although the Post Office Department competed only up to five pounds in weight. By conference between officers representing the express companies of Canada and the United States section D was placed in the International Classification applying to traffic carried to common points between Canada and the United States and vice versa. Held, 1. That the said section should remain in the classification and should not be eliminated. 2. That the discrimination was not undue because it was not caused by any initiative of the express companies. 3. That under the exceptional circumstances, the scale of rates should not be removed without affirmative evidence that it was not profitable to the express companies carrying that class of traffic. 4. That if section D was eliminated, shippers in Canada might be injured by very much lower rates being charged on traffic originating at points in the United States coming to Canadian common points and in the same car. 5. That it was optional with the express companies to meet the reduced rates introduced by the Post Office Department or not, and the Board had no jurisdiction to order them to carry traffic in competition with the department.

Express Traffic Association v. Canadian Manufacturers Association and Boards of Trade of Toronto, Montreal and Winnipeg, 13 Can. Ry. Cas. 169, 22 O.W.R. 262.

Application directing the respondents to reduce their commodity rate on oil and its products from 35 cents per hundred pounds to 22 cents from basing points in the United States, St. Paul, etc., to Winnipeg or a proportionate reduction to points beyond Winnipeg in Manitoba, Saskatchewan and Alberta not to exceed the rates from Fort William to the same points. The commodity rate from the basing points in the United States, St. Paul, etc., and from those in Canada, Fort William and Port Arthur to Winnipeg, is 35 cents per hundred pounds, through competition, but from the Canadian basing points to other points in Manitoba, Saskatchewan and Alberta it is lower than from those in the United States. The applicants submitted that the commodity rate from St. Paul should be lowered or the rate from Fort William raised so that a proportionate reduction would result in their favour to western points beyond Winnipeg as against traffic via Fort William, presumably in competition with oil refiners in Eastern Canada. The respondents submitted that such a reduction or raising of rates to Winnipeg and points west thereof would be unjust discrim-

ination in favour of the applicants and would divert the traffic to foreign competing railways. The respondents further submitted that they were enabled to lower these rates because a single line haul for substantially similar distances has advantages over a two or more line haul, its net revenue is a unit coming to it alone, while in the latter case the net revenue must be subdivided between the participants in the carriage. Held, that the Board had no jurisdiction to order a reduction in rates from initial points in the United States and the application must be dismissed: Canadian Northern Ry. Co. v. Grand Trunk and Canadian Pacific Ry. Cos. (Muskoka Rates (No. 2). 10 Can. Ry. Cas. 139, at pp. 147, 148, followed.

Continental, Prairie and Winnipeg Oil Cos. v. Canadian Pacific, Canadian Northern, Minnesota, St. Paul and Sault Ste. Marie, Great Northern and Northern Pacific Ry. Cos., 13 Can. Ry. Cas. 156.

(§ IV C 4—542a)—COMPETITION; DISSIMILAR CONDITIONS.

It constitutes an unlawful preference and discrimination, under sec. 317 of the Railway Act, for a railway company to carry for an independent contractor over a road he is constructing which had not yet been opened to the public for traffic by an order of the Board of Railway Commissioners under sec. 261 of the Railway Act, camp and contractor's supplies other than those actually necessary for the construction of the road, to be sold by the contractor for his own benefit.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

The fact that the officers of a railway company that gave a contractor, who was building it, a preference in the transportation of freight over the road before it was opened for traffic to the public by an order of the Board of Railway Commissioners, under sec. 261 of the Railway Act, did not have knowledge that the goods transported were being sold by the contractor for his own benefit, or that they were not camp and contractor's supplies necessary for the construction of the road, will not relieve the company from the charge of giving an unlawful preference under sec. 317 of the Act, where no attempt was made by them to ascertain if the goods transported were actually necessary to the construction of the road.

Re Grand Trunk Pacific Railway Co., 3 D.L.R. 819.

(§ IV C 4—545) — EXPRESS AND C.O.D. CHARGES.

It is an unjust discrimination against a shipper, as well as an excessive charge, for an express company to remit money collected on a C.O.D. shipment to the shipper by an express money order instead of sending him the money therefor, and to exact for such service the regular merchandise C.O.D. rate which was greatly in excess of that chargeable for the money order.

Boyes v. Dominion Express Co., 4 D.L.R. 653, 21 W.L.R. 389.

D. Duty as to depots; stopping trains; duty to run trains.

(§ IV D—550)—DUTY AS TO DEPOTS; STOPPING TRAINS; DUTY AS TO STOPPING PLACES.

Board of Railway Commissioners—Regulation of location of stations and sidings—Railways exploiting townsite—Disregard of public convenience.

Re Cutknife Stations, 7 D.L.R. 844, 21 W.L.R. 382.

The Board of Railway Commissioners, on fixing the location for a railway station on the Transcontinental Railway at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out.

Kelly v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 303, 21 W.L.R. 810.

Governmental regulation—Location of station—Engineering difficulties—Public convenience.

Re South Hazelton, 8 D.L.R. 1036, 22 W. L.R. 445.

Governmental regulation—Erection of station—Contradictory evidence—Board of Railway Commissioners.

Re Druid Station, 7 D.L.R. 884, 21 W.L.R. 813.

Governmental regulation as to erection of station—Board of Railway Commissioners—Approval of works constructed in contravention of the Railway Act.

Re Grand Trunk Pacific Branch Lines, 7 D.L.R. 885, 21 W.L.R. 379.

The railway commission may, if it sees fit, order a railway company to maintain at a flag station a caretaker to receive, protect and deliver freight, express goods and mail bags.

Rutter Station Patrons v. Canadian Pacific R. Co. (Rutter Station Case), 8 D.L.R. 711, 14 Can. Ry. Cas. 1.

The board will not require the establishment of a station within two or three miles of another one. In this case the board declined to interfere with the location of stations proposed by a railway company.

Eby v. Grand Trunk Pacific R. Co., 20 W.L.R. 629.

(§ IV D—555)—REGULATION OF REFRIGERATION CARS; RATES.

Upon an application by the Canadian Freight Association to revise the charges provided by the Car Service Rules with respect to refrigerator cars, the chief complaint was as to the detention of the cars

by consignees. Held, that no order could be made until it was affirmatively shewn that the provisions of sec. 6 of the form of bill of lading authorised by the order of the Board No. 7562, of the 15th July, 1909, were insufficient to furnish a remedy for the grievance. Semble, that, if it is shewn that sec. 6 is inadequate for the purpose, there is sufficient of a grievance to warrant an increase of charges on refrigerator cars detained more than two days over the authorised free time.

Canadian Freight Association v. Winnipeg Board of Trade and Canadian Manufactures' Association, 21 W.L.R. 646.

(§ IV E—561)—POWER OF RAILWAY COMMISSION TO RESTRICT LIABILITY.

The power of the Dominion Railway Commission under sec. 340 of the Railway Act to sanction a form of shipping contract impairing, restricting or limiting the liability of the railway company, includes the power to sanction a contract whereby the liability which would otherwise arise would be entirely destroyed or abrogated. Per Riddell, J. [The Railway Act, R.S.C. 1906, ch. 37, sec. 340, considered.]

Heller v. Grand Trunk Ry. Co., 2 D.L.R. 114. 3 O.W.N. 642, 25 O.L.R. 488, 21 O.W.R. 219.

CARRYING WEAPONS.

Carrying of concealed weapons, see Concealed Weapons.

Forfeiture of weapons unlawfully carried, see Forfeiture.

Effect of carrying weapon contrary to law on right to use in self-defence, see Homicide.

CEMETERIES.

Interference with bodies in, see Corpse.

Ejectment to obtain possession of, see Ejectment.

Right to compensation for location of, near property, see Eminent Domain.

Enjoining persons from interfering with, see Injunction.

CENSUS.

Census returns as evidence, see Evidence.

CERTIORARI.

I. JURISDICTION; USE OF WRIT GENERALLY.
- A. In general.
- B. Existence of other remedy.

II. PROCEDURE; HEARING DETERMINATION.

Order protecting magistrates, see Justices of the Peace, II.

I. Jurisdiction; use of writ generally.

A. In general.

(§ I A—1) — JURISDICTION; USE OF WRIT GENERALLY.

A Circuit Court in the Province of Quebec has no jurisdiction to issue a writ of certiorari in respect of a charge of assault heard before justices of the peace.

Dion v. Champagne, 18 Can. Cr. Cas. 489, 13 Que. P.R. 36.

An objection to a summary conviction that the same is made under a statute or part of a statute, claimed to be no longer effective because of subsequent legislation, is properly raised by a certiorari proceeding.

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495.

(§ I—2)—TO REVIEW OF JUDICIAL DECISIONS.

The Court on certiorari will not exercise its judgment upon the credit or weight due to the facts from which the magistrate's conclusion was drawn if such facts would be sufficient to be left to a jury on a trial.

The King v. Kolotyla, 19 Can. Cr. Cas. 25, 17 W.L.R. 640, 21 Man. L.R. 197.

The order of a County Court Judge upon review, under C.S. 1903, ch. 122, is final, if within his jurisdiction.

The King v. Wedderburn; Ex P. Carnwath, 40 N.B.R. 285.

(§ I A—3)—IN CRIMINAL CASE.

Accused was convicted before a police magistrate for a city of over 5,000 inhabitants of an offence over which the magistrate had jurisdiction only by consent. The record stated "accused consents to jurisdiction and pleads not guilty," and the conviction "the accused having consented to jurisdiction." The accused denied that she had been informed of her right, but the magistrate filed an affidavit, corroborated by the chief constable, shewing that the necessary preliminaries had been taken. On motion to quash the conviction:—Held, before the magistrate has jurisdiction to try the accused there must be at least a substantial compliance with the provision of sec. 778 of the Criminal Code. 2. In considering whether these provisions were complied with, the record is the only evidence that can be considered in support of the conviction, and affidavits cannot be received for that purpose. 3. Such proceedings must shew on their face that jurisdiction has been acquired, and the simple statement, "the accused consents to jurisdiction," does not sufficiently shew what steps were taken by the magistrate to acquire jurisdiction. 4. Nothing should be inferred in support of the jurisdiction of an inferior Court. 5. The Crown having asked for leave to begin de novo, such leave should be granted.

Rex v. Crooks, 4 S.L.R. 335.

(§ I A—9)—INTOXICATING LIQUOR CASES.

Failure to prove that notice of cancellation of the license has been given in conformity with the Licensing Act, R.S. Que. 1909, sec. 1077, constitutes a serious irregularity which will warrant the issue of a writ of certiorari.

Metropole Co. v. Recorder's Court, 18 Can. Cr. Cas. 492.

Where an information under the Canada Temperance Act was laid within three months after the offence, but no summons was issued thereon for a year and fourteen days after information laid:—Held (per Barker, C.J., Landry, White and Barry, JJ., McLeod and McKeown, JJ., dissenting), that the delay in issuing summons did not deprive the magistrate of jurisdiction. The magistrate issued his summons upon an information alleging only information and belief without previously examining witnesses, and, upon proof that the summons had been duly served, and the failure of the defendant to appear, he issued a warrant, upon which the defendant was arrested and brought to trial. Upon certiorari:—Held, per Barker, C.J., Landry, White and Barry, JJ.:—The conviction is good even though the warrant was improperly issued. Per Barker, C.J., Landry and White, JJ.:—The warrant is good because no sworn information is necessary where defendant disobeys a summons. Per Barry J.:—The warrant is bad because a sworn information is necessary and where no witnesses are examined the information must contain a positive statement that an offence was committed.

The King v. Peck; Ex parte O'Neill, 40 N.B.R. 339.

The Court refused to set aside a search warrant issued under the Canada Temperance Act where the informant's grounds of suspicion were written on a separate piece of paper attached to the information, but not initialled.

The King v. Wilson; Ex parte Harrington et al, 40 N.B.R. 384.

A conviction for selling liquor or keeping liquor for sale in contravention of a local option municipal by-law prohibiting the issue of liquor licenses is a conviction under the Liquor License Act for selling or keeping for sale "without a license," and is subject to the same limitations as to review on certiorari and habeas corpus as a conviction against a non-licensee in a district in which licenses are issued.

Re Leach and Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

II. Procedure; hearing determination.

(§ II—20)—AMENDMENT OF CONVICTION.

The word "justice" is to be construed in sec. 1124 of the Criminal Code 1906 in a different manner from the words "justice of the peace" which were used in the corresponding section of the former Code (Cr. Code 1892, sec. 889) by reason of the statutory definition given to the word "justice" by the interpretation clause, Cr. Code 1906, sec. 4 (18) whereby police magistrates and stipendiary magistrates are included in its meaning, and also by reason of the transposition of former sec. 889 in the 1906 consolidation from the summary convictions part to the part of the 1906 Code entitled "Extraordinary Remedies," with the result that the present section 1124 as to amendment on certiorari applies not only to "summary convictions" but to convictions on "summary trials" held under Part 16 of the Code.

Rex v. Crawford, 6 D.L.R. 380, 22 W.L.R. 107, 20 Can. Cr. Cas. 49.

Assuming that a police magistrate, who imposed a penalty in excess of what was authorized by the Criminal Code, 1906, had no power, after service upon him of a notice of motion to set aside the conviction, which called upon him to make a return of the conviction, information, etc., to amend the conviction by substituting a penalty provided by the Code, the Court, to which the conviction was removed by certiorari, may amend the conviction so as to conform to the Code, under the authority given by sec. 1124 thereof providing that no conviction made by any justice should be held invalid for any regularity, etc., therein, if the Court or Judge before which or whom the question is raised is satisfied that an offence of the nature described in the conviction has been committed, over which such justice has jurisdiction, and giving the Judge or Court where so satisfied, even if the punishment imposed is in excess of that which might lawfully have been imposed, like powers in all respects to deal with the case, as are given by sec. 754 of the Code providing that, in every case of appeal from a summary conviction, the Court to which such appeal is made, shall, notwithstanding, among other things, that the punishment imposed may be in excess of that which might lawfully have been imposed, hear and determine the charge on which such conviction was made upon the merits and, among other things, exercise any power which the justice whose decision is appealed from, might have exercised.

Rex v. Marcinko, 4 D.L.R. 687, 19 Can. Cr. Cas. 388, 3 O.W.N. 1626, 22 O.W.R. 846.

(§ II—24)—NATURE AND EXTENT OF REVIEW.

Where there was some evidence before the magistrate to support his findings of fact such findings will not be reviewed in certiorari proceedings.

Rex v. Campbell, 8 D.L.R. 321.

(§ II—26)—RECOGNIZANCE.

An application for a writ of certiorari should not be dismissed under B.C. Crown Office Rule 36 on a preliminary objection that no recognizance had been filed. Semble, Crown Office Rule 36 is complied with if the recognizance on a certiorari is filed on taking out the order or writ in case the Judge grants the certiorari.

The King v. Ferguson, 19 Can. Cr. Cas. 31, 16 B.C.R. 287.

(§ II—27)—STAYING PROCEEDINGS ATTACKED.

When the Council of the Bar is served with a notice of certiorari in respect of a charge of unprofessional conduct against a member, it should suspend all proceedings

pending the decision on the certiorari, and if it disregards the same and proceeds to decree the suspension of the advocate who had served notice of this certiorari the execution of this suspension will be restrained by prohibition.

Gosselin v. Bar of Montreal (No. 1), 2 D.L.R. 19.

CHAMPERTY AND MAINTENANCE.

I. In general.

II. Agreements between attorney and client.

III. Purchase of realty in third person's possession.

I. In general.

(§ I—1)—In general.

When several creditors assign their several claims to one of their number, without selling them to him, but transferring them for the purpose of having but one suit brought against their common debtor, so as to avoid costs and multiplicity of actions, the defence of litigious rights cannot be pleaded, article 1582 of the Quebec Civil Code applying only in the case of an onerous contract based on speculation. [Powell v. Watters, 28 Can. S.C.R. 133, followed.]

French Gas Saving Co. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

(§ I—2)—Transfer of litigious rights.

An exception to an agreement, whereby the principal plaintiff agrees to limit the responsibility of the principal defendant (who is also plaintiff in warranty) to a certain sum on condition that such principal defendant prosecuted an action in warranty against the defendant in warranty, on the ground that such agreement is a transfer of litigious rights should be raised by a peremptory exception to the action in warranty and cannot be entertained as a ground against an appeal from a judgment rendered on such action.

Stilwell-Bierce and Smith-Vale Co. v. Lyall, 3 D.L.R. 369.

II. Agreements between attorney and client.

(No cases.)

III. Purchase of realty in third person's possession.

(No cases.)

CHARGE.

Of realty under will, see Wills, III.
Of mortgage, see Mortgage.
Under Land Titles, see Land Titles, III.

CHARACTER.

Proof of, generally, see Evidence, XI.
Libellous charges affecting, see Libel and Slander, II.

CHARITIES AND CHURCHES.

I. Nature and validity.
- A. In general.
- B. What are charities.
- C. Conditions; existence and capacity of trustees or beneficiaries.
- D. Definiteness; discretion of trustees.

II. Enforcement; control; forfeiture; liability.
- A. In general.
- B. Cy-près doctrine.
- C. Liability for damages.

As to limitation of charitable bequests, see Wills, III.

I. Nature and validity.

C. Conditions; existence and capacity of trustees or beneficiaries.

(§ I C—22)—Capacity generally.

R.S.O. 1897, ch. 307, sec. 23, gives power to sell land held by churches in trust, when it becomes unnecessary to hold it for the religious use of the congregation, and it is deemed advantageous to sell, but without disturbance of special trusts, the aim of the statute being to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession.

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

(§1 C—24)—Holding title to church lot.

Where a given trust deed provides a specific event when "the church, for which the trust was created shall lose its visibility and cease to exist," this cannot be said to have happened where the church congregation has merely moved to another location.

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

Where a church, to which certain lands are conveyed in perpetual trust for its maintenance, is organized on a congregational basis, the view of the majority prevails, and no breach of a general trust occurs by the conversion of the lands pursuant to direction of the majority of the congregation; and resolutions to change the place of worship and sell the lands deeded to the trustees of the congregation are matters of congregational competence and are conclusive against dissident members of the congregation. [Newburgh Reformed Church v. Princeton Theological Seminary (1837), 4 N.J. Eq. 77; and Pine Hill Lutheran v. St. Michael's Evangelical (1864), 48 Pa. St. 20, followed.]

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

A deed of land to church trustees upon trust that the land shall be forever held and enjoyed for the use of the members of a specified local church and that rents derived from any portion of the site shall be applied towards the upkeep of the meeting-house thereon, is a trust which forbids a

change of site so long as a congregation exists.

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 951, 21 O.W.R. 776, 26 O.L.R. 94.

Where a conveyance of land was made to the rector of a certain parish, "his successor and successors in office forever," in trust to erect and maintain a church thereon, and a statute, 39 Vict. Que. 1875, ch. 74, declared that the land and the new church to be erected thereon should "be vested in the rector and churchwardens of the church" and their successors in office "in trust for the uses and purposes ecclesiastical of the said parish," and after many years there was added to the parish a portion of a non-contiguous parish in which a chapel was afterwards built, served at first by the incumbent of the church of the parish but to which the congregation removed after a time, the chapel thus becoming the parish church, and an incumbent was appointed to the old church, and churchwardens were elected thus making two separate churches between whose congregations many discussions arose as to their respective rights culminating in a division of the parish by which the part which had formerly been the old parish was made into a separate parish and called by a new name while the strip of non-contiguous territory which had been added to the old parish retained the old name, the title to the old church was not vested in the corporation of the parish retaining the old name, since the trust on which the land was conveyed had a territorial meaning and related to a defined and well understood parochial area and to the maintenance within that area of a church for the purposes ecclesiastical of the original beneficiaries, the inhabitants of the district formerly known by the old name.

Parish of St. Stephen's v. Parish of St. Edward's, 2 D.L.R. 594.

(§ I C—27)—Unincorporated association.

The ratepayers of school sec. 8 in the County of Richmond raised a sum of money to be applied inter alia to providing a place of residence for members of a religious order then teaching in the section, so long as they should remain in the section, and, in the event of their leaving, to become the property of the section. The defendant L., who was a member of the committee appointed to carry out the purpose of the ratepayers, purchased a property with the funds placed in his hands and executed a deed in fee simple of it to the mother of the order, who, some months after, when the order decided to leave the province, reconveyed the property to L., who mortgaged it to his brother. The order was not incorporated in Nova Scotia, and the mortgagee had knowledge of the purpose for which and the circumstances under which the property was acquired. Held, affirming the judgment of Longley, J., and dismissing the defendants' appeal with costs: (1) That the deed being made to a religious order not incorporated in Nova Scotia was a nullity and no title passed under it. (2) The same defect would affect the title of defendant under the deed to him and the mortgage to his brother who was aware of the facts. (3) The action by the Attorney-General on the relation of one of the ratepayers to recover for the section property which rightfully belonged to it would not be affected by a resolution of the majority of the ratepayers instructing discontinuance of the proceedings for the recovery of the property. (4) The property having been obtained by public subscription for the use of the ratepayers of the section for educational purposes was a charitable trust, for the enforcement of which the Attorney-General was properly made a party, and was property which it was the duty of the trustees to take possession of under the provisions of R.S.N.S., ch. 52, sec. 55, subs. (a), and as to which they were guilty of a breach of trust in abandoning the proceedings for its retention.

The Attorney-General ex rel. Morrison v. Landry et al., 45 N.S.R. 298.

(§ I C—27a)—Rights of dissident members.

Dissident members of a church organized on an independent or congregational basis, who band themselves together with others in a new organization, are an off-shoot from the old body, and, therefore, have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in trustees for that original body.

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

D. Definiteness; discretion of trustee.

(§ I D—39)—Discretion as to beneficiaries.

Vacating the site of a place of worship by a church organized upon a congregational basis pursuant to a special trust granting the site to the church for that purpose, does not amount to a cesser of the existence of the beneficiary. [Compare Parish of St. Stephen's v. Parish of St. Edward's, 2 D.L.R. 594, a decision of the Supreme Court of Canada affirming the King's Bench of Quebec.]

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

II. Enforcement; control; forfeiture; liability.

(No cases.)

CHASTITY.

Opinion evidence as to, see Evidence.

Publication effecting, see Libel and Slander.

Fraudulent representation as to, see Marriage.

CHATTEL MORTGAGE.

I. In general.

II. Validity; consideration.
- A. Generally.
- B. Description of property.
- C. Property subject to mortgage; after-acquired property.
- D. Possession; power to sell.

III. Filing; recording; renewing.

IV. Effect; rights of parties; priorities.
- A. In general.
- B. Priorities.

V. Assignment; satisfaction; abandonment; waiver.

VI. Enforcement.

I. In general.

(No cases.)

II. Validity; consideration.

A. Generally.

(§ II A—5)—Validity; consideration.

Where the object of a chattel mortgage made by an insolvent debtor is to withdraw all his assets from the reach of the other creditors in order to enable a surety to pay a debt of the insolvent which the surety had guaranteed, the chattel mortgage is invalid as against creditors under the Assignments and Preferences Act, 10 Edw. VII. (Ont.) ch. 64, as having been made for an unlawful purpose. (Per Idington, J.)

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

(§ II C—16)—After acquired property or things not in esse generally.

Where a chattel mortgage conveys the stock in trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to cover and include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at "stock in trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things ejusdem generis with those before enumerated. [Moore v. Magrath, 1 Cowper 9, referred to.]

Dominion Register Co. v. Hall & Fairweather, 8 D.L.R. 577.

C. Property subject to mortgage; after-acquired property.

(§ II C—22)—Book debts.

A transfer of book debts is not within the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) ch. 65, and does not require registration under that Act in order to be valid against creditors if the transaction is otherwise unimpeachable. [Kitching v. Hicks, 6 Ont. R. 739; Thibaudeau v. Paul, 26 Ont. R. 385, followed; Tailby v. Official Receiver, 13 App. Cas. 523, applied.]

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 22 O.W.R. 933, 3 O.W.N. 1903, 26 O.L.R. 279.

Where a mortgage not specifically mentioning present or future book debts covers "undertakings . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by [the mortgagor], now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made.

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 22 O.W.R. 933, 26 O.L.R. 279.

Book debts are not within the Ontario Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148 (now 10 Edw. VII. ch. 65), and the transfer of them does not require registration, and, therefore, the mortgagee in an unregistered mortgage covering book debts as well as other personal property which would require its registration to make it valid as against creditors of the mortgagor, is entitled to recover the amount realized from the book debts by the mortgagor's assignee for the benefit of creditors or by the liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, even though no notice was given by the mortgagee to those owing the book debts.

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 22 O.W.R. 933, 26 O.L.R. 279.

III. Filing; recording; renewing.

(§ III—31)—Necessity of filing or recording.

A mortgage is a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning of secs. 2 and 23 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148 (now secs. 5 and 24 of 10 Edw. VII. ch. 65), which mortgage covered the mortgagor's "undertakings then made or in course of construction, or thereafter to be constructed, together with all the property, real and personal, tolls, incomes, and sources of money, rights, privileges and franchises, owned, held, or enjoyed by it" and "all machinery of every nature and kind including all tools and implements used in connection therewith," al-

though it stipulated that for the purpose of the mortgage security "all machinery, plant, and personal property of the mortgagor were to be considered fixtures to the realty" and that the mortgage was not to be registered as a bill of sale or chattel mortgage; and therefore, if such mortgage is not accompanied by an immediate delivery for an actual and continued change of possession of the things mortgaged, or is not registered as a chattel mortgage, as required by sec. 2 of that Act, it is absolutely null and void as against creditors of the mortgagor under sec. 5 of that Act (now sec. 7, 10 Edw. VII. ch. 65).

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 22 O.W.R. 933, 26 O.L.R. 279.

The liquidator of an incorporated company is not a creditor of, or a purchaser for valuable consideration from the company, within the meaning of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148 (see now 10 Edw. VII. (Ont.) ch. 65). [Re Canadian Camera and Optical Co., 2 O.L.R. 677, distinguished, and dictum of Street, J., therein, dissented from.]

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 3 O.W.N. 1476, 22 O.W.R. 585, 26 O.L.R. 564.

IV. Effect; rights of parties; priorities.

(No cases.)

V. Assignment; satisfaction; abandonment; waiver.

(No cases.)

VI. Enforcement.

(No cases.)

CHEQUES.

I. In general; nature of.
II. Presentation.
III. Certification.
IV. Bona fide holders.
V. Forged paper.

I. In general; nature of.

(No cases.)

II. Presentation.

(§ II—12)—What will excuse failure to present.

A drawer of a cheque, who notifies the payee that he has stopped payment thereof, thereby waives presentation for payment. [Hill v. Heap, D. & R.N.P. 57, distinguished.]

Trapp & Co. v. Prescott, 5 D.L.R. 183, 17 B.C.R. 298, 21 W.L.R. 521.

III. Certification.

(§ III—16)—Rights and liabilities of drawee.

Where a cheque drawn to the order of another person is accepted by the bank on which it is drawn at the request of a third person, such acceptance renders the bank the sole debtor of the legal holder of the cheque; and if the drawer becomes insolvent after such acceptance and before payment of the cheque, his estate is not liable for the cheque either as regards the bank or as towards the legal holder of such cheque. [Brunelle v. Ostiguy, 21 Que. K.B. 302, followed.]

Brossard v. Sterling Bank and Turgeon es qual, 8 D.L.R. 889.

IV. Bona fide holders.

(§ IV—21)—Who are bona fide holders.

Where a sum of money is given as a deposit of good faith to bind a transaction (e.g., the transfer of a license) and a cheque is also given to evidence the transaction, but payable to the order of a third person (the collector of provincial revenue), and the transaction falls through and is not completed, the party to whom the cheque was given is the legal holder of the cheque within the meaning of the Bills of Exchange Act, and in order to obtain payment of this cheque the legal holder has the right to demand and the Court has the power to grant an order authorizing the modification of the cheque so as to make him the payee thereof.

Brossard v. Sterling Bank and Turgeon es qual, 8 D.L.R. 889.

V. Forged paper.

(No cases.)

CHILDREN.

Relation between parent and children generally, see Parent and Child.

In general, see Infants.

CITIES.

See Municipal Corporations.

CHOSE JUGEE.

(§ I—5)—Quebec practice.

A married woman, member of the community, authorized by her husband "to institute any action whatsoever, to plead, etc.," has no right to sue in her own name for a debt due to the community. But the husband himself may afterwards bring an action which will not be barred by the plea of chose jugée. A party whose action or proceeding has been dismissed by a judgment of the Court may institute a fresh action without first paying the costs of the first. He is only required to do so when he abandons his action.

Mercure v. Bassinet, 13 Que. P.R. 379 (Sup. Ct.).

CHURCHES.

Generally, see Religious Societies.

Gifts, see Charities and Churches.

CIVIL RIGHTS.

(§ I—10)—Effect of conviction on criminal's property.

Under section 1033, Criminal Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs.

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 3 O.W.N. 1486, 22 O.W.R. 643, 26 O L.R. 576.

The Court will not enforce property rights directly resulting to the person asserting them from the crime of that person. (Per Riddell, J.) [Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q.B. 147; and Lundy v. Lundy, 24 Can. S.C.R. 650, referred to.]

Re Sanderson and Saville, 6 D.L.R. 319, 3 O.W.N. 1560, 22 O.W.R. 672, 26 O.L.R. 616.

The rule that a wrongdoer cannot acquire rights from his own wrong, while requiring the undoing, wherever possible, of the advantage gained, does not operate to deprive the wrongdoer of a right previously possessed by him. (Per Riddell, J.) [Hooper v. Lane, 6 H.L.C. 443; and Ockford v. Freston, 6 H. & N. 466, referred to.]

Re Sanderson and Saville, 6 D.L.R. 319, 3 O.W.N. 1560, 22 O.W.R. 672, 26 O.L.R. 616.

CLOUD ON TITLE.

I. When action lies.
- A. In general.
- B. What are clouds.
- C. Who may sue; title or possession of complainant.

II. Defences; counterclaims.

III. Conditions.

IV. Cross bill.

I. When action lies.

B. What are clouds.

(§ I B—5)—What are clouds.

Defendant recovered judgment and issued execution against a party bearing the same name as plaintiff. This was registered against plaintiff's land. He demanded that the defendant remove same, but this was not done. In an action brought to secure the removal, the defendant admitted that the execution did not bind plaintiff's land, and was a cloud upon the title, but pleaded that he had not refused to remove the execution, and that in any event he had commanded the sheriff to register the execution against the lands of his execution debtor, and not the plaintiff's land, and was not, therefore, responsible for the sheriff's act: —Held, that the plaintiff in issuing his execution, the sheriff in delivering the certificate, and the registrar in registering the same against plaintiff's land, were only carrying out the provisions of the Act governing the issue and registration of execution, and none of them were tort feasors. (2) But the defendant, by neglecting to remove the execution and defending the action, had rendered himself liable to costs.

Martens v. O'Brien, 4 S.L.R. 292.

II. Defences; counterclaims.

(No cases.)

III. Conditions.

(No cases.)

IV. Cross bill.

(No cases.)

COLLISION.

(§ I—3)—Fixing liability.

A railway company cannot be held liable for the death of a fireman on a snow-plough train as a result of a collision, merely because it employed an unqualified signalman on the snow-plough, where it did not appear that an accident was the result of his disqualification.

Jones v. Canadian Pacific R. Co., 5 D.L.R. 332, 3 O.W.N 1404, 22 O.W.R. 439.

(§ I—8)—Limitation of action.

An action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle, commenced three and a half years after the cause of action arose, does not fall within the two-year limitation of 10 Edw. VII. (Ont.) ch. 34, sec. 49 (h), upon actions for "damages given by any statute," notwithstanding the statutory provisions governing the operation of motor vehicles, and is, therefore, not barred on a plea of the Statute of Limitations. [Corporation of Peterborough v. Edwards (1880), 31 U.C. C.P. 231; Thomson v. Lord Clanmorris, [1900] 1 Ch. 718, referred to.]

Maitland v. MacKenzie and Toronto R. Co., 6 D.L.R. 336, 4 O.W.N. 109, 23 O.W.R. 80.

COMBINATIONS.

Of workmen, see Conspiracy, Labour Organizations.

As to illegal trade combines, see Monopoly and Combinations; Contracts.

Combines Investigation Act (Can.), see Monopoly.

COMMERCE.

As to, see Carriers.

COMMISSIONS.

Of stock brokers, see Brokers.

Of real estate agents, see Brokers.

Of administrator, see Executors and Administrators.

COMPANY.

See Corporations and Companies.

COMPOSITION WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

(§ I—1)—WHAT IS PROPER SUBJECT OF.

An agreement between an employer and a workman in settlement of a claim of the latter for damages caused by the neglect of the former, is in the nature of a transaction (article 1918 et seq. c. c.), and though, by its terms, the employer promises to pay, and does pay for a while, by monthly instalments, "a sum equivalent to what the workman would earn during the time he is disabled as the result of the injuries," it is not governed by the rules applicable to contracts for hire of work, and does not give the workman, in case of breach by the employer, a right to claim a lump sum as damages; he is only entitled to the amount, "equivalent to what he would have earned," that remains unpaid at the time his action is brought.

McKinstry (plaintiff, appellant) v. Irwin (defendant, respondent), 21 Que. K.B. 139.

(§ I—4)—VALIDITY; WHEN BINDING.

Where it appears that an agreement was intended to settle all matters then in dispute between the parties, no subsequent claim should be allowed in respect of a matter arising prior to the date of the agreement, of which the party claiming had knowledge at that date.

Cooney v. Jickling, 6 D.L.R. 145, 22 W.L.R. 53.

Confirmation by Court order in pending action.

Smyth v. Harris (No. 3), 6 D.L.R. 885, 4 O.W.N. 223, 23 O.W.R. 241.

(§ I—8)—RESERVATIONS UPON.

Where in an action to revendicate the plaintiff has reserved his recourse for hire or use of his property and this action is settled by means of a lump sum in full of "capital, interest and costs," such settlement is a settlement of the action as taken only, and the word "interest" cannot be construed as embracing the claim for use and hire expressly excluded from such suit.

O'Brien v. Maloney, 1 D.L.R. 760.

(§ I—9)—AS AFFECTING PLAINTIFF'S COSTS.

A settlement or transaction between the parties entered into without the knowledge and consent of their attorneys cannot affect the rights which the attorneys for plaintiff have for their costs, and they will be entitled to have judgment entered for such costs against the defendant, notwithstanding such settlement.

Seale v. Bowers, 1 D.L.R. 632.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONDITION.

In railroad ticket, see Carriers.

In contract, see Contracts, IV.

Relating to real property, see Covenants and Conditions.

For forfeiture on land purchase contract, see Covenants, etc.

CONDITIONAL SALE.

See Sale.

CONFESSION.

Evidence of, see Evidence.

Sufficiency of corroboration, see Evidence.

Judgment by, see Judgment.

Of judgment by company, see Corporations and Companies.

CONFLICT OF LAWS.

I. AS TO RIGHTS.
- A. In general.
- B. As to contracts; insurance.
- C. Status, marriage, domestic relations; legitimation.
- D. Corporate matters.
- E. Torts and crimes generally.
- F. Insolvency; assignments for creditors.
- G. Rights in property generally.
- H. Transfers of property generally.
- I. Chattel mortgages; conditional sales.
- J. Descent and distribution; wills.

II. REMEDIES.

I. As to rights.

E. Torts and crimes generally.

(§ I E—101)—TRADE INTERFERENCE, UNFAIR COMPETITION; TRADE-MARK.

Civil law responsibility for wrongful interference with a plaintiff's trade is to be determined by Quebec law and not by English law, except in so far as it depends upon statutory construction.

Lambert Pharmacal Co. v. Palmer and Son, Ltd., 2 D.L.R. 358, 21 Que. K.B. 451.

H. Transfers of property generally.

(§ I H—137)—DECREE OF FOREIGN COURT.

Upon confirming a sale of lands by an executor a Michigan Court of Chancery cannot make its decree effective as a conveyance of land situated in Ontario without a conveyance signed by the executor as directed by the decree. [Norris v. Chambres (1861), 29 Beav. 246, 3 DeG. F. & J. 583; Re Hawthorne, Graham v. Massey (1883), 23 Ch. D. 743; and Companhia de Mocambique v. British South Africa Co., [1892] 2 Q.B. 358, referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

II. Remedies.

(§ II—151)—ATTACHMENT AND GARNISHMENT.

The question as to whether foreign Courts might not accord Ontario Courts any extra-

territorial recognition is a question of policy affecting those who make the law and cannot be considered by the Courts who are called upon to administer the law as they find it. [The King v. Lovitt, [1912] A.C. 212, distinguished; Western National Bank of New York v. Perez, Triana and Co., [1891] 1 Q.B. 304; Tytler v. C.P.R., 29 Ont. R. 654, specially referred to.

McMulkin v. Traders Bank of Canada, 6 D.L.R. 184, 3 O.W.N. 787, 21 O.W.R. 640, 26 O.L.R. 1.

CONFISCATION.

Of private rights, see Constitutional Law, II G.

CONFUSION.

See Accession and Confusion.

CONSIDERATION.

Of bills and notes, see Bills and Notes.
For contracts generally, see Contracts.
Of deeds, see Deeds, Evidence.
Parol evidence to shew, see Evidence.
Of conveyance attacked for fraud, see Fraudulent Conveyance.

CONSERVATION.

Conservatory attachment in Quebec, see Attachment.

Conservatory order upon seizure under execution, see Execution.

CONSOLIDATION.

Of actions, see Action or Suit, II.

CONSPIRACY.

I. In general.
II. To cheat, rob or steal.
III. To injure the business of another.
  A. In general.
  B. Boycott.
IV. Of labourers; strikes.

I. In general.

(§ I—3)—To withhold certificate or diploma.

A wilful and fraudulent conspiracy on the part of the examiners and the College of Dental Surgeons to undermark the examination papers of an applicant so as to prevent his admission to the college, is not established by the fact that the secretary of the college, after the commencement of the plaintiff's action and making discovery therein of his own examination papers and the books of the college, while making a change in his office, destroyed, without the knowledge of his co-defendants, before the time fixed by said college therefor, and before he had knowledge that their discovery would be required, among a quantity of other papers, the examination papers of the other candidates who were examined with the plaintiff.

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779.

II. To cheat, rob or steal.

(No cases.)

III. To injure the business of another.

(No cases.)

IV. Of labourers; strikes.

(No cases.)

CONSTABLE.

Arrest by, see Arrest.

As public officer, protection from action, see Officers.

CONSTITUTIONAL LAW.

I. In general; governmental matters.
  A. Adoption; amendment; construction.
  B. Ex post facto and retrospective laws.
  C. Vested rights.
  D. Delegation of powers.
  E. Separation of powers.
  F. Local self-government.
  G. Functions and powers of Crown.
  H. Abandonment of power.
II. Rights of persons and property.
  A. Equal protection and privileges; abridging immunities and privileges.
  B. Due process of law or law of the land; guaranty of right to life, liberty and property.
  C. Police power.
  D. Freedom of speech, press and worship.
  E. Natural rights; implied guaranties.
  F. Guaranties of justice.
  G. Impairing obligations of contracts.

I. In general; governmental matters.

A. Adoption; amendment; construction.

(§ I A 1—2)—Adoption.

The Forfeiture Act, 33 and 34 Vict. ch. 23 (Imp.), is not in force in Canada. [Dumphy v. Kehoe, 21 Rev. Leg. 119, Jetté, J., pp. 126, 127, followed.]

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 3 O.W.N. 1486, 22 O.W.R. 643, 26 O.L.R. 576.

(§ I A 3—39)—As to criminal matters.

If the enactment of the Provincial Parliament of Quebec, of 1 Geo. V. ch. 35, regulating the sale of cocaine, morphine or their compounds, and providing a punishment for violations thereof, is not void because it is criminal legislation exclusively within the province of the Dominion Parliament, it was rendered ineffectual by the subsequent enactment by the latter body of 1 and 2 Geo. V. ch. 17, prohibiting the use or sale of such drugs, since the Provincial Act was in contravention to and incompatible with

the Dominion Act. [Regina v. Wason, 17 Ont. A.R. 221; Fielding v. Thomas, [1896] App. Cas. 600; The Manitoba Liquor Act Case, [1902] App. Cas. 73; Local Prohibition Case, [1896] App. Cas. 348; and subsec. 27 of sec. 91 of the British North America Act, 1867, specially referred to.]

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

B. Ex post facto and retrospective laws.

(§ I B—40)—Ex post facto and retrospective laws.

While the Courts will closely scrutinize by-laws of Municipal Councils which limit freedom of trade, the Court's jurisdiction should not be exercised to quash a by-law unless the Municipal Council has clearly exceeded its powers.

Re Simpson and Village of Caledonia, 1 D.L.R. 15, 3 O.W.N. 503, 20 O.W.R. 874.

D. Delegation of powers.

(§ I D 5—110)—Of judicial power.

Section 60 of the Supreme Court Act, R.S.C. 1906, ch. 139, which empowers the Governor-in-Council to refer to the Supreme Court of Canada for their opinion questions either of law or of fact, is within the legislative jurisdiction of the Parliament of Canada. [Re References by the Governor-in-Council (1910), 43 Can. S.C.R. 536, affirmed on appeal.]

Attorneys-General for the Provinces v. Attorneys-General for Canada, 3 D.L.R. 509.

(§ I D 5—117)—Appointment of magistrates.

The power of the Provincial Legislature, under the British North America Act, to legislate on the subject of the administration of justice, including the constitution, maintenance and organization of Courts, and with respect to the appointment of Provincial officers, extends to the appointment of stipendiary magistrates, although the power to appoint Judges of Superior, District and County Courts is reserved to the Governor-General of Canada.

The King v. Sweeney, 1 D.L.R. 476, 19 Can. Cr. Cas. 222, 45 N.S.R. 494.

It is within the legislative power of the Legislature of Nova Scotia to pass a statute empowering the Lieutenant-Governor-in-Council to appoint stipendiary magistrates for incorporated towns and municipalities throughout the Province of Nova Scotia.

The King v. Basker, 1 D.L.R. 295, 19 Can. Cr. Cas. 158, 10 East. L.R. 320.

G. Functions and powers of Crown.

(§ I G—140)—Functions and powers of Crown.

Under the Confederation Act of 1867, it is within the power of the Dominion Parliament to declare any act a crime which it may consider necessary to so characterize.

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

C.O. (N.W.T.) 1898, ch. 91, sec. 3, which declares void all sales and purchases as well as contracts and agreements for the sale or purchase of real or personal property when made on the Lord's Day, was intra vires of the Legislature of the North-West Territory, and its adoption in Alberta is intra vires of the Legislature of Alberta.

Fallis v. Dalthaser, 4 D.L.R. 705, 21 W.L.R. 171.

II. Rights of persons and property.

A. Equal protection and privileges; abridging immunities and privileges.

(§ II A—160)—Marriage laws.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce," and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," the Parliament of Canada has no power to amend the Marriage Act, R.S.C. 1906, ch. 105, by adding thereto either the whole or any of the provisions of a section, providing that every ceremony or form of marriage theretofore or thereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony; and that the rights and duties as married people of the respective persons married as aforesaid and of the children of such marriage shall be absolute and complete, and that no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever. [Re Marriage Laws, 6 D.L.R. 588, 46 Can. S.C.R. 132, affirmed on appeal.]

Re the Marriage Law of Canada, 7 D.L.R. 629, [1912] A.C. 880, 11 East. L.R. 255.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce" and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," the Parliament of Canada has no power to amend the Marriage Act, R.S.C. 1906, ch. 105, by adding thereto either the whole or any of the provisions of a section, providing that every ceremony or form of marriage theretofore or thereafter performed by any person authorized to perform any ceremony of marriage by the laws

of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony; and that the rights and duties as married people of the respective persons married as aforesaid and of the children of such marriage shall be absolute and complete, and that no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or disqualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

In re Marriage Laws, 6 D.L.R. 588, 46 Can. S.C.R. 132.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive authority over "Marriage and Divorce" and upon the Legislature of each Province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," a Provincial Legislature has power to enact that no marriage in the Province shall be valid in which the laws of the Province as to solemnization of marriage shall not have been complied with.

In re Marriage Laws, 6 D.L.R. 589, 46 Can. S.C.R. 132.

The powers conferred by sub-sec. 26, sec. 91, of the B.N.A. Act upon the Parliament of the Dominion of Canada to make laws in respect to "Marriage and Divorce" are limited by the provisions of sub-sec. 12 of sec. 92 of the said Act, which confers exclusive jurisdiction upon the Legislatures of each Province to make laws relating to "the solemnization of marriage in the Province."

Re The Marriage Law of Canada, 7 D.L.R. 629, [1912] A.C. 880, 11 East. L.R. 255.

(§ II A 2—175)—As to non-residents or aliens; foreign corporations.

The Alberta and Great Waterways Railway Bonds Act, Alberta Statutes 1910, ch. 9, declaring that the proceeds of bonds issued by a railway company incorporated in that Province for the purpose of constructing a railway wholly within the Province, the payment of which bonds had been guaranteed by the Province, which proceeds were standing to the credit of the Provincial Treasurer in a special account in a bank within the Province, should form part of the general revenue fund of the Province, and be forthwith paid over by the holders thereof to the Treasurer of the Province free from any claim of the railway company or its assigns, falls within clause 13, "Property and Civil Rights in the Province," of section 92 of the B.N.A. Act, and is therefore within the constitutional powers of the Provincial Legislature, even though it affects the interest in such proceeds of parties without the Province. [Jones v. Canada Central R. Co., 46 U.C.R. 250, and Attorney-General of Manitoba v. Manitoba License Holders' Association, [1902] A.C. 73, specially referred to.]

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

(§ II A 2—178)—Regulation of business generally.

Those provisions of the B.C. Companies Act, 10 Edw. VII. (B.C.) ch. 7, which impose conditions upon companies incorporated under the Companies Act, R.S.C. 1906, ch. 79, in order to do business within the Province of British Columbia are not ultra vires. [Waterous Engine Co. v. Okanagan Lumber Co, 14 B.C.R. 238, followed.]

John Deere Plow Co. v. Agnew, 8 D.L.R. 65, 22 W.L.R. 243.

(§ II A 2—194z)—Foreign corporations.

A foreign boom company is not entitled to construct or maintain its works or any portion thereof within Canada, and the construction by a boom company, whose amended articles of incorporation by the State of Minnesota purported to confer upon it powers for "the improvement of the Rainy River from its mouth at the Lake of the Woods to the falls of the said river at International Falls . . . and to drive, tow, boom, assort, hold, distribute and otherwise handle logs . . . in said river and to collect tolls and charges for such services," etc., of a sheer boom and part of its main boom wholly on the Canadian side of the boundary line between Canada and the United States, by means of which logs of a Canadian log owner were diverted into the possession and control of the foreign boom company, is illegal.

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

(§ II A 3—195)—As to corporations, associations and carriers.

Upon the true construction of sections 91 and 92 of the British North America Act, 1867, a Provincial railway is not subject to the jurisdiction of the Federal Railway Commission in respect of its through traffic with a Federal railway. [Montreal Street R. Co. v. City of Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed on appeal.]

Montreal v. Montreal Street R. Co., 1 D.L.R. 681, 10 E.L.R. 281.

(§II A 3—196a)—As to banks.

Where a Provincial Legislature incorporated a railway company and empowered it to build a railway wholly within the Province and to issue bonds and authorized the Provincial Government to guarantee the bonds to a specified amount and directed the proceeds of the sale of the bonds to be paid by the purchaser directly into a bank or banks approved by the Lieutenant-Governor-in-Council, to the credit of a

special account in the name of the Provincial Treasurer, to be paid to the railway company from time to time as a specified portion of the line was completed to the satisfaction of the Lieutenant-Governor-in-Council, and an agreement was subsequently made between the Government and the company settling the details in carrying out the legislative enactments, in which was incorporated the statutory requirements as to paying in and paying out of the proceeds of the sale of the bonds, and the bonds were sold and the proceeds deposited as required in certain banks, a subsequent Act, Alberta Statutes 1910, ch. 9, assuming primary liability on the bonds and declaring the proceeds of the same held on special deposit in branch banks within the Province to be part of the general revenue fund of the Province and requiring them to be paid over forthwith by the banks to the Provincial Treasurer, is not ultra vires as banking legislation within sec. 91, B.N.A. Act, giving exclusive jurisdiction to the Dominion Parliament to legislate on banks and banking or as being in conflict with the Canada Bank Act, though one of the banks incorporated under Federal authority having its head office in another Province claimed an interest in the proceeds under an alleged assignment made to it for past and future advances by a construction company to which the railway company had theretofore attempted to assign the fund.

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

(§ II A 3—208)—For general advantage of Canada.

When a railway company constituted by a Provincial Act are, after completion, declared by Parliament to be a work for the general advantage of Canada, it becomes subject to Federal jurisdiction; but if, by a Federal Act, the company is authorized to purchase and operate another Provincial railway which is not declared to be a work for the general advantage of Canada, it remains subject, as to the latter, to Provincial jurisdiction. Therefore, the Public Utilities Commission is competent to arbitrate on disagreements provided for by articles 740 et seq. R.S.Q. 1909, which may arise respecting the last mentioned railway between the company and individuals.

Quebec Railway, Light, Heat & Power Co. v. Langlais, 21 Que. K.B. 167.

(§ II A 4—210)—As to taxes and assessment.

The Alberta and Great Waterways Railway Bonds Act (Alberta Statutes 1910, ch. 9), passed with a view of protecting the Province from loss by reason of its guarantee of the payment of bonds issued by a railway company incorporated by the Province for the purpose of building a railway wholly within the Province, is not unconstitutional because it declares such proceeds to be part of the general revenue fund of the Province, especially in view of the provision of section 5 of the Alberta Treasury Department Act, 1906, ch. 5, that all revenues from whatever source arising, of which the Legislature had the power of appropriation, should form one general revenue fund, though such means of raising revenue is not specifically authorized by section 92 of B.N.A. Act.

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

(§ II A 5—248)—Sunday laws; theatres.

The statute, 7 Edw. VII. ch. 42, as amended by ch. 51, 9 Edw. VII., of Quebec, which, among other things, prohibits, under penalty, the giving on Sunday of theatrical performances for gain, is prohibitive and not permissive, and cannot be upheld under section 16 of the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, which permits Provincial Legislatures to except from its operation any act which Provincial legislation, existing at the time the Federal Act came into force or which might be subsequently enacted, "permitted" to be done.

Ouimet v. Bazin, 3 D.L.R. 593, 46 Can. S.C.R. 502.

The Act, 7 Edw. VII. (Que.) ch. 42, as amended by the statute 9 Edw. VII. (Que.) ch. 51, which, among other things, prohibits, under penalty, the giving of theatrical performances on Sunday for gain, except in case of necessity or urgency, is void, because it is criminal legislation which, under sec. 91, sub-sec. 27, of the British North America Act, is exclusively within the power of the Dominion Parliament to enact. [Attorney-General v. Hamilton Street R. Co., [1903] A.C. 524, followed; 9 Halsbury's Laws of England 233; Russell v. The Queen, 7 A.C. 829; Re Sunday Legislation, 35 Can. S.C.R. 581; Pringle v. Napanee, 43 U.C.R. 285; Cowan v. Milburn, L.R. 2 Ex. 230, and Vidal v. Girard's Executors, 43 How. U.S. 198, referred to.]

Ouimet v. Bazin, 3 D.L.R. 593, 46 Can. S.C.R. 502.

(§ II A 5—249)—Sunday laws; railways.

In order that a railway or part of a railway may form part of a continuous route or system within the meaning of sub-sec. 5 of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, respecting operations on Sunday, there must be a direct physical connection between it and the other through road of which it is to form a part, and proper facilities by way of sidings and accommodations for the transfer of traffic must exist, which should generally be sanctioned by the proper authorities. [Hammans v. Great Western R. Co., 4 Ry. & Canal Traffic Cas. 181; Great Central R. Co. v. Lancashire & Yorkshire R. Co., 13 Ry. & Canal Traffic Cas. 266; Black v. Delaware & Raritan Canal Co., 22 N.J. Eq. 402, referred to.]

Kerley v. London and Lake Erie Transportation Co., 6 D.L.R. 189, 3 O.W.N. 1498, 22 O.W.R. 646, 26 O.L.R. 588.

Section 9 of the Railway Act, R.S.C. 1906, ch. 37, enacting that every railway situated wholly within one Province of Canada and declared by Parliament to be either wholly or in part a work for the general advantage of Canada, shall be subject to any Act of the Legislature of the Province in which it is situated prohibiting or regulating work on Sunday, is intra vires of the Parliament of Canada.

Kerley v. London and Lake Erie Transportation Co., 6 D.L.R. 189, 3 O.W.N. 1498, 22 O.W.R. 646, 26 O.L.R. 588.

(§ II A 8—283)—RESCUING CATTLE FROM POUNDKEEPER.

To rescue cattle from the custody of a poundkeeper while he is taking the cattle to the pound is a criminal offence in Manitoba by virtue of the Imperial Statute 6 and 7 Vict. ch. 30, there in force (Criminal Code of Canada 1906, sec. 12), and the provisions of that statute supersede the provisions of any municipal by-law purporting to impose penalties for the like offence.

Rex v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 W.L.R. 199.

B. Due process of law or law of the land; guaranty of right to life, liberty and property.

(§ II B—325)—REGULATION OF BUSINESS, RESTRICTIONS ON RIGHT OF CONTRACT.

No person can legally be deprived of his property without being given an opportunity of being heard and obtaining compensation, and such hearing must be before the proper tribunal, a municipal officer having no jurisdiction in such a case to decree confiscation or destruction.

City of Montreal v. John Layton & Co., Ltd., 1 D.L.R. 160.

(§ II B 4—359)—REGULATION OF SALES OF INTOXICATING LIQUORS.

The Ontario Legislature was acting within its powers in passing sec. 13 of Act 2 Geo. V. (Ont.) ch. 55, providing that in a municipality in which a by-law, under sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, prohibiting the sale by retail of liquor is in force, a person found upon a street or in any public place in an intoxicated condition owing to the drinking of liquor shall be guilty of an offence against the Liquor License Act aforesaid, and, upon any prosecution for such offence, he shall be compelled to state the name of the person from whom and the place in which he obtained such liquor, and in case of his refusal to do so, he shall be imprisoned for a period not exceeding three months, or until he discloses such information. [Hodge v. The Queen, 9 App. Cas. 117, followed.]

Rex v. Riddell, 4 D.L.R. 662, 19 Can. Cr. Cas. 400, 3 O.W.N. 1628, 22 O.W.R. 847.

(§II B 7—398)—AGAINST INSURANCE COMPANIES.

Where the cause of action arose in the Province in which an insurance company was organized and has its head office and principal place of business, suit is not authorized in a different Province by the fact that the company has been registered and has a registered office therein, under R.S.B.C. 1911, ch. 53, sec. 67, which permits a defendant to be sued at the place where he "dwells or carries on business."

Pearlman v. Great West Life Assurance Co., 4 D.L.R. 154, 21 W.L.R. 557.

C. Police power.

(§ II C 4—500)—REGULATION OF MANUFACTURE AND SALE.

(1) It is within the legislative powers of the Dominion Parliament to enact as a part of legislation intended to protect the public against fraud that it shall be a criminal offence for a dealer in watch cases or other plated ware to apply a mark to plated goods purporting to guarantee that the plating would last for a specified time or to advertise to that effect; and the prohibited offence may be made a crime and punished as such, regardless of the question of intent to deceive the public and regardless of the fairness or truth of the warranty. (2) Subsec. (b) of sec. 16 of the Gold and Silver Marking Act, 7 and 8 Edw. VII. (Can.), ch. 50, is intra vires.

The King v. Lee, 18 Can. Cr. Cas. 480.

(§ II C 4—503)—REGULATION OF SALE OF INTOXICATING LIQUOR.

Section 3 of the Dominion Police Act, R.S.C. 1906, ch. 92, authorizing the appointment of commissioners of police by the Governor-in-Council and conferring upon them the authority of justices of the peace in matters arising under Dominion laws, is within the legislative powers of the Dominion Parliament. The Dominion Parliament has power to make it a crime to be in possession of liquor for the purpose of giving it or selling it to another person within a defined distance of any public work under construction, and Criminal Code, sec. 143, is, therefore, not beyond the legislative power of the Canadian Parliament.

Geller v. Loughlin, 18 Can. Cr. Cas. 461, 24 O.L.R. 18, 19 O.W.R. 318.

G. Impairing obligation of contracts.

(§ II G 1—525)—IMPAIRING OBLIGATIONS OF CONTRACTS.

A Provincial statute is not ultra vires merely because it may operate as a confiscation of private rights the benefit whereof is thereby applied for the purpose of the public revenue of the Province. [Florence Mining Co. v. Cobalt Lake Mining Co., 102 L.T. 375 (P.C.), and 18 O.L.R. 275, specially referred to.]

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

CONSTRUCTION.

Of contracts generally, see Contracts, II.

Of covenants, see Covenants and Conditions, I.

Of deeds, see Deeds, II.
Of guaranty, see Guaranty, I.
Of insurance contract, see Insurance, III.
Of pleading, see Pleading, I.
Of railroads, see Railroads, II.
Of statute, see Statutes, II.
Of wills, see Wills, III.

CONTEMPT.

I. What constitutes.
A. In general.
B. Charge against Judge; publication as to pending case or judicial decision.
C. Disobedience.
II. Procedure.
III. Power as to.
A. Of notary public or other officer.
B. Of Court.
IV. Judgment; punishment.
V. Purging from contempt.

I. What constitutes.

A. In general.

(§ I A—2)—Interfering with property.

Where an appointment was obtained for the examination of defendant as to her estate and effects, and it appeared thereon that the plaintiff's share of an estate had never been received by defendant, and that she did not obtain it and pay it over to plaintiff as she had an outlawed set-off in excess of the amount of said share, and would not assist the plaintiff by bringing the fund into Canada; a motion to commit the defendant, or, in the alternative, to re-examine, for not disclosing her property, or for having concealed or made away with the same, should be dismissed. [McKinnon v. Crowe, 17 P.R. (Ont.) 291, distinguished.]

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 573, 23 O.W.R. 489.

C. Disobedience.

(§ I C—10)—Disobedience.

Plaintiff served notice of motion to attach for failure to comply with an order of the Court, such notice being returnable before the Court at a sittings thereof appointed for trials. On the motion being made, the Chief Justice refused to hear it, but granted a summons returnable in Chambers at Regina for the purpose of the motion. This summons having come on to be heard:—Held, that such applications should not be made to the Court at regular sittings appointed for trials. (2) That no procedure for motion to attach being provided in the rules of Court, the English practice prevails, and that practice requires notice of motion to be given; the summons was, therefore, irregular, and, as in such proceedings the practice should be strictly observed, the order should be refused.

Vickerman v. Mackenzie, 4 S.L.R. 302.

Motion to commit—Refusal to answer questions on examination—Company—Director.

Powell-Rees, Limited v. Anglo-Canadian Mortgage Corporation, 8 D.L.R. 944, 4 O.W.N. 499.

(§ I C—14)—Of injunction.

Disobedience of injunction—Punishment limited to payment of part of costs of motion.

Dean v. Wright, 1 D.L.R. 918.

II. Procedure.

(No cases.)

III. Power as to.

(No cases.)

IV. Judgment; punishment.

(No cases.)

V. Purging from contempt.

(No cases.)

CONTEST.

Of election, see Elections, IV.
Of mining claim, see Mines, I.
Of title to office, see Officers, I.
Of will, see Wills, I.

CONTINUANCE AND ADJOURNMENT.

I. In general.
II. Grounds for.
III. Affidavits for.
IV. Effect of admission.

I. In general.

(§ I—2)—Limitations of, criminal.

The delay of eight clear days which must not be exceeded between two remands upon a preliminary enquiry does not apply to the case of an accused who is held on bail.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

The Criminal Code, sec. 679, in stating that the accused cannot be detained in prison more than eight clear days between two adjournments ipso facto permits an adjournment until the ninth day, as the statute expressly provides that the day following the remand is to be counted as the first day.

Dick v. The King, 19 Can. Cr. Case, 44, 13 Que. P.R. 57.

(§ I—3)—Date of adjournment.

The Court may extend the time for renewing a motion if it has lapsed through a misunderstanding as to the date to which the previous motion was enlarged, particularly where the enlargement was not recorded.

Lavallee v. The Canadian Northern R. Co. (No. 1), 4 D.L.R. 375, 21 W.L.R. 180.

Where there are no fixed days for holding Chambers, and an enlargement is made of

a summons upon an application to vary the clerk's report, and for other purposes, until after vacation, without a date being fixed for hearing the application, it need not be taken up on the first day after vacation when Chambers may be held, but may be heard at any time upon giving the opposite party two clear days' notice.

Lavallee v. The Canadian Northern R. Co. (No. 1), 4 D.L.R. 375, 21 W.L.R. 180.

(§ I A—4)—CANCELLING POSTPONEMENT.

The Judge at the Assizes may, after postponing till the next Assizes the trial of a person accused of murder on account of the absence of a witness, order the trial to be proceeded with at the same Assizes if the witness is produced.

Rex v. Redd, 21 Man. R. 785.

II. Grounds for.

(§ II—6)—ABSENCE OF COUNSEL.

The magistrate has a discretion to grant an adjournment of the hearing in order that the defendant may obtain counsel, but where the accused failed to ask for counsel or for an adjournment until after the evidence for the prosecutor was closed, the magistrate's refusal to adjourn will not invalidate the conviction.

The King v. Pfister, 19 Can. Cr. Cas. 92, 3 O.W.N. 440.

(§ II—7)—ABSENCE OF WITNESS.

A Judge presiding at the assizes has power, during the sitting, to recall his order postponing the trial of a prisoner till the next assizes and to order the trial to proceed, the absent witness, upon whose account the order for postponement was made, having been produced.

Rex v. Redd, 20 W.L.R. 645.

III. Affidavits for.

(No cases.)

IV. Effect of admission.

(No cases.)

CONTRACTORS.

Liability for negligence of, see Master and Servant.

CONTRACTS.

I. NATURE; FORM AND REQUISITES.
- A. In general.
- B. Implied agreement.
- C. Consideration.
- D. Meeting of minds; definiteness.
- E. Formal requisites; Statute of Frauds.
- F. Incorporating extrinsic document.
- G. Merger.

II. CONSTRUCTION.
- A. In general.
- B. Entirety.
- C. Time.
- D. Particular words, phrases and cases.

III. VALIDITY AND EFFECT.
- A. In general.
- B. Illegal by express provision.
- C. Public policy.
- D. Gambling and wager contracts.
- E. In restraint of trade.
- F. Ratification; validating; holding out as agent.
- G. Remedies; proceeds of unlawful contract.

IV. PERFORMANCE; BREACH.
- A. In general.
- B. Excuse for failure of performance.
- C. Incomplete performance; sufficiency of performance.
- D. Condition; certificate of performance.
- E. Breach and its effect.
- F. Time.

V. CHANGE OR EXTINGUISHMENT.
- A. In general.
- B. Termination.
- C. Rescission; cancellation.

VI. ACTIONS; LIABILITIES.
- A. In general.
- B. Defences.

VII. PUBLIC CONTRACTS.
- A. In general.
- B. Advertisements and bids; letting.

VIII. WRONGFUL INTERFERENCE WITH.

Accounting as to, see Accounting.

Assignment of, see Assignment.

With passenger, see Carriers, II.

As to covenants, see Covenants and Conditions.

Measure of damages as to, see Damages.

For separate support and maintenance, see Divorce and Separation, VII.

Admissibility of parol evidence as to, see Evidence, VI.

Of guaranty, see Guaranty.

Power of married woman to contract, see Husband and Wife, I.

Between husband and wife, see Husband and Wife, II.

Guaranty for performance of building contract, see Guaranty, I.

By incompetent persons, see Incompetent Persons, II.

Of infants, see Infants, I.

Injunction to protect contract rights, see Injunction, I.

Of insurance, see Insurance, III.

As to when Statute of Limitations begins to run, see Limitation of Actions, II.

As to mortgages, see Mortgage.

Of municipal corporations, see Municipal Corporations, II.

For partnership, see Partnership.

By agent, see Principal and Agent.

Record of, see Records and Recording Laws.

Of sale of goods, see Sale.

Specific performance of, see Specific Performance.

For purchase of land, see Vendor and Purchaser.

Criminal liability for making contract in undue restraint of trade, see Conspiracy.

I. Nature; form and requisites.

A. In general.

(§ I A—2)—Parties.

The mere fact that the owner of land who had sold it at an inadequate price was an old man nearly eighty years of age, does not make the contract of sale unenforceable where no suggestion of any other incapacity appears on the record.

Baxter v. Rollo, 5 D.L.R. 764, 21 W.L.R. 892.

B. Implied agreement.

(§ I B—5)—Implied agreement.

Where a real estate agent knowing of a possible buyer of property not listed with him interviews the owner and submits an offer upon a form of "offer and acceptance" and the acceptance form contains in addition to the formal acceptance of the offer an agreement with the agents to pay them the usual commission, then if the owner asks the agent to submit offers and does not repudiate any liability to pay commission, a contract will be implied to employ the agent and to pay him the usual commission if he effects a sale, although the owner does not at any time sign such formal agreement to pay commission.

Singer v. Russell, 1 D.L.R. 646, 3 O.W.N. 588, 21 O.W.R. 24, 25 O.L.R. 444.

Where the language of the contract and the circumstances under which it was entered into lead to the inference that a stipulation not expressed in the writing must have formed a part of the bargain, the Court may consider such unexpressed stipulation as an implied term of the contract.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

Plaintiff sold certain land to parties who re-sold under agreement for sale to defendant. While defendant was in possession of the land he created a seed grain lien thereon under the provisions of sec. 5, ch. 8, of 1908 (Sask.), which lien was duly registered by the Registrar, although there was nothing on record to shew that the defendant had any interest in the land. Subsequently the plaintiff acquired a title in fee to the land and found the lien in question thereon. In the meantime the defendant's interest had been cancelled for default. The plaintiff requested the defendant to pay the lien, but defendant disputed the amount and refused, whereupon the plaintiff paid off the lien to clear his title, and brought action to recover the amount:—Held, that the lien in question was improperly registered against the land of plaintiff in that the defendant did not own the land, nor did it appear by the records of the Land Titles Office to be held under agreement for sale.

(2) That being so improperly registered, the plaintiff was not legally compelled to pay the same, and he not being compelled to pay, no contract to indemnify could be implied on the part of defendant.

Otis v. Weedmark, 4 S.L.R. 531.

(§ I B—6)—To pay for services.

Where a railway company which was unable at the time to definitely award a contract, by telegram guaranteed to the plaintiff that in the event of a contract for the construction of a portion of its road not being awarded him, the cost, as well as ten per cent. advance on all contractor's supplies placed by him on the ground, upon it becoming apparent that such contract would not be awarded him, a new contract does not arise from a subsequent promise of the company to assume the liability imposed by such telegram; such promise was, however, an admission that the alternative provision for paying such cost and percentage had come into effect.

Alfred and Wickham v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, 20 W.L.R. 111.

When three co-sureties on a contractor's bond enter into an agreement in writing, appointing one of their number to represent all and authorizing their appointee to do all things necessary for the carrying on of the work, a contract will be implied to pay the active surety a reasonable remuneration for his services.

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

(§ I B—8)—Between relatives.

Where there has been no agreement for payment of any definite amount as remuneration for personal services in looking after an aged person, the fact that a fixed monthly allowance had been for a long time paid and accepted, will not bar a claim for a larger allowance for a later period, during which the services were more onerous by reason of the illness of the aged person during which the usual allowance was not paid.

Smith v. Hopper, 3 D.L.R. 339, 3 O.W.N. 1039, 21 O.W.R. 891.

(§ I B—9a)—Time in which contracts are to be performed.

Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do the act within a reasonable time under the circumstances; and, if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time, he is responsible for the damage. [Ford v. Cotesworth, L.R. 4 Q.B. 127, followed.]

Webber v. Copeman, 7 D.L.R. 58, 21 W.L.R. 961.

C. Consideration.

Where an option is given for a consideration for a limited time from its date and is later amended, and re-dated as of the date of the amendment without further payment, the amended option as to the time for which no consideration was paid is a new agreement without consideration, and is revocable at any time before acceptance.

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595.

(§ I C—12)—For option.

Where the plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, it is necessary for the plaintiff to prove that he gave consideration for the same.

Adamson v. Vachon, 8 D.L.R. 240, 22 W.L.R. 494.

(§ I C 1—17)—For license to use patent.

A licensee of a patent of invention is not permitted during the term of such license to shew a failure of consideration therefor by reason of the alleged invalidity of the patent where there was no warranty of the patent and no fraud.

The Imperial Supply Co., Ltd. v. The Grand Trunk R. Co., 1 D.L.R. 243, 10 East. L.R. 414, 13 Ex. Ct. R. 507.

(§ I C 2—25)—Inadequacy as ground for refusing specific performance.

Specific performance will not be refused on the sole ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud.

Baxter v. Rollo, 5 D.L.R. 764, 21 W.L.R. 892.

(§ I C 2—26)—To will property.

A binding contract arises from the performance, by a woman, of household work, for a man in consideration of his promise to make her a testamentary gift of all of his property. [See also McGugan v. Smith, 21 Can. S.C.R. 263, and Kinsey v. National Trust Co., 15 Man. R. 32.]

Legeas v. Trusts and Guarantee Co., 5 D.L.R. 389, 20 W.L.R. 172.

(§ I C 2—33)—Performance of existing obligation.

Where one enters into an agreement to purchase certain shares of stock for cash, and subsequently substitutes for such agreement a new agreement to deliver certain bonds in exchange for the shares, and to sell the bonds within a certain time for the face value thereof, the agreement to sell the bonds is not without consideration as being merely collateral to the main transaction, but is part thereof, and can be enforced.

Martin v. Munns, 3 D.L.R. 435, 3 O.W.N. 1055.

(§ I C 2—37)—Forbearance to sue.

Where a landlord in misconception of his legal rights bonâ fide believing that a lease had been terminated, forbears bringing an action to enforce this claim against a tenant who is in possession claiming to have exercised an option to renew contained in the original lease, for a further term of five years, by an unsigned notice in writing, such forbearance is sufficient consideration to support the compromise effected whereby two years of the alleged renewed term was surrendered. [Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449, followed; see also Cook v. Wright, 1 B. & S. 559, and Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793.]

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816.

D. Meeting of minds; definiteness.

(§ I D—46)—Mistake or fraud.

Where a contract for the sale of certain machinery was neither read over nor explained to the purchasers other than the part that dealt with the description of the machinery, and a provision that the damages for a breach thereof should be a certain per cent. of the price of the machinery was not read over to them or in any way brought to their notice, and the vendor's agent knew that one of the purchasers could neither read nor write and that the other could not read the proposed contract so as to understand it, both being foreigners with little if any education, there was no agreement on their part to the per cent. fixed as damages for breach or to any other part of the contract than the order for the machinery.

Sawyer-Massey Co., Ltd. v. Fedo Szlachetka, 4 D.L.R. 442, 21 W.L.R. 580.

A memorandum in writing otherwise sufficient under the Statute of Frauds is not vitiated by reason of the insertion of an incorrect admission of payment of the cash portion of the price, if the party in whose favour the admission is made admits the error and submits to the correction of same. Gillatley v. White, 18 Gr. (Ont.) 1; Martin v. Pycroft, 2 DeG. M. & G. 785, applied; McLaughlin v. Mayhew, 6 O.L.R. 174, and Vanderwoort v. Hall, 18 Man. R. 682, specially referred to.]

Knight v. Cushing, 1 D.L.R. 331, 20 W.L.R. 28.

(§ I D—51)—Sale of personal property.

Where an illiterate person signs by his mark a contract to sell standing timber and it appears that the instrument was not, before signature, read or explained to him and that he did not know the wording when he made his mark thereto, such circumstances constitute in his favour a valid ground of defence against the enforcement of the contract by the other party thereto, particularly where the written contract was materially different from the oral agreement in conformity with which the illiterate person might reasonably have supposed the writing to have been drawn.

Keddy v. Daurey, 7 D.L.R. 118.

Where the question in an action by the owner of certain mining stock for the specific performance of an agreement which he alleged to be for the sale of the shares was whether the instrument was an option or a contract for sale, and it appeared at the trial that the agreement was made in duplicate in the handwriting of the plaintiff and that his duplicate contained a statement following his agreement to sell that the purchaser agreed to take the stock, which statement was absent from the defendant's duplicate, and the evidence as to what occurred at the execution of the agreement consisted of conflicting statements of the parties and of the testimony of one witness who corroborated one party as much as the other, so that there was no preponderance in the plaintiff's favour, the fact that the instrument contained the further provision that the stock was to be transferred three months after the date of the instrument "without interest" while hardly applicable to the case of a mere option, was not sufficient to establish the plaintiff's claim that it was a contract for sale.

Clark v. Wigle, 4 D.L.R. 335, 22 O.W.R. 748, 3 O.W.N. 1583.

(§ I D—52)—Sale of real property.

The omission from a contract for the sale of lands of the terms of a mortgage to be given thereon by the purchaser as security for payment of a portion of the purchase price, other than to mention the amount and the rate of interest, is of such a material portion of the agreement as to render it incomplete in a particular that could not be supplied by implication, and, therefore, void under the Statute of Frauds. [Green v. Stevenson (1905), 9 O.L.R. 671; South Wales R. Co. v. Wythe (1854), 5 DeG. M. & G. 880, and Bayley v. Fitzmaurice (1857), 8 E. & B., referred to.]

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838.

In a land contract the place of payment of the purchase money is a material term, and where an intending purchaser, without the knowledge or consent of the vendor, alters the formal contract of sale, which had been executed by the vendor, by changing the place of the payment of the purchase money, such amounts to a material alteration, and the contract may be avoided by the vendor even after he has cashed the cheque for the initial payment forwarded by the purchaser with a letter purporting to accept the terms of the informal offer to sell, not knowing of such alteration of the place of payment named in the contract. [Burchfield v. Moore, 3 E. & B. 683; Master v. Miller, 4 T.R. 320, followed.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

An unilateral agreement is not created by the fact that but one party to the contract signed it, as it may become binding by the acts of the parties thereunder.

Mills v. Marriott, 3 D.L.R. 266, 20 W.L.R. 917.

(§ I D—55)—Definiteness.

An agreement is too indefinite and incomplete to call for a specific performance thereof, by which the plaintiff was to sell to the defendants his interest in a mining claim upon the basis of a specified amount for the whole claim, less a sum not to exceed a certain amount for charges against the first mentioned sum, the price to be in certain instalments at fixed rates, shares to be delivered as paid for or secured, and there was nothing to shew what interest the plaintiff had in the claim or how many shares he was entitled to, so that the price was not ascertainable without further negotiations between the parties. [House v. Brown, 14 O.L.R. 500, followed.]

Thomson v. McPherson, 3 D.L.R. 269, 3 O.W.N. 791, 21 O.W.R. 646.

In cases of sale a contract or agreement is complete and susceptible of being executed when the parties have agreed as to the object sold and the amount of the price; absence of a stipulated term for payment of the balance of purchase price is no bar to the enforcement of such contract.

Poirier v. Archambault, 1 D.L.R. 358.

An agreement concerning mining claims is a contract of sale and purchase and not a mere option to purchase, which provided not for a small down payment, but for a cash payment of $20,000 and the payment of the balance of the purchase price, $15,000, in two cash instalments within one year and that the vendors were to sell and the purchaser was to purchase all the right, title and interest of the vendors in the mining claims, it also appearing that the purchaser went into possession and continued therein until after all the purchase money was paid, when he received from the vendors written documents transferring to him all their right, title and interest in the claim.

Dubé v. Mann, 4 D.L.R. 164, 3 O.W.N. 1580, 22 O.W.R. 751.

The promise on the part of the buyer to re-sell to seller, "if he should decide to alienate," constitutes a "preferential agreement" and not a nullity as a purely faculative, since the condition is subordinate not to the will of the obligor, but to a fact depending whether or not this fact will be followed up or not.

Herbert v. Corporation en Village de Saint-Michel, 18 Rev. de Jur. 228.

(§ I D 4—61)—Necessity of acceptance.

One who has made an offer cannot dispense with an acceptance thereof, so as to create a contractual relationship without such acceptance.

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

The phrases "acceptance of option" and "exercise of option" as used in a written agreement giving an option to pur-

chase land, mean one and the same thing, that is, the time when an election is made to buy upon the terms specified.

Lawrence v. Pringle, 3 D.L.R. 634, 21 W.L.R. 546, 17 B.C.R. 250.

(§ I D 4—62)—SUFFICIENCY.

The mere acceptance of a proposal to materially modify the terms of an existing contract, will not have that effect when the proposal was made subject to the express condition that it should not have legal effect on such contract until its terms were reduced into a new written agreement. [Chinnock v. Marchioness of Ely, 4 DeG. J. & D. 638, and Rossiter v. Miller, 3 A.C. 1124, followed.]

Wallace Bell Co., Ltd. v. City of Moose Jaw (No. 2), 4 D.L.R. 438, 21 W.L.R. 871.

A statement in writing by the owner of real property to a prospective purchaser that "the best I can consider is, etc." (naming the price and terms), is not an offer to sell the property at the price and terms quoted.

Blackstock v. Williams, 7 Terr. L.R. 362.

A contract of purchase and sale of real estate may be proved by the exchange of letters and where an offer made by letter is accepted by letter, the agreement is completed, and such a contract is sufficient to satisfy the requirements of the Statute of Frauds.

Mansfield v. Toronto General Trusts Corporation, 1 D.L.R. 503, 20 W.L.R. 344, 22 Man. L.R. 49.

The place of payment is a material term of a contract, and acceptance of an offer which changes the place of payment is merely a new offer and not an acceptance which concludes a contract. [Birchfield v. Moore, 3 E. & B. 683.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

Where a written offer to purchase land purported to be made pursuant to conditions imposed by the owner and set out in the offer, to the effect that no application would be considered by the owner unless accompanied by a cash payment of a certain amount, and the prospective purchaser forwarded with it a lesser sum than was called for by the terms of the offer, the fact that the owner replied, acknowledging receipt of the offer and stating that a sight draft would be made for the balance of the first payment does not constitute an acceptance of the offer where such balance represented by the draft was not in fact paid.

Richardson v. Ramsay, 2 D.L.R. 686, 20 W.L.R. 566.

Where it was stipulated in a written offer to purchase a piano, that the order was not subject to countermand or rescission, and the vendee requested that the piano should be held for him until such time as his rooms should be ready to receive it, the offer is sufficiently accepted so as to create a binding contract which was not subject to countermand, where, after the piano had been held about two months, the vendor acted upon the offer by requesting the vendee to name a time for delivery, whereupon the vendee did not repudiate but asked the vendor to hold the piano a little longer. [Ellis v. Abell, 10 A.R. 226, and Ruess v. Picksley, L.R. 1 Ex. 342, specially referred to.]

Heintzman & Co., Ltd. v. Rundle, 4 D.L.R. 688, 20 W.L.R. 202.

A clause in a lease not under seal giving to the lessee the option to purchase the demised premises at a stated price, is not necessarily an integral part of the lease and where it is not founded upon any consideration, specific performance of the option will be refused. [Davis v. Shaw, 21 O.L.R. 474, and Maltezos v. Brouse, 19 O.W.R. 6, applied; Hall v. Center, 40 Cal. 63, referred to.]

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

(§ I D 4—62a)—TENDER OF PURCHASE PRICE.

Where the owner of land gives an option to purchase, which requires the first payment for the land to be made by a certain date, and provides no other manner of accepting the option, and before such date the owner transfers the land to a third person, without the knowledge or consent of the holder of the option, the holder is relieved from the necessity of tendering the first payment, and an acceptance of the option by letter without any such tenders is effectual. [McKay v. Wayland, 2 O.W.N. 741, 18 O.W.R. 696, referred to. See also Dart, Vendor and Purchaser, 7th ed., p. 273.]

Carey v. Roots, 5 D.L.R. 670, 21 W.L.R. 795.

(§ I D 4—62b)—TIME, AS ESSENCE OF.

Where one party interested with another in a piece of land makes an offer by mail to sell his interest and requests an answer by return mail, an attempt to accept the offer eight days after its receipt by the offeree is too late, where in the meantime the interest was sold to another.

Kelley v. Holley et al., 8 D.L.R. 176, 22 W.L.R. 587.

Where, in an option to purchase land, time was declared to be of the essence of the agreement which stipulated that 25 per cent. of the purchase money should be paid at the time of "exercising the option," the failure to make such payment when an election was made to buy upon the terms stated in the option, will permit the owner of the property to treat the agreement as broken and ended.

Lawrence v. Pringle, 3 D.L.R. 634, 21 W.L.R. 546, 17 B.C.R. 250.

(§ I D 4—63)—WITHDRAWAL OF OFFER.

A statement by the giver of an option to purchase, which is not under seal, and for which there is no consideration, that the option has expired and that he will have nothing further to do with the holder of it, constitutes a sufficient withdrawal of the offer contained in the option.

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

Where the owner telegraphed to a real estate agent who was not only seeking to procure a purchaser for him, but who was also acting as agent of a proposed purchaser for the purpose of completing the deal, that he would "accept $2,400, $400 cash, purchaser paying costs, commission," and then wrote him referring to his previously quoted price as $15 per acre (which in fact amounted to less than $2,400), saying that his telegram is "practically a confirmation of" the price previously quoted of $15 per acre, the word "practically" in such case means no more than "very nearly" and the letter does not constitute a renewed offer to take $15 per acre.

Meivre v. Steine, 2 D.L.R. 106, 21 W.L.R. 687.

The vendor of goods sold at auction who agreed to accept a designated person as accommodation signer to the note to be given for the purchase money, may retract such consent and refuse to accept such signer at any time before the note was actually signed, where the conditions of sale provided that for goods not paid for in cash, the vendor should receive the note of the purchaser and of an accommodation maker satisfactory to the vendor, particularly where an enquiry by the latter as to the financial standing of the proposed surety disclosed misrepresentations of the buyer with reference thereto.

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408.

(§ D 4—64)—PLACE OF ACCEPTANCE.

Contracts by letter correspondence are only completed where there is absolute agreement between the parties as to the object, price and conditions of the contract, and the place where the contract is completed is the place where the letter of actual acceptance is posted irrespective of whatever offers and negotiations may have preceded it. [See also Magann v. Auger, 31 Can. S.C.R. 186.]

Butler v. Mechanical Equipment Co., 7 D.L.R. 77.

E. Formal requisites; Statute of Frauds.

(§ I E—65)—FORMAL REQUISITES; STATUTE OF FRAUDS.

The effect of the 4th and 17th sections of the Statute of Frauds is the same; they do not render contracts within them void, still less illegal, but they render the kind of evidence required indispensable when it is sought to enforce the contract. [Maddison v. Alderson, 8 A.C. 467, referred to.]

Maloughney v. Crowe, 6 D.L.R. 471, 3 O.W.N. 1488, 22 O.W.R. 635, 26 O.L.R. 579.

(§ I E—67)—SALE OF PERSONAL PROPERTY.

The validity of a contract for the sale of goods is not affected by the omission therefrom of the date of their delivery.

Schrader, Mitchell and Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

(§ I E 4—80)—CONTRACTS AS TO REALTY.

A letter written to the plaintiff by the defendant stating that "I will sell my hotel . . . for the sum of forty thousand dollars, covering lots 1 and 2, block 4, and lot 19, block 4, in Blairmore. I will pay you five per cent. commission on purchase price," and signed by the defendant, is sufficient, under chapter 27 of Alberta Statute of Frauds of 1906, to constitute a contract to pay commission in the event of the plaintiff finding a purchaser for the property.

George v. Howard, 4 D.L.R. 257.

In an action for the sale of lands under a certificate of judgment, for a sum of money, registered in the Land Titles Office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, such an agreement is valid at common law, and, although it is well-settled law that under the 4th section of the Statute of Frauds it cannot be enforced against an unwilling or dishonest vendor, yet it is equally well-settled law that the statute does not affect the validity of the agreement, but only the remedy upon it, the signature so required is not of the substance of the contract, but is matter of procedure only, making a particular kind of proof necessary to enable a party to bring an action upon it; hence the verbal agreement is as effective (except as to enforcement) as a written contract. [Leroux v. Brown (1852), 12 C.B. 801; Jones v. Victoria, 2 Q.B.D. 314, 323; Re Hoyle, [1893] 1 Ch. 84; Laythoarp v. Bryant, 2 Bing. N.C. 735, referred to; see also Fry on Specific Performance, 5th ed., 254.]

Fenson v. Shore, 6 D.L.R. 376, 22 W.L.R. 202.

Where the plaintiff, who had agreed, in consideration of a half-interest in property the defendant purposed to purchase, to provide a large sum for the initial cash payment, instead of doing which he claimed to have found a purchaser for the property, but upon terms the defendant refused to accept, and also attempted to obtain an option on the property to the exclusion of the defendant, the latter is relieved from making a demand upon the plaintiff to furnish the money necessary for such payment, or of giving him notice of the repudiation of such agreement.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499.

Rights granted under a Crown license to cut timber, pursuant to R.S.O. 1897, ch. 32 (which include the right to take and keep exclusive possession and to sue for trespass) are an "interest in lands" within the meaning of the Statute of Frauds. [Hoeffler v. Irwin (1904), 8 O.L.R. 740, followed; see also Leake on Contracts, 6th ed., 165.]

Thomson v. Playfair (No. 1), 2 D.L.R. 37, 3 O.W.N. 506, 21 O.W.R. 867, 25 O.L.R. 365.

Parol agreement to furnish part of purchase price—Partnership—Trust.

Stewart v. Saunders (No. 2), 7 D.L.R. 812.

Where a marriage contract provides that the community property of the proposed husband and wife shall, during the marriage, be used for their joint benefit, and that, upon the death of either, the usufruct goes to the survivor, and that, after, the survivor's death, the property shall go in moieties to the two families of the proposed husband and wife; it is beyond the power of either of the parties, after the marriage, to make any change in the marriage agreement contained in the contract.

Houde v. Marchand, 8 D.L.R. 431.

(§ I E 4—90)—To complete title.

Where the grantee of lands subject to an instalment contract of sale made by his grantor under which a Torrens title was to be given, orally agrees with the purchaser to furnish a Torrens title if the balance of the purchase money is paid directly to him instead of to the original vendor, such agreement is not a contract for the sale of lands or of an interest therein within the meaning of the Statute of Frauds, but for the performance of an act with reference to his own lands and title, and it may be specifically enforced at the instance of the purchaser. [Angell v. Duke, L.R. 10 Q.B. 174; Jeakes v. White, 6 Ex. 873, and Boston v. Boston, [1904] 1 K.B. 124, followed.]

Smith v. Ernst (No. 3), 3 D.L.R. 736, 22 Man. L.R. 363, 21 W.L.R. 483.

(§ I E 5—95)—Sufficiency of writing.

Where a contract is made by correspondence between the parties, even though the final letters of both parties are under seal, any letter in the series of correspondence may be read in evidence for the purpose of explaining any ambiguity or doubt which might exist in the contract. (Per Howell, C.J.M., Richards, and Perdue, JJ.A.) [See Phipson on Evidence, 5th ed., 580.]

Brandon Gas & Power Co. v. Brandon Creamery Co., 8 D.L.R. 191, 22 W.L.R. 476.

An option to purchase land given to a person living at a distance from the owner may be effectually accepted by letter. [Bruner v. Moore (1904), 1 Ch. 305, referred to.]

Carey v. Roots, 5 D.L.R. 670, 21 W.L.R. 795.

A writing shewn by parol not to include the entire contract and which does not purport to contain all the terms of agreement is insufficient as a memorandum under the Statute of Frauds to establish a sale of lands. [Rogers v. Hewer, 1 D.L.R. 747, reversed in the result.]

Rogers v. Hewer (No. 2), 8 D.L.R. 288, 22 W.L.R. 807.

An act of possession by an alleged vendee of land under a parol contract, in order to satisfy the Statute of Frauds, must be an unequivocal act. (Per Stuart, J.) [See Thomson v. Playfair, 6 D.L.R. 263, reversing 2 D.L.R. 37, and see annotation, 2 D.L.R. 43, on possessory acts under the Statute of Frauds.]

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

Proof of the existence of a written memorandum of an agreement for the sale of land without proving what were the terms of payment is insufficient to satisfy the Statute of Frauds. (Per Stuart, J.)

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

Proof of the mere letting into possession of an alleged vendee of land is not sufficient to satisfy the Statute of Frauds. (Per Stuart, J.)

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

The fact that the alleged vendee of land under a parol contract of sale entered the land and cut the natural hay thereon and put out the stray cattle and repaired the fences so as to keep the cattle out, does not constitute such an unequivocal act as would take the case out of the Statute of Frauds where those acts were explained by the alleged vendor on some other theory than that of a contract of sale. (Per Stuart, J.)

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

In order for possession of land to take a case out of the Statute of Frauds, the act of possession must be incapable of explanation on any other theory than that of the existence of a contract of the nature alleged by the plaintiff, and where the alleged act of possession involved no permanent interest in the land, and was, from its nature, capable of explanation in the manner sworn to by the defendant, the plaintiff cannot succeed even where such plausible explanation is disbelieved by the trial Judge. (Per Stuart, J.) [Maddison v. Alderson, 8 A.C. 467; Ungley v. Ungley, 5 Ch. D. 887, and Bodwell v. McNiven, 5 O.L.R. 332, specially considered.]

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

(§ I E—97)—Several writings.

Where an owner answers a real estate agent's inquiry as to price and terms and intimation of the possibility of prospective sale on given terms, by instructions to take a deposit and prepare agreements for signature, the contract is closed by taking the deposit and giving a receipt shewing a sale on the terms of the instructions.

Lloy v. Wells, 3 D.L.R. 315, 21 W.L.R. 50.

Where the defendant orally agreed with the agent of the plaintiff to sell the plaintiff certain land and thereafter enclosed the conveyance thereof and other documents to be executed in compliance with the oral contract in a letter signed by him and addressed to the plaintiff stating that he therewith handed him a transfer of the land, describing it, to be delivered to the plaintiff upon the payment of the purchase price, the letter and the documents enclosed therein, together with a sight draft made by the defendant on the plaintiff for the amount of the purchase price, constitute a contract of sale in writing under section 4 of the Statute of Frauds.

Brown v. Street, 3 D.L.R. 291, 21 W.L.R. 46.

Where an alleged agreement for the sale of land is contained in a cheque and receipt, and it appears in an action for specific performance thereof that a more formal agreement was to be prepared, providing for payment of taxes, cancellation on default, transfer of the property, and other important matters not mentioned in the cheque and receipt, the cheque and receipt do not constitute a sufficient memorandum in writing of the agreement to satisfy the Statute of Frauds. [Green v. Stevenson, 9 O.L.R. 671, followed; Harris v. Darroch, 1 Sask. L.R. 116, distinguished.]

Strickland v. Ross, 5 D.L.R. 706, 21 W.L.R. 945.

A receipt given a purchaser of land for his first payment, which stated all the terms of the contract of sale and was sufficiently executed to satisfy the Statute of Frauds, is a binding agreement of itself, and the fact that it contained a provision making a specified sum payable "on the execution of the necessary agreement of sale," does not make it merely a contract for a contract. [Von Halzfeldt Wildenburg v. Alexander, [1912] 1 Ch. 284, specially referred to.]

Conley v. Paterson, 2 D.L.R. 94, 20 W.L.R. 722, 22 Man. L.R. 127.

Where the defendant, who had, while dealing with a real estate agent, mentioned property belonging to his wife, without giving him instructions to sell it, upon receiving an offer by telegraph for such property, which, however, was in fact made to another real estate agent, not associated with the first real estate agent, in any manner, but who had negotiated a sale with the plaintiff, and had given him a receipt for a cash payment stating that it was received to apply on the offer to purchase the property, which it described, refused such offer, and later, the second real estate agent sent a telegram in the name of the first real estate agent making another offer, which the defendant wired the first agent to accept, stating that the title was in his wife, whereupon the second agent accepted from the plaintiff a further payment by cheque, payable to the Realty Exchange, which did not shew for what it was given, and which was indorsed by the second agent in his own name under instructions from the first agent, such receipt and telegrams did not amount to a written contract sufficient to satisfy the requirements of the Statute of Frauds, since the defendant's telegram to the first agent was an instruction to him to accept the offer of the plaintiff, which he did not do, and the acceptance by the second agent was insufficient because the defendant had not given him authority to accept it for him, and the indorsement of the cheque by the second agent under the first agent's instructions, if sufficient to constitute an acceptance, was not binding upon the defendant, since the first agent could not delegate to the second agent the authority the defendant had given him.

Boland v. Philp, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 849.

A party seeking to make out a memorandum to satisfy the requirements of the Statute of Frauds, cannot select some of the writings and say that they sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled. [Hussey v. Horne-Payne, 4 A.C. 311; Bristol Co. v. Maggs, 44 Ch.D. 616; Stow v. Currie, 21 O.L.R. 486; Queen's College v. Jayne, 10 O.L.R. 319, and Bohan v. Galbraith, 15 O.L.R. 37, specially referred to.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

Where a receipt for a payment on account of the purchase price of an interest in lands, containing sufficient particulars to satisfy the Statute of Frauds, is signed by the vendor, and a copy of it, headed "copy of receipt," is signed by the agent of the purchaser and handed to the vendor, the two documents may be read together, and constitute as against the purchaser a sufficient memorandum in writing to satisfy the Statute of Frauds.

Thomson v. Playfair (No. 2), 6 D.L.R. 263, 3 O.W.N. 1539, 26 O.L.R. 624, 22 O.W.R. 866.

Contract for sale of land—Formation of —Husband of vendor—Authority—Statute of Frauds—Specific performance.

Boland v. Philp (No. 2), D.L.R. 863, 4 O.W.N. 166, 23 O.W.R. 185.

Sale of land—Specific performance——Contract by correspondence.

Storie v. Hancock, 4 O.W.N. 459.

(§ I E 5—98)—Description of land.

Where a receipt for the initial payment upon land sold failed to shew with certainty how many lots were sold, its insufficiency in this regard under the Statute of Frauds, if any, was covered by the fact the cheque given by the purchaser for such payment plainly shewed that the sale was of a specified number of lots.

Rogers v. Hewer, 1 D.L.R. 747, 19 W. L.R. 868.

(§ I E 5—99)—Contradictory terms of payment.

Where the terms of payment stated in a memorandum of the sale of land are contradictory, the contract is within the Statute of Frauds.

Frith v. Alliance Investment Co., 5 D. L.R. 491, 20 W.L.R. 551.

(§ I E 5—100)—Execution.

Where the real estate agent obtained on the owner's behalf a deposit on the purchase of land and gave a receipt therefor specifying as the terms of the sale that a portion of the price (including the deposit) should be "cash" and balance in instalments, and a formal agreement to the like effect was afterwards signed and delivered by both the vendor and purchaser, the latter agreement is evidence in writing of the contract under the Statute of Frauds although the cash payment, the receipt whereof it purported to acknowledge, was not actually paid, if the agreement was not delivered conditionally upon such payment being made. [Re Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 98, specially referred to.]

Knight v. Cushing, 1 D.L.R. 331, 20 W. L.R. 28.

(§ I E 5b—103)—Signature.

Where a writing relied upon as an acknowledgment or waiver is a printed form with intervening blanks between the various clauses thereof, a signature placed in one of such blanks is not equivalent to a signature placed at the end of the document, and cannot be considered as an authentication of a clause which follows the signature so placed.

Eisler v. Canadian Fairbanks Co., 8 D.L. R. 390, 22 W.L.R. 888.

(§ I E—105)—Memorandum.

To satisfy the requirements of the Statute of Frauds as to the formalities of a written contract for the sale of lands, it is essential that the manner and time of payment, as well as the amount to be paid, should be set out with such particularity and certainty as would enable the Court to ascertain and define whether or not payment was to be made in cash, and if not in cash, then on what dates and in what amounts the payments are to be made. [See also Fenske v. Farbacher, and its annotation, 2 D.L.R. 634.]

Clement v. McFarland, 8 D.L.R. 226, 4 O.W.N. 448, 23 O.W.R. 613.

An agreement in writing for the sale of lands in which the price is shewn, but the terms of payment are not inserted, is insufficient to satisfy the Statute of Frauds. [Reynolds v. Foster, 3 D.L.R. 506, 3 O. W.N. 983, applied.]

Clement v. McFarland, 8 D.L.R. 226, 4 O.W.N. 448, 23 O.W.R. 613.

(§ I E 5—106)—Description of parties.

Where the instrument relied upon as shewing a contract of sale of land consisted of a receipt signed by a real estate agent which contained a stipulation that the sale was "subject to confirmation by owner," such reference is sufficient to describe the joint-owners as the vendors to satisfy the Statute of Frauds, and they will be bound by the terms of the writing if it is shewn that the real estate agent had their authority to sell on the terms of the receipt and that their approval had been duly given by one of such co-owners holding written authority from the others so to do.

Rogers v. Hewer, 1 D.L.R. 747, 19 W. L.R. 868.

The particulars required to make a complete memorandum for the purposes of the Statute of Frauds need not all be contained in one document. The signed writing may incorporate others by reference, but taken together they must identify the parties and subject-matter. [Clergue v. Preston (1904), 8 O.L.R. 84, distinguished.]

Bailey v. Dawson, 1 D.L.R. 487, 3 O. W.N. 560, 20 O.W.R. 908, 25 O.L.R. 387.

It is essential that a contract for sale of lands should express the names of the contracting parties or of their agents authorized to act in the matter of the sale. [Maber v. Penskalski, 15 Man. L.R. 236; Miller v. Rossiter, 3 A.C. 1124, referred to.]

Tremblay v. Dussault, 8 D.L.R. 348, 22 W.L.R. 716.

A contract for the sale of land which is signed by persons "as agents for the owner" sufficiently satisfies the requirements of the Statute of Frauds in that regard. [Rossiter v. Miller, 3 A.C. 1124, applied. See also annotation to this case.]

Conley v. Paterson, 2 D.L.R. 94, 20 W. L.R. 722, 22 Man. L.R. 127.

(§ I E—108)—Signature.

A concluded bargain is made for the sale of land when the owner signs a receipt that he had received a certain sum of money on account of the purchase thereof.

Baxter v. Rollo, 5 D.L.R. 764, 21 W.L.R. 892; see Contracts (§ I E 5—103).

A receipt for the deposit on a sale of land expressed to be "subject to owners' approval" and containing a statement of the price and terms of sale will not satisfy the Statute of Frauds where it is signed "per" one of several joint owners and was repudiated by the co-owners who declined the deposit and had it returned to the proposed purchaser.

Tremblay v. Dussault, 8 D.L.R. 348, 22 W.L.R. 716.

(§ I E 6—121)—POSSESSION AND IMPROVEMENT.

The purchaser under an oral agreement for sale cannot set up his own contract of re-sale made with a third party as a part performance of the original agreement excluding the operation of the Statute of Frauds for the purpose of the purchaser's action for specific performance, if the contract of re-sale was made without the knowledge or acquiescence of the original vendor. [See also Fry on Specific Performance, 5th ed., p. 311.]

Adolph v. Good, 1 D.L.R. 750, 20 W.L.R. 401.

No taking of possession sufficient to operate as a part performance so as to take the case out of the Statute of Frauds, occurs where the intended purchaser, under an incomplete and unfinished contract, without the privity or consent of the owner goes into possession of the land being negotiated for and also pays part of the municipal taxes levied against the same. [Fry on Specific Performance, 5th ed., par. 587, specially referred to; Pearson v. O'Brien, 18 W.L.R. 563, affirmed on appeal.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

Where an agreement has been made for the sale of standing timber on an island, the action of the purchaser's agents in going to and landing upon the island, and inspecting the timber thereon, does not constitute such part performance of the agreement as to take the case out of the Statute of Frauds. [Thomson v. Playfair, 2 D.L.R. 37 (head-note 2), reversed on this point; and see annotation to that case, 2 D.L.R. 43.]

Thomson v. Playfair (No. 2), 6 D.L.R. 263, 3 O.W.N. 1539, 26 O.L.R. 624, 22 O.W.R. 866.

No taking of possession sufficient to satisfy the requirements of the Statute of Frauds, occurs where one in possession of a piano under a storage arrangement, orally agrees to exchange certain land for the piano, and merely continues in possession of the piano without any overt act or writing to indicate a change in the character of the continued possession. [Maddison v. Alderson, 8 App. Cas. 467, specially referred to.]

Adolph v. Good, 1 D.L.R. 750, 20 W.L.R. 401.

A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms.

Haney v. Winnipeg and Northern R. Co., 1 D.L.R. 387, 20 W.L.R. 540.

Where there has been part payment on a contract to purchase timber limits not sufficiently evidenced by a writing under the Statute of Frauds, the subsequent entry upon the lands by the purchaser's agents or employees and their examination of the timber, may constitute a taking of possession and a part performance of the contract sufficient to take the case out of the operation of the Statute of Frauds, if the vendor as a licensee under the Crown Timber Act, R.S.O. 1897, ch. 32, sec. 3, had the exclusive right of possession and the acts of the purchaser were not referable to or justifiable from any circumstance other than the contract in question.

Thomson v. Playfair (No. 1), 2 D.L.R. 37, 3 O.W.N. 506, 21 O.W.R. 867, 25 O.L.R. 365.

F. Incorporating extrinsic document.

(§ I F—121z) — INCORPORATING EXTRINSIC DOCUMENT.

The terms of a written contract with a municipal corporation, under its seal, cannot be varied so as to result in a binding agreement, by a written acceptance of a proposition to enter into a new and modified contract, contained in a letter written by a city solicitor, under directions from the City Council, where such letter expressly stated that the offer therein contained was merely a tentative suggestion which was not to have any legal effect on the existing contract until reduced into a new written agreement. [Bonnewell v. Jenkins, 47 L.J. Ch. 758; Rossiter v. Miller, 3 A.C. 1124; Stow v. Currie, 21 O.L.R. 486, and Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 638, at p. 645, applied.]

Wallace Bell Co. v. Moose Jaw (No. 1), 3 D.L.R. 273, 21 W.L.R. 36, affirmed; Wallace Bell Co. v. Moose Jaw (No. 2), 4 D.L.R. 438, 21 W.L.R. 871.

In the interpretation of a vague or ambiguous term used in a contract, a letter having reference to the same subject-matter written by another person on the plaintiff's instructions in which the same term is used, may be considered as the language of the plaintiff for the purpose of assigning to such term a meaning consistent with that in the letter but adverse to the meaning which the plaintiff seeks to place upon it in the contract.

Davis v. Lowry, 3 D.L.R. 157, 20 W.L.R. 839.

II. Construction.

A. In general.

(§ II A—127)—Construing as a whole.

Under an absolute covenant in a contract for the sale of mining claims that the purchaser should pay a royalty at a specified rate for each long ton of ore removed from the claims, the amount to be removed from the claims in each year to be not less than a specified amount of long tons and that the said royalty at such rate should be paid on such number of tons annually at least, whether that amount should be actually removed or not, the fact that no merchantable ore was found in the claims will not relieve the purchaser from the royalty. [Palmer v. Wallbridge (1888), 15 Can. S.C.R. 650, applied; Leake on Contracts, 6th ed., 490, specially referred to.]

Dubé v. Mann, 4 D.L.R. 164, 3 O.W.N. 1580, 22 O.W.R. 751.

Where the agreement between the parties is that the one shall supply all the gas which the other may use for power purposes, though there is no express agreement that the other would take all the gas which it needed, yet the Court will infer an agreement on the part of the latter to do so. (Per Howell, C.J.M., Richards, and Perdue, JJ.A.) [The Queen v. MacLean, 8 Can. S.C.R. 210, referred to.]

Brandon Gas & Power Co. v. Brandon Creamery Co., 8 D.L.R. 191, 22 W.L.R. 476.

An offer by a gas company that it would supply gas at a certain reduced rate for a certain period of years to a manufacturing company for power purposes, and would extend its system and install apparatus so as to be able to make such supply, when accepted by the manufacturing company, is an agreement that the gas company would manufacture and supply to the manufacturing company all the gas which it would use for power purposes in its factory during that period at that reduced rate, and that the manufacturing company would take all the gas which it would use for that purpose during that period. (Per Howell, C.J.M., Richards, and Perdue, JJ.A.) [The Queen v. MacLean, 8 Can. S.C.R. 210; Kenney v. The Queen, 1 Can. Ex. R. 68, referred to.]

Brandon Gas & Power Co. v. Brandon Creamery Co., 8 D.L.R. 191, 22 W.L.R. 476.

In an action for rescission under art. 1641 of the Civil Code of Quebec, the contract must be looked at as a whole, and the relative importance of the result of any single breach thereof must be considered in determining whether the party injured is entitled to rescind. (Per Idington, J.)

Consumers' Cordage Co. v. Bannerman, 2 D.L.R. 419.

An agreement of three persons relating to property and dealing with matters in which all three were interested, to be binding on any one of them must be executed by all, and where such a contract is signed by two only, the third refusing to sign, and one of the two signers proceeds to do what is required of him by the contract, he cannot recover from the other signer for any damages suffered by reason of the latter's failure to perform his part.

Black v. Townsend, 2 D.L.R. 826, 3 O.W.N. 541, 20 O.W.R. 974.

Sale of goods—Agent for sale or purchaser—"Time of sale."

Traders Bank of Canada v. Bingham, 1 D.L.R. 911, 3 O.W.N. 772.

Printed form—Partial filling in of blanks.

Kelly v. Locklin, 8 D.L.R. 1039, 17 B.C. R. 331.

(§ II A—128)—Intention of parties; construction given by them.

It is necessary, in interpreting a contract, to endeavour to ascertain the common intention of the parties rather than to be satisfied with the literal meaning of the expressions used. Thus when in a contract to furnish beer to a customer at a price fixed and for a term of years the brewer covenants that "if he should join a trust" formed for the purpose of procuring a monopoly of the business he would incur a penalty, the condition is formed and the penalty incurred by the sale of his brewery and good will to the trust though he does not join nor acquire any interest in it. The common intention of the parties by the penal clause was to oblige the brewer not, by his act, to allow the brewery to pass into the hands of the trust whether he joined it or not. The fixed penalty provided for is only the valuation agreed upon for the damages caused by non-observance of the main obligation. The Court may reduce the amount in case of partial performance or if the circumstances exclude the right to demand the whole, e.g., in allowing a penalty to indemnify a hotelkeeper for loss in his business, it is necessary to consider the limited time for his license to run.

Robitaille v. Proteau, Q.R. 41 S.C. 214 (Sup. Ct.).

The acts and conduct of the parties cannot be invoked to affect the interpretation of plain and unambiguous language used in their written contract. [Baynham v. Guy's Hospital, 3 Ves. 294; Iggulden v. May, 9 Ves. 325, followed.]

Wilson v. Kerner, 3 D.L.R. 11, 3 O.W.N. 769, 21 O.W.R. 477.

(§ II A—129)—Upholding contract to prevent forfeiture.

When a contract of option for the purchase of mining locations provides (a) that the owner giving the option shall deposit all the titles in escrow in the hands of a third party within the delay for declaring the option, under a fixed penalty; (b) that the intending purchaser may take im-

mediate possession of the property; (c) that in the event of the option being made the owner will execute the necessary instruments to put the purchaser in full possession and ownership of the property; (d) that the price agreed upon will be paid by instalments at stated dates; the first of these covenants is sufficiently executed by depositing the documents of title exhibited at the time of the contract and on which it was made, though not perfect and complete. The penalty is not incurred till the purchaser, by payment of the entire price, has put the owner in default of vesting him with the ownership of the property.

Marshall et al. v. Leckie et al., 41 Que. S.C. 206 (Sup. Ct.).

(§ II A—132)—PLACE OF PAYMENT.

Where a contract for sale of lands made by offer and acceptance is silent as to the place of payment of the purchase money, the presumption is that the price is payable at the place where the party made the offer and was domiciled. [Fessard v. Mugnier, 34 L.J.C.P. 126, and Robey v. Snaefell, 20 Q.B.D. 152, followed.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

(§ II A—133)—INCONSISTENT PROVISIONS.

In an action by the plaintiff for a stipulated sum as liquidated damages under the defendant's written agreement to carry out and complete an option with a third party for the purchase of a certain interest in a mine, where the recital provides that in case the option is not carried out and completed the defendant will "on or before" June 1st pay the sum so fixed, and where a later clause stipulates that in case of the defendant's failure to carry out the option and complete the purchase he shall "within one month after such default, on or before June 1st," pay the stipulated sum, the specific provisions of the later clause prevail, and the liability will arise at the expiry of one month after the default, although such construction of the contract may mature the obligation prior to June 1st.

Kennedy v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, 23 O.W.R. 179.

If it is agreed between the parties that time shall be of the essence of the contract, the Court will hold to a strict construction unless an intention to the contrary is shewn. On an agreement for sale of land, the purchase price to be paid in instalments, and interest to be paid in advance, it was provided that time should be of the essence of the contract, and that all interest on becoming overdue should be forthwith treated as purchase-money and bear interest. The plaintiff on tendering an overdue instalment, after having been notified that the contract had been cancelled, owing to his failure to pay on time, sought a decree declaring that the contract was in full force and effect, and an injunction restraining the defendant from dealing in any way with the land. Held, that time was of the essence of the contract, although it stipulated that all interest on becoming overdue should be forthwith treated as purchase money, this stipulation not being inconsistent with the time clause, and that either one of them might be enforced at the option of the defendant. Where the contract states no address to which a notice of cancellation may be sent, it is sufficient if it is sent to the plaintiff's residence, and he receives it.

Steele v. McCarthy, 7 Terr. L.R. 351.

On September 7th, 1907, a written agreement was entered into between the plaintiff D. D. and the defendants C. McM. and L. McM., for the sale of certain lands, the title to which was vested in the defendants, for the sum of two hundred dollars ($200). At the time there was a verbal understanding between the parties to the agreement and S. D., the mother of the plaintiff, that the agreement was only to be used to raise money to pay the creditors of the plaintiff and S. D., and was not to be used for any other purpose until the assent of R. C. D., the father of the plaintiff, had been obtained. The agreement was never used for the purpose of paying the creditors and the assent of R. C. D. to it was never obtained. Held, that the agreement was valid, although the assent of the plaintiff's father was never obtained, and that the verbal agreement not to use was only a collateral agreement, and did not affect the validity of the agreement itself. Held also, that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, subject to the trust that such moneys be held for the benefit of the creditors of the plaintiff and his mother.

Donald v. McManus et al., 4 N.B. Eq. 390.

B. Entirety.

(§ II B—135)—SEVERABILITY.

Where tenders of the same contractor for two independent construction works for a municipality are accepted by separate resolutions of the Council of the municipal corporation, the subsequent execution under the corporate seal, of one indenture of agreement embodying the two contracts formed by the separate resolutions, which were not under seal, whereby the tenders were accepted will not destroy the separate identity of each contract embodied in the one indenture if there was no consensus of intention of the parties that both should constitute one entire contract.

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405.

Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies:—

Held, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title.

Dunsmuir v. Last Chance Mining Company, Limited, 16 B.C.R. 499.

Where one agrees to cut and deliver at a given point all the hay upon a piece of land owned by another for a stated price per ton, the agreement is an entire agreement, but the owner must nevertheless pay for each ton as it is delivered. [Johnston v. Keenan, 3 Terr. L.R. 239; and Taylor v. Kinsey, 4 Terr. L.R. 178, followed.]

Webber v. Copeman, 7 D.L.R. 58, 21 W.L.R. 961.

C. Time.

(§ II C—140)—TIME.

Where a contract to sell goods stipulated for delivery "on or about the 28th April," the variance from the exact date "28th April" must be only slight if at all, where the seller at the time of the contract knew the purpose of the purchase and that the buyer needed and expected prompt delivery not later than the day specified, and this, especially where between the date of execution of the agreement and the date for delivery, the buyer further gave special written notice that failure to deliver promptly would involve him in a loss of $40 per day. [Cross v. Elgin, 2 B. & Ad. 106, applied.]

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

Where a written mining contract prescribes a fixed liability if one of the contracting parties "fails in carrying out" a certain option with a third party, such is in effect an agreement to keep the option alive; and the date of the default may be fixed by reference to the date of the cancellation of the option by the third party.

Kennedy v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, 23 O.W.R. 179.

Where the vendor of a property who has reserved in his favour a right of redemption of such property, exercisable within a certain stipulated delay, informs the buyer within such delay of his intention to exercise such privilege, and does as a matter of fact come to exercise such right on the day following the expiry of the delay and the buyer requests him to call later, the buyer will be held to have acquiesced in the exercise of such right of redemption.

Malo v. Roy, 3 D.L.R. 431, 18 La Rev. de Jur. 462.

The words "whilst the mother is self-dependent" contained in a stipulation to pay for a grandchild's maintenance are not to be restricted to the lifetime of the testator, but are equally applicable to the period after his death as to that before, during which the child's mother continues to be self-dependent.

Chisholm v. Chisholm, 2 D.L.R. 57.

A stipulation in a contract to pay maintenance made for valuable consideration whereby the promisor agrees to pay the maintenance money quarterly in advance "so long as I can," will not enable the promisor to terminate the contract at his own will and pleasure; the words "so long as I can" are to be considered as having reference to his financial ability, and such ability being proved the promisee is entitled to recover.

Chisholm v. Chisholm, 2 D.L.R. 57.

Where it is a condition of a contract for the sale of land that time is to be considered as of the essence of the agreement, a mere extension of time is a waiver of such condition only to the extent of substituting the extended time for the original time and the condition remains effective so as to make time of the essence of the agreement as to the substituted date. [Barclay v. Messenger, 43 L.J. Ch. 449, followed.]

Hicks v. Laidlaw, 2 D.L.R. 460, 20 W.L.R. 479, 22 Man. L.R. 96.

D. Particular words, phrases and cases.

(§ II D—145)—PARTICULAR WORDS, PHRASES AND CASES.

Claim by unsecured creditor of a litigant against attorney "ad litem" of the latter for reimbursement, in pursuance of agreement, of advances for costs, upon attorney having recovered his costs from adverse party. It was held (confirming adjudication made by the Superior Court), that the right of action, against the defendant, was not vested in the plaintiffs.

Gagnon v. Bedard, 18 Rev. de Jur. 134.

(§ II D 1 — 150) — PARTICULAR WORDS, PHRASES AND CASES.

Construction—"Site of the work"—Reformation.

Wallberg v. Jenckes Machine Co., 4 O.W.N. 555, 23 O.W.R. 891.

(§ II D—157)—TO FURNISH GAS.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the part of the company as a further consideration for the purchase of such stock, that the holders thereof should be entitled to receive from the company gas free for use in their private dwellings in the district in which the company was carrying on its operations, the effect of such contract is that the company was bound to supply the other parties to the contract gas free for use in their private dwellings so long as they lived in such district and gas was obtainable therein sufficient for that purpose.

Sundy v. Dominion Natural Gas Co., 4 D.L.R. 663, 3 O.W.N. 1575, 22 O.W.R. 743, affirmed Sundy v. Dominion Natural Gas Co. (No. 2), 6 D.L.R. 863, 4 O.W.N. 167, 23 O.W.R. 228.

(§ II D—163)—WITH CARRIER.

Where seed grain is delivered by rail and the bill of lading is endorsed "for seed purposes free from noxious weeds," if it be shewn that the seller made this endorsement as a representation to the railway company which refuses to carry seed grain containing noxious weeds, the words will not necessarily, upon a legal construction of the contract of sale, be read into it.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W. L.R. 433.

(§ II D—164a)—ASSUMPTION OF DEBTS.

Construction—Purchase of assets of company—Assumption of liabilities—Liabilities assumed "without corresponding value"—Surrounding circumstances and object—Tranfer of shares—Rectification of contract—Damages—Loss of dividends—Counterclaim.

Grice v. Bartram, 3 D.L.R. 868, 3 O.W. N. 1312, 22 O.W.R. 182.

In an agreement for the sale of shares in a lumber company, were the following covenants: "(2) It is understood and agreed and the parties of the first part hereby guarantee that the assets of the said company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed. (6) The said parties of the first part further guarantee that the balance of the assets of the said company over and above the logs, stock in store, piles, boom sticks and boom chains are truly and correctly set forth in the said schedule and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part and a third by the two arbitrators so named as aforesaid and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement." Held, on appeal (per Macdonald, C.J.A., and Galliher, J.A.), that, assuming the clauses to be independent, the defendant, not having counterclaimed under clause 2, he should not be allowed to amend on the appeal, as to do so would be simply allowing him to set up a cross-action. Per Irving, J.A.:—That is was intended by clause 6 that any deficiency should be decided by arbitration. Per Martin, J.A.:—Defendant should have been permitted to establish the deficiency, if any, in Court, and then gone to arbitration to determine the value of such deficiency. Judgment of Morrison, J., affirmed, Martin, J.A., dissenting.

Cuddy & Boyd v. Cameron, 16 B.C.R. 451.

The defendants agreed to purchase from the plaintiff, for $10,000, five-sixths of the plaintiff's shares in an incorporated publishing company; and the plaintiff agreed to "pay all the liabilities" of the company, out of the "first payment of $5,000 paid to him," the plaintiff. The defendants, instead of paying the first instalment of $5,000 direct to the plaintiff, and trusting to him to fulfill his covenant to pay the liabilities of the company therewith, ascertained the names of the creditors and the amounts of their claims, and, with the plaintiff's consent, paid these sums, and charged the amounts thus paid against the first instalment payable to the plaintiff. Before the sale-agreement the company had undertaken to do some printing for the Government at the price of $404; and this amount had been paid to the plaintiff before the sale-agreement, but the work had not been done. After the agreement, the company sublet the contract for the printing and got it done for $200, which the company paid. In adjusting the accounts between themselves and the plaintiff, the defendants retained, out of the first payment of $5,000, the sum of $404, contending that it constituted a "liability," within the meaning of the sale-agreement. The plaintiff assented to being charged with $200, the amount which the printing actually cost, but not with the balance, $204, for which he sued. It was held (Harvey, C.J., hesitating), that the plaintiff was entitled to recover the $204. Judgment of Lees, Dist. Ct.J., affirmed. Per Scott, J.:—As the work had not been performed at the time of the sale-agreement, its performance constituted a liability of the company, which, under the terms of the agreement, the plaintiff was bound to discharge; and, the work having been done at a cost of $200, the defendants were entitled to deduct that amount, and no more, from the purchase-money. Per Stuart and Beck, JJ.:—In the sale-agreement the word "liabilities" meant "debts" only; and, semble, that the plaintiff might have claimed the whole $404; but the adjustment was an equitable one, and should not be disturbed. Per Simmons, J.:—The defendants were entitled only to the sum of $200, which would have been the actual liability if the company had not elected to do the work and discharge the liability. Per Harvey, C.J.:—The extent of the plaintiff's liability, under his contract with the defendants, was to discharge the company's liability; the company's liability was discharged by the payment of $200; and the

additional sum of $204 paid by the defendants to the company was a sum which the company was not entitled to receive, and which the plaintiff should not be charged with.

Koerman v. Parlee, 20 W.L.R. 17.

(§ II D 2—170)—As to transfer of real property.

Where a vendor and vendee stipulated in an agreement for the sale of property, that the vendee might, before a certain cash payment was due, obtain a designated credit thereon by conveying certain other property to the vendor, the former is not entitled to such credit where he did not, nor could not, convey the land until after such maturity date. [Vanderlip v. Peterson, 16 Man. L.R. 341, Paterson v. Houghton, 19 Man. L.R. 168, referred to.]

Bergman v. Cook, 5 D.L.R. 233, 3 O.W.N. 968.

The contract by which the owner of an immovable grants the possession and use of it, by means of a lease, for a term, at the expiration of which he undertakes to consent to a sale to the lessee is a mixed contract of renting and promise of sale. The latter remains subject to the suspensive condition of the lease which alone determines the judicial relations between the parties during the term and gives to the owner all the remedies of a lessor in case of non-observance of his obligations by the lessee including the action for resiliation of the lease in default of payment of rent and that with saisie-gagerie to recover the amount.

Carey v. Carey, O.R. 42, S.C. 11 (Sup. Ct.).

(§ II D 2—173a)—As to quantity of land.

Where an agreement for the sale of a specified number of feet of land more or less for a lump sum, provides that, upon any valid objection to title being made which the vendor is unable or unwilling to remove, the agreement shall be null and void, and an objection is made by the purchaser on the ground that parts of the land are subject to rights of way, the vendor, if he acts in good faith, and promptly under the circumstances, and not unreasonably or capriciously, and does not waive his rights, or omit anything which the ordinary prudent man, having regard to his contractual relations with other parties, is bound to do, is entitled to rescind the agreement. [In re Jackson and Haden's Contract, [1906] 1 Ch. 412; Wilson Lumber Co. v. Simpson, 22 O.L.R. 452; and In re Dames and Wood, 29 Ch. D. 626, referred to.]

Jewer v. Thompson, 3 D.L.R. 628, 3 O.W.N. 1122, 22 O.W.R. 610.

One who, after personally examining a piece of land, purchased the right to cut and remove the timber therefrom, cannot, after removing the timber without complaint as to the extent of the land, in an action for the balance of the purchase money, assert that there were not as many acres in the property as called for in the deed thereof, where the Court found that he purchased it as he found it on examination, entirely independent of an exact or approximate measurement or acreage.

Leclaire v. Laviolette, 3 D.L.R. 716.

A description of the premises in a contract for the sale of land as having a depth of about 130 feet to a lane 20 feet wide more or less is not so defective as to render the contract void where the purchaser knew before the contract was executed that such lane extended but part way across the premises so as to leave the remainder with a greater depth than 130 feet. which, however, was incumbered with a right of way, as under such circumstances extrinsic evidence would be admissible to identify the premises sold. [Foster v. Anderson (1908), 16 O.L.R. 565; Plank v. Bourne, [1897] 2 Ch. 281, and Lewis v. Hughes, 13 B.C.R. 228, referred to.]

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838.

Where an entire contract for the sale of several lots of land mentions the prices of all the lots except one, and provides that the price of that one, which the vendor has not yet acquired, shall be its cost price to him, the purchaser is not entitled to insist upon a conveyance of one of the other lots at its cost price, merely because it also had not been acquired by the vendor at the date of the agreement.

McManus v. Edmonton Public School Board, 6 D.L.R. 370, 22 W.L.R. 120.

(§ II D 2—174)—As to evidence of title.

A stipulation in a promise to sell to the effect that the vendor will not be obliged to furnish copies of title deeds under which the property was sold to him, but that same may be inspected in the hands of a named custodian, does not release him from the obligation of giving communication of his own deed of acquisition which had not been in the same custody.

Poirier v. Archambault, 1 D.L.R. 358.

A person contracting to buy land from one he knows to be merely a holder of an agreement for its purchase, is entitled to an inspection of such an agreement before he pays any part of the purchase price and the vendor has no power to cancel the agreement upon a failure of the purchaser to pay the first instalment of the purchase price when due where he has refused the other's request for such inspection and ignored the further demand, on the latter's part, for a solicitor's abstract of title both made before any part of the purchase price was due, even though time was made of the essence of the contract as far as the payment of the purchase price was concerned. [Gamble v. Gummerson, 9 Gr. 193, and Cameron v. Carter,

9 Ont. R. 426, specially referred to. See also Knight v. Cushing, 1 D.L.R. 331, and annotation, 1 D.L.R. 354.]

Langan v. Newberry, 2 D.L.R. 298, 20 W.L.R. 826.

A person contracting to buy land from one he knows to be merely a holder of an agreement for its purchase, is entitled to an inspection of such an agreement before he pays any part of the purchase price and the vendor has no power to cancel the agreement upon a failure of the purchaser to pay the first instalment of the purchase price when due where he has refused the other's request for such inspection and ignored the further demand, on the latter's part, for a solicitor's abstract of title both made before any part of the purchase price was due, even though time was made of the essence of the contract as far as the payment of the purchase price was concerned. [Langan v. Newberry, 2 D.L.R. 298, affirmed; Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, 23 W.L.R. 93.

(§ II D 2—175)—As to transfer of personal property.

Upon the sale of certain machinery and accessories where the buyer agreed to give the seller a lien or charge on certain lands for the price, but because of the seller's failure to deliver three of the articles enumerated an allowance was agreed upon in lieu of such articles and their delivery was waived, such does not constitute a substitution of a new verbal contract for the original written agreement, but only a modification of one part of it, to which modification the defendant was a consenting party, and the sellers were entitled not only to judgment for the balance of the original debt but to a lien or charge on the lands referred to and a sale of the buyer's interest therein to realize the amount of the debt and costs. [Rustin v. Fairchild, 39 Can. S.C.R. 274, distinguished.]

Gaar-Scott v. Mitchell (No. 2), 8 D.L.R. 129.

Where two persons are entitled to personal property by virtue of instruments of different dates the one whose right is superior in point of time is entitled to preference under C.C. 1027 where he was the first to reduce the property in possession.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

(§ II D 4—185)—For services, construction of buildings or works.

Where the specifications for a plumbing contract for installation of plumbing on the construction of a row of attached houses, stipulated that the contractor should supply all stacks necessary to fill all requirements of city by-laws and the tender and formal contract did not mention the number of stacks, the contractor will be bound to supply separate stacks for each house in conformity with the city building by-law although the plans shewed only one stack for each pair of houses.

Elford v. Thompson, 1 D.L.R. 1, 19 W. L.R. 809.

Supply of timber bolts—Breach—Counterclaim—Damages.

Keenan Woodware Manufacturing Co. v. Foster, 6 D.L.R. 861, 4 O.W.N. 168, 23 O. W.R. 153.

Construction—Municipal corporation — Compliance with contract—Acceptance—Counterclaim—Default—Damages.

Canadian Electric and Water Power Co. v. Town of Perth, 3 D.L.R. 884, 3 O.W.N. 1449, 22 O.W.R. 319.

Remuneration for services—Company shares received.

Warfield v. People's Railway Co., 1 D. L.R. 897.

(§ II D—186)—Sub-contract.

A contractor who agreed to build a house for a fixed advance above the cost of material cannot recover from the owner money paid a sub-contractor for extra work the contractor should have done.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424.

Construction of buildings or works—Plumbing and heating.

O'Rourke v. Bell, 8 D.L.R. 1027.

(§ II D 4—187a)—Cutting and delivering hay.

One who agrees verbally to cut, stack, bale and haul to the station the hay growing on a piece of land owned by the other party to the agreement, and to load it on the cars as that party shall order, for a stated price per ton, is bound to cut all the hay upon the land which is capable of being cut.

Webber v. Copeman, 7 D.L.R. 58, 21 W. L.R. 961.

(§ II D 4—188)—Building contracts.

The failure of a contractor to keep an account of materials used and time devoted to extra work on a building he agreed to erect for a stated consideration. does not prevent his recovery of the value thereof, where he was not required by the terms of his contract to keep such account, but it was a requirement imposed by an architect for his own convenience in fixing the value thereof. (Per Riddell, J.)

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298.

The owner of a building erected by a contractor at a fixed price, is answerable for material and labour for extras ordered by or approved of by him.

Jack v. Kearney, 4 D.L.R. 836, 10 E.L. R. 298.

One who contracts merely to build the foundation and walls for a building will not be held liable to do the beam filling

thereon where such was not specifically mentioned in the contract or specifications nor was any evidence given to shew that such work was impliedly included in such trade contracts.

Iredale v. Drewey, 4 D.L.R. 868, 19 W.L.R. 931.

The contractor for construction of work according to his own plans is subject to the ten years' guarantee provided for by arts. 1688 and 1696 C.C. He cannot plead the nature of the soil, its porosity, etc., nor the custom of the place, as to the mode of construction. The words "if a building perish in whole or in part" in art. 1688 C.C. are not limitative but comprise grave defects which involve serious inconvenience. The acceptance of the work and payment of the price by the owner do not extinguish this obligation of warranty especially as regards poor work and imperfections constituting latent defects. The contractor in the above circumstances has no recourse in warranty against his sub-contractor who constructed the work according to his plans and under his direction.

Audet v. Guérard, Q.R. 42 S.C. 14 (Sup. Ct.).

One who contracts to erect a building for another can claim payment only when he has entirely completed the work. Therefore he cannot recover the value of work done and materials furnished by offering to deduct the amount of damages caused by defective work, delays, etc. Except in cases expressly provided for by law the Court cannot set aside a contract, under the provisions of art. 1065 C.C. unless the decree can restore the parties to the position in which they formerly were. If it gives an advantage to the one to the prejudice of the other cancellation should be refused.

Rachon v. Tavereau, Q.R. 21 K.B. 61, reversing 38 S.C. 421.

Extras—Refusal of contractors to execute contract for another building—Contract let at higher rate—Neglect to re-advertise after rejecting lower tenders—Tender not accepted by corporation under corporate seal—Costs.

Teagle & Son v. Toronto Board of Education, 3 D.L.R. 874, 3 O.W.N. 1332, 22 O.W.R. 254.

A written agreement to build a house at a fixed advance above the cost of material will not prevent the contractor subletting such portions of the work as are usually undertaken by special trades, and from recovering the cost thereof from the person for whom the work was done.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424.

Where a building contract was intended to be made out in duplicate and an agreed alteration of a name therein was made on one copy left with the owner and authority given to the building contractor to similarly alter his copy, the contractor may, in case of variance, rely on the copy produced from the possession of the property owner in preference to his own copy on shewing by parol that the wrong name had been filled in on his copy by mistake.

Donaldson v. Collins, 3 D.L.R. 359, 21 W.L.R. 56.

Where the signed memorandum of a building contract had the specifications attached to it, but the latter were not signed, they may still be incorporated by reference into the signed memorandum so as to constitute both writings one agreement.

Donaldson v. Collins, 3 D.L.R. 359, 21 W.L.R. 56.

A statement in a written agreement by a contractor to build a house at a cost of "about" $3,500 is a mere expression of judgment and does not amount to a warranty or a condition limiting its cost to that figure.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424.

Building contracts—Construction of.

Favrean et al. v. Rochon et al., 8 D.L.R. 1031, 46 Can. S.C.R. 647.

Extras—Architect—Counterclaims.

Hamilton v. Vineberg, 2 D.L.R. 921, 3 O.W.N. 605, 21 O.W.R. 139.

Parol modification of written agreement — Evidence — Onus — Allowance for materials—Services of architect — Quantum meruit.

McKenzie v. Elliott, 2 D.L.R. 899, 3 O.W.N. 1083, 21 O.W.R. 929.

Under a contract, whereby plaintiff agreed to perform certain work and supply materials in connection with the erection of a building for defendant, for a definite sum, a certain per cent. of which was payable at stated periods during the performance of the work and the balance after the completion of the work, plaintiff is not entitled to recover more than the sums which had accrued due at the stated times where the work was not completed by reason of the destruction of the building by fire from causes not attributable to either party. [Collins Bay Rafting Co. v. New York and Ottawa R. Co., 32 Can. S.C.R. 216, applied.]

Charette-Kirk Co., Ltd. v. McKittrick, 8 D.L.R. 365, 22 W.L.R. 711.

(§ II D 4—190)—Digging well.

Where, as the result of his own negligence, the plaintiff was compelled to abandon a well he had sunk for the defendant under an agreement to do so for a stated price per foot, but with no stipulation that he should go to any particular depth to obtain water, and without a new agreement, but with the knowledge and consent of the defendant, he began another, which, after going a considerable depth, he also abandoned without finding water, the defendant is answerable only for drill-

ing the second well, since it became necessary to do so as the result of the plaintiff's own negligence.

Wright v. Edwards, 4 D.L.R. 497, 21 W. L.R. 851.

(§ II D 4—192)—CONDITIONS PRECEDENT.

Where a building contract provides that any dispute as to extras or reductions after the issuance of the architect's certificate shall be referred to arbitration and also provides for the recovery of what is "justly due," the latter stipulation not being conditioned upon an architect's certificate or upon an award, and the contract does not contain any proviso that the certificate of the architect shall be final, the contractor is entitled to recover the amount earned under the contract and for extras, without either an architect's certificate or an award, particularly where no certificate had been given by the architect until after the litigation had begun and no arbitrator had been appointed.

Contractors' Supply Co. v. Hyde, 2 D.L. R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

(§ II D 4—193)—ADVERTISING CONTRACTS.

Where the plaintiff claims a balance as due for advertising, under a written contract which purported to lease to the defendant for one year for advertising purposes a numbered space on the "specialty drop curtain" of the "Empress Theatre" with a proviso for a pro rata reduction if the "theatre" during the term should close, or fail to give the regular number of performances; and, where the evidence shewed that such theatre was of the vaudeville class and within four months was moved with all its plant and scenery, except the "specialty drop curtain," to another building on another street in the city, and there adopted the same name "Empress Theatre" and that the name of the original "Empress Theatre" building was changed to the "Bijou," and was operated for the remainder of the term as a moving picture show under that name, the advertisement on the curtain remaining in the "Bijou" on the original drop curtain left there, the true construction of the words "Empress Theatre" read with "theatre" in contract, as gathered from the whole instrument, is that the parties thereby contemplated the organization, including the plant and scenery, as an active theatre and vaudeville show giving regular performances, and therefore that as to the remaining eight months the defendant was not liable under the contract, the advertisement in the "Bijou" was not of the kind contracted for.

Winnipeg Advertising Co. v. Hilson, 6 D.L.R. 143, 22 W.L.R. 200.

Where a publishing firm publishes from year to year a directory of the names and addresses of the inhabitants of a city, and sells copies thereof to any residents who may choose to become subscribers, under a custom that the names and business addresses and callings of such subscribers shall be published in large, heavy type, the enterprise being a private one in the publishing firm's own interest, it is presumed to take all the risks of oversights and omissions in respect of any such subscriber, and may be held responsible in damages therefor.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

Where the defendants have for several years been publishing an annual city directory, and the plaintiff, a practising barrister, gives the defendants a written order for a copy of the directory for a certain year, and where it was and had been the custom of the defendants to publish in large, heavy type the names, callings and office addresses of all subscribers, and where all this was omitted from the directory in respect of the plaintiff, the omission is actionable.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

III. Validity and effect.

B. Illegal by express provision.

(§ III B—211)—SALE OF LIQUOR.

Where a sale of intoxicating liquor is made by a principal through an agent to a purchaser who, to the knowledge of the agent, acting in the course of his employment and within the scope of his authority, intends to dispose of the same in violation of law, the contract is void for illegality and the principal cannot recover the purchase price. In such a case the knowledge of the agent is atttributed to the principal and it makes no difference that the principal reserves to himself a discretion as to whether he will accept the order or not. [Craigellachie v. Bigelow, 37 N.S.R. 482; 37 S.C.R. 55, distinguished.] Drysdale, J., dissented on the ground that the agent in question only had a limited authority to solicit and transmit orders and had no authority to make sales, and his knowledge (as to which he thought the evidence insufficient) was therefore not sufficient to bind the principal.

St. Charles & Co., Limited v. Vassallo, 45 N.S.R. 195, 9 E.L.R. 355.

C. Public policy.

(§ III C 1—216)—BY GUARDIAN.

An agreement made by the grandfather of a child to pay the mother of a child a fixed sum annually on condition that he be appointed the guardian of the child is not void as against public policy where such appointment is merely asked for as a guarantee that the education of the child shall be finished in an institution named by the grandfather, and there is no desire otherwise to divest the mother of her rights and liabilities with respect to the child. [Humphreys v. Pollys [1901], 2 K.B. 385, distinguished.]

Chisholm v. Chisholm, 45 N.S.R. 288.

(§ III C 1—228a)—As to changing jurisdiction of Court.

A covenant in a contract that litigation arising from it, shall be had before the Court in a different district from that in which it should be had in the ordinary course, is not invalid, but no consent of parties, by contract or otherwise, can vest in a Judge or a Court a jurisdiction that the law does not give them.

Jonquières Pulp Co. v. Chicoutimi Pulp Co., 41 Que. S.C. 97 (Sup. Ct.).

(§ III C 1—239)—To compound crime.

Defendant had allowed a fire to escape from his land, and was liable to a fine and costs under the Forest Fires Act. He was informed by the defendant, an officer charged with the enforcement of the Act, that he would be liable to a fine of $20 and that the costs of extinguishing the fire would amount to $25 more. Wishing to prevent an information being laid against him the plaintiff agreed to pay the defendant these amounts, and actually paid him $29 on account. Held, that if the agreement was a legal one, there was consideration for the payment, and if the agreement was illegal then the plaintiff was a party to it, and in either event the money could not be recovered back.

Chipman v. Whitman, 11 East. L.R. 313.

(§ III C—239c)—Immoral motives.

Where both parties enter into a contract from an improper and immoral motive, then that motive becomes the real cause of the contract and the contract is illegal.

Bedard v. Phœnix Land and Improvement Co., and Drolet, 8 D.L.R. 686, 43 Que. S.C. 50.

(§ III C 3—247a)—As to steamship companies.

An agreement between steamship companies fixing rates for freight and passengers for one season is not void as against public policy if the rates are proper and reasonable and the contract in fact beneficial to the public. The plaintiffs proved one breach of such contract by the defendants and the Court directed the jury that in the absence of evidence to the contrary they might infer that other breaches had been committed. Held, the direction was right, inasmuch as the defendants knew and could have given evidence as to whether or not other breaches had been committed.

Saint John River Steamship Company, Limited v. The Star Line Steamship Company, 40 N.B.R. 405.

D. Gambling and wager contracts.

(§ III D—272) — Purchase of grain, stocks, etc.

Where parties entrust moneys to a financial agent for him to carry on imaginary speculations of every kind for their benefit, so as to yield them fantastic benefits, they are participants in illegal gaming contracts under art. 1927 of the Civil Code (Que.), hence the winners of the game have no action to recover their profits nor the losers any action to recover the profits paid out, even if these were fictitious and in reality paid with their own (the losers) moneys. [Wilks v. Matthews, 41 Que. S.C. 155, affirmed on different grounds.]

Wilks v. Matthews, 7 D.L.R. 395.

(§ IV D—274)—Stakes, right to recover.

The deposit with a third party of the stakes by the makers of a wager is not a mere revocable promise to pay but a real payment by anticipation and subject to the conditions governing the wager. From the time that it is decided the stakes become the property of the winner by that very event and the loser has no means of recovering it either from the winner or from the depository.

Marquis v. Cantin, Q.R. 42 S.C. 132 (Sup. Ct.).

E. In restraint of trade.

(§ III E—282)—Restricting prices to be paid.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and aimed to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is not void at common law as being in restraint to trade. [Shragge v. Weidman, 20 Man. R. 178, 15 W.L.R. 616, reversed on appeal.]

Weidman v. Shragge, 2 D.L.R. 734, 46 Can. S.C.R. 1.

(§ III E—288)—Limitation as to time and space.

Restraint of trade—Injunction—Patent for invention—Infringement.

William Peace Co. v. William Peace, 5 D.L.R. 891, 4 O.W.N. 63, 23 O.W.R. 22.

F. Ratification; validating; holding out as agent.

(§ III F—290)—Ratification; validating.

A company is liable to third parties who in good faith contract with a person in reality not the agent of the company under the belief that he was so when the company and its directors have given reasonable cause for such belief.

French Gas Saving Co. v. The Desbarats Advertising Agency, Limited, 1 D.L.R. 136.

IV. Performance; breach.

A. In general.

(§ IV A—316)—Who must perform.

Agreement between shareholders—As to contribution to company. (Gregory, J.)

Kenworthy v. Kenworthy, 6 D.L.R. 919.

Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding

any accident, by inevitable necessity, because he might have provided against it by his contract. [Wallbridge v. Gaujot, 14 O.A.R. 460, affirmed in Palmer v. Wallbridge, 15 Can. S.C.R. 650; Ridgeway v. Sneyd, Kay 627; Clifford v. Watts, L.R. 5 C.P. 577, at p. 586, 40 L.J.C.P. 36; Gowan v. Christie, L.R. 2 Sc. App. 273, and Leake on Contracts, 6th ed. (Can.), 495, specially referred to.]

Sundy v. Dominion Natural Gas Co., 4 D.L.R. 663, 3 O.W.N. 1575, 22 O.W.R. 743.

(§ IV A—319)—NOTICE, OFFER.

There cannot be recovery for a breach of warranty in the sale of an engine, where the purchaser did not give notice of its failure to work properly in the manner required by the contract of sale, but continued to use it for nearly a year afterwards.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 19 W.L.R. 934.

(§ IV A—321)—RECOVERY FOR EXTRA WORK.

A contractor who built the foundation and walls for a stone building, may recover for extra work caused by the property owner enlarging the dimensions of the building from those specified in his contract.

Iredale v. Drewey, 4 D.L.R. 868, 19 W.L.R. 931.

B. Excuse for failure of performance.

(§ IV B—325)—EXCUSE FOR FAILURE OF PERFORMANCE.

A persistent failure on the part of the vendors to respond to the frequent calls of the vendee for more grain under several contracts for future delivery justifies a breaking off of the contract on the part of the vendee.

Wilks v. Matthews, 7 D.L.R. 395.

Where a dealer in motor cars sells a car with a stipulation to equip it with a certain kind of battery and without the buyer's knowledge substitutes a different kind of battery, such variance constitutes a breach of contract notwithstanding the seller's opinion that the substitute may be better than the stipulated appliance. [Forman & Co. v. The Ship "Liddesdale," [1900] A.C. 190, applied.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O.W.N. 445, 23 O.W.R. 563.

(§ IV B 1—328)—FAILURE TO MAKE TEST.

Where a dealer in motor cars sells a car unfit for ordinary use, due in part to a defective battery resulting from the want of a proper primary charge, that is, in this instance from a failure to properly saturate the cell plates of the battery, without which a car could not be expected to work properly; it was the duty of the seller in the circumstances to have had a proper primary charge made, and in this respect there was no obligation whatever upon the buyer, who neither knew nor could be expected to know of such requirements.

Trethewey v. Moyes, 8 D.L.R. 280, 4 O.W.N. 445, 23 O.W.R. 563.

(§ IV B—331)—EARLY FROST.

A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

Albo v. Great Northern R. Co., 2 D.L.R. 290, 20 W.L.R. 844, 17 B.C.R. 226.

(§ IV B—335)—PREVENTION OR HINDRANCE BY OTHER PARTY.

Where a term of a contract is that it shall be completed by the plaintiff by a certain time and the defendant by his own act makes it impossible for the plaintiff to complete within the specified time, the contract is impliedly varied and the time for completion is extended for a reasonable time.

Kelly v. Nepigon Construction Co., 8 D.L.R. 116, 4 O.W.N. 279, 23 O.W.R. 298.

Under a contract by the plaintiffs to cut railway ties, the defendant furnishing the permits for cutting such ties, the plaintiffs are not bound to select the timber limits, and are entitled to damages for being prevented from carrying out their contract by reason of the permits not being provided.

Kelly v. Nepigon Construction Co., 8 D.L.R. 116, 4 O.W.N. 279, 23 O.W.R. 298.

A provision in a contract for work and labour that no formal payment will be made on account of the work until completion and acceptance thereof becomes inoperative if the contractor is wrongfully ousted by the other party from the work before its completion. [See also Leake on Contracts, 6th ed., 507; and compare Dodd v. Churton, [1897] 1 Q.B. 562.]

Neros v. Swanson, 1 D.L.R. 833, 20 W.L.R. 175.

C. Incomplete performance; sufficiency of performance.

(§ IV C—340)—INCOMPLETE PERFORMANCE.

The contract in this case contained the usual provisions for the termination of it by the owner before completion in the event of the contractor making default, and for payment by the contractor of a fixed amount as liquidated damages for every day's delay in completion beyond the time fixed. Upon the happening of an accident and damage to the works, for which the Court held the plaintiffs responsible, they refused to make good the damage and the defendants terminated the contract and completed the building. By the terms of the contract the plaintiffs were not entitled to receive any further payment after their employment had been discontinued until the work was wholly finished unless the defendants should be unreasonably dilatory in completing it, and

the trial Judge found that they had not been. Moreover, payments were to be made "only upon the written certificate of the architect to the effect that such payments are due unless the architect is in default in issuing the same," and the trial Judge found that the architect was not in default in refusing a certificate after the damage had occurred. The plaintiffs brought this action before the completion of the building and claimed to be entitled to recover the full amount earned by them up to the time their employment was terminated. Held, that their action was premature and should be dismissed with costs. The defendants in their counterclaim sought to charge against the plaintiff $100 per day as liquidated damages for delay in completion from the time fixed, 1st April, 1907, but they had not terminated the contract until 21st September following, and the work was not completed by them until the following spring. Held, (1) That the defendants had precluded themselves from recovering anything under the penalty clause by ordering several complete changes in the character of portions of the building, by ordering a number of important extras after the time fixed for completion, by paying the progress estimates given by the architect up to the time of the cancellation of the contract and by great delays on the part of the architect in furnishing drawings and specifications of the work. [Findlay v. Stevens (1910), 20 O.L.R. 334; Dodd v. Churton, [1897] 1 Q.B. 562, and Roberts v. Bury Commissioners (1870), L.R. 5 C.P. 310, followed.] (2) That the defendants could not recover anything by reason of the plaintiff having left the floors of the building out of level, as the defendants had chosen to complete the building without restoring the level, although they could have recovered the expense of it if they had restored the level as they might have done. (3) That the defendants were entitled to recover under their counterclaim any excess of the cost of completing the building according to the original plans and specifications over and above the balance unpaid of the original contract price plus the cost of extra work done by the plaintiffs, and also the expense incurred by the defendants in repairing and restoring an adjoining building belonging to a different owner which had been seriously damaged in consequence of the accident. (4) A contractor for the erection and completion of a building is liable to make good any injury that happens to it during the progress of construction, although the cause of that injury was some defective design or errors on the part of the architect in preparing the specifications for the work unless these causes have been expressly excepted by the contract. [Thorn v. Mayor of London (1876), 1 A.C. 120; Bottoms v. Mayor of York (1892); Hudson on Building Contracts, vol. 2, p. 220, and Hydraulic Engineering Co. v. Spencer (1886), 2 T.L. R. 554, followed.] Per Mathers, C.J., in the Court below:—In the absence of any provision that, in the event of the owners exercising their power to forfeit the contract, the liquidated damages for delay were still to run till the date of the actual completion, they could not recover such damages for any time beyond the date of the forfeiture: 3 Halsbury's Laws of England, sec. 514. [Yeadon Water Works Co. v. Binns (1895), 72 L.T. 538, followed.] Neither would the defendants be entitled to unliquidated damages for delay beyond that date: Hudson on Building Contracts, vol. 1, p. 543.

Grace v. Osler, 21 Man. R. 641.

(§ IV—345)—RIGHT OF RECOVERY ON PART PERFORMANCE.

In an action for an overdue instalment of the purchase money under an agreement for the sale of land, the defendant cannot set up as a defence that he paid the instalment by virtue of a new contract with the plaintiffs for the sale to them of an interest in other land at a price equivalent to the amount of the new instalment sued for; where the evidence shewed that the new contract was only in the nature of a security and was upon a condition which was not performed and there was a total failure of consideration for it.

McCutcheon Brick Co. v. Gardiner, 4 D. L.R. 487, 21 W.L.R. 72.

Where a contract for railway grading empowered the employing party, if in the opinion of a certain specified person there was not sufficient force at work to complete the grading within the time called for by the contract, to put on an additional force to be charged to the contractor or to take over the work by giving due notice of such intention, and the employing party after notifying the contractor that an additional force would be put on without notice that the work was to be taken over, not only put an additional force but also took charge of the work and of the contractor's workmen, it amounts to an ouster of the contractor from the work and he is entitled to recover on a quantum meruit for the work performed by him with damages, if any, sustained by reason of not being permitted to complete the same.

Neros v. Swanson, 1 D.L.R. 833, 20 W. L.R. 175.

The mere fact of a building contractor abandoning his contract does not preclude him from recovering on a quantum meruit for the work already done if there is evidence of a fresh contract to pay for same, and such fresh contract may arise from a notice by the property owner to the contractor that he will engage other tradesmen to complete the work and charge the cost to the contractor's account. [Sumpter v. Hedges, [1898] 1 Q.

B. 673, followed; and see Leake on Contracts, 6th ed., pages 34 and 38; 2 Canadian Ten Year Digest, 4315, Simpson v. Rubeck (1911), 3 O.W.N. 577, and see annotation to this case, p. 9.]

Elford v. Thompson, 1 D.L.R. 1, 19 W. L.R. 809.

The completion of a building contract is a condition precedent to the builder's right to recover unless the contract provides otherwise or unless there has been a waiver of such condition by the other party, or an interference preventing the completion of the contract. [See Elford v. Thompson (1912), 1 D.L.R. 1, and annotation to 1 D.L.R. 9.]

Dixon v. Ross, 1 D.L.R. 17.

Failure to complete a building in accordance with the specifications in a building contract precludes recovery of the contract price and the enforcement of a mechanic's lien thereon.

Simpson v. Rubeck, 3 O.W.N. 577, 21 O. W.R. 260.

(§ IV C—347)—ARCHITECT'S DEDUCTION.

A provision in a building contract from an architect's certificate as to the completion of the work, that if the work is incomplete but may be readily completed by the contractors, to state in what particulars, being for the benefit of the contractor, so that he may then complete the work if in his power, does not call for the architect to set out, in his certificate, the particulars of the deduction made if the incomplete part of the work cannot then be readily finished and the certificate is a final one directing the deduction of the value thereof in pursuance of an alternative power reserved to the architect to deduct such value, together with a fixed percentage thereof, if the work cannot readily be completed for reasons beyond the contractor's control.

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

(§ IV C 2—351)—SUFFICIENCY OF TENDER OR OFFER TO PERFORM.

A tender on the part of the vendors during the lifetime of a contract for future delivery of grain by sending a number of cars loaded for the purpose of fulfilling the contracts or some one of them, but subsequently diverting such shipments to some other destination at the request of the vendee, is not a pro tanto fulfilment of the contract. in the absence of a shewing that the parties intended to treat the tender of these cars as such part fulfilment.

Wilks v. Matthews, 7 D.L.R. 395.

(§ IV C—356)—ACCEPTANCE OF BUILDING.

The mere taking possession of a building agreed to be built is not, of itself, acceptance of the work.

Donaldson v. Collins, 3 D.L.R. 359, 21 W.L.R. 56.

(§ IV C—357)—ACCEPTANCE WAIVER OR ESTOPPEL.

Where a contract is to erect a building to certain specifications for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the owner has accepted the work with a knowledge of the defects or variations, or has done something from which a new contract to pay for the work done can be inferred. [Broley v. Mills, 1 Sask. L.R. 20, followed; Elford v. Thompson, 1 D.L.R. 1, specially referred to.]

Donaldson v. Collins, 3 D.L.R. 359, 21 W.L.R. 56.

D. Condition; certificate of performance.

(§ IV D—360)—CERTIFICATE OF PERFORMANCE.

Where a builder's contract calls for payment as the work progresses, the owner of the building is not entitled to retain in his hand a large amount of the contract price on the ground that the work has not been properly done, when it is established that the work of a value of $8,000 is all finished saving a few trifling imperfections (e.g., $15.40), and in such case the owner will be condemned to pay the balance of the contract price less the value of such imperfections.

Dulac v. Lauzon, 8 D.L.R. 400.

A builder or contractor who agrees to build according to plans and specifications for a fixed price cannot recover for alterations and extras unless such alterations and extras and the price to be paid therefor are stipulated in writing, and parol evidence of such additional contract alleged to have been made verbally is inadmissible.

Dulac v. Lauzon, 8 D.L.R. 400.

A stipulation in a building contract to the effect that final payment should be made within twenty days after the substantial completion of the structure, does not mean twenty days after the architect's final certificate was given, and an action begun three days after the giving of such certificate was not premature, where the building was substantially completed more than twenty days before.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

Where a building contract provided that if the contractor did not give satisfactory proof that there were no liens against the building, final payment should be made two days after the expiration of the time within which liens might be filed, it is no defence to an action by the contractor for the balance of the contract price due him brought after the expiration of the time within which liens might be filed, that he did not give satisfactory evidence that no liens existed other than of his own or liens of which he held discharges.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

(§ IV D—362)—Necessity of certificate.

Where payment under a building contract is conditioned on the completion of the work to the satisfaction of the engineer, and upon the strict compliance with all the provisions of the contract, the contractor cannot recover the contract price without asserting and proving strict compliance with all conditions precedent. [Brydon v. Lutes, 9 Man. R., at pp. 471, 472, followed.]

Merriam v. Public Parks Board, 2 D.L.R. 702, 20 W.L.R. 603, 22 Man. L.R. 107.

A certificate of an inspector that the ploughing and improving of land by the plaintiff had been done to the satisfaction of the former, as was required by the terms of the contract, is a condition precedent to the right of the plaintiff to recover for doing such work, and, where such inspector acts honestly and in good faith, his decision that the work was not performed in accordance with the contract is final and cannot be questioned in the Courts. [McRae v. Marshall, 19 Can. S. C.R. 10, applied.]

Schultz v. Faber & Co., 4 D.L.R. 707, 21 W.L.R. 163.

As an architect's final certificate is conclusive as to the completion of a structure by a contractor, upon the giving of such certificate, the contractor is entitled to have returned to him a deposit made to secure the execution of the contract, or which was given in lieu of a bond as security for the performance of the contract.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

(§ IV D—363)—Conclusiveness and sufficiency of certificate.

An architect's decision as to the value of work performed or of materials furnished for a building erected under a contract declaring that his decision should be final, is not open to attack if he acts fairly and honestly and no collusion between him and the contractor is shewn. [Hamilton v. Vineberg, 2 D.L.R. 921, 3 O. W.N. 605, affirmed on appeal.]

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

Where provision is contained in a contract for the construction of certain works that payment is to be made on the completion of the work to the satisfaction of the engineer, the authority of the engineer is to be confined to what is specially conferred on him by the contract including the specifications, and while he may, pursuant to the provisions of the specifications, issue progress estimates from time to time, he has no authority to release the contractor from the performance of any essential part of the work, nor has he power to give a certificate, final in its nature, until the work is completed to his satisfaction. [Davidson v. Francis, 14 Man. R. 141; Canty v. Clark, 44 U.C.R. 222, followed.]

Merriam v. Public Parks Board, 2 D.L.R. 702, 20 W.L.R. 603, 22 Man. L.R. 107.

In a proviso in a building contract that, if the contractor shall observe and keep its terms and conditions, the owner will make monthly payments to him of a fixed percentage of the estimate certified by the engineer or architect in a progress certificate, the payments so provided for are subject to adjustment or re-adjustment at the end of the contract, and, if the contractor abandons the work so that he is disentitled to claim for the work done, his right to claim on the progress certificate falls with the principal claim and he cannot recover thereon. [Tharsis v. McIlroy, 3 A.C. 1040, applied.]

Merriam v. Public Parks Board, 2 D.L.R. 702, 20 W.L.R. 603, 22 Man. L.R. 107.

A contract for the erection of a building authorizing the architect, if there was any part of the work remaining uncompleted for reasons not within the contractor's control, to deduct the value of the incomplete portions from the contract price and to issue a final certificate that the works were completed, gives the architect no power to accept the contractor's guarantee that he will complete the uncompleted portions of the work in lieu of the deduction required by the contract and a certificate by the architect to that effect is not a final one.

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

(§ IV D—364)—Application for certificate.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work.

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

Where a contract for the erection of a building authorized the architect to give a final certificate that the work was completed, or if incomplete to state in writing in what particulars, and in the next sentence it was stipulated that, if any part of the work remained incomplete for reasons not within the contractor's control, the architect should deduct the value of the incomplete portions from the contract price and that he should be the judge of the propriety of such deduction and its amount, a certificate stating that a spe-

cified sum should be deducted for work not complete is not objectionable because it fails to shew that the work for which the deduction was made could not then have been readily completed. [Richards v. May, 10 Q.B.D. 400, specially referred to.]

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

Under a contract for the construction of a building which stipulated that the work was to be performed "to the satisfaction of" the architect and authorizing him to give a final certificate that the work was completed as a pre-requisite to the final payment therefor, a final certificate stating that the contractor was entitled to final payment on his contract is sufficient though it fails to certify in terms that the work was "completed" in accordance with the contract. [Accord, 3 Halsbury's Laws of England, p. 214, sec. 429, 1 Hudson on Building Contracts, 3rd ed., 383.]

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

A document signed by an engineer on the construction of works certifying to the correctness of a statement shewing the balance due a contractor up to a fixed date, and that the same had not been previously certified to, but withholding a sum "pending repairs," is not a final certificate, nor can it be construed as a progress estimate.

Merriam v. Public Parks Board, 2 D.L.R. 702, 20 W.L.R. 603, 22 Man. L.R. 107.

E. Breach and its effect.

(§ IV E—365)—BREACH AND ITS EFFECT.

Where a contract between the owner of land and a real estate agent provided that the land in question be sold at a profit to be divided equally between them, and the owner declines to entertain an offer, made either by the real estate agent or any other person, the real estate agent is not obliged to treat such refusal as a breach of the contract, but may elect, either to consider the contract as still in existence and await the performance of the same or to treat it as a breach and in the absence of such election the contract still stands. [Johnstone v. Milling, 16 Q.B.D. 460, and McCowan v. McKay, 13 Man. R. 509, specially referred to.]

Donough v. Moore, 2 D.L.R. 525, 20 W. L.R. 334, 22 Man. L.R. 79.

(§ IV E—367)—EFFECT OF BREACH.

One who erected a water tank and a steel supporting structure therefor on the roof of a building, under a contract calling for first-class material and workmanship, is liable to the owner of the building for damages caused by the fall of the tank as a result of defects of which the defendant should have been aware, in the construction of the supporting structure.

Wilson v. The H. G. Hogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the part of the company as a further consideration for the purchase of such stock, that the holders should be entitled to receive from the company gas free for use in their private dwellings in the district where the company was carrying on its operations and the company continued to supply the other party to the contract with natural gas free of charge for more than six years when it discontinued doing so and took up the pipe line by which the gas was delivered and sold the wells producing it to third persons from whom the other parties to the contract were obliged to secure their supply of gas upon the company refusing to furnish it and to pay therefor and the company claimed that its action was caused by the fact that the wells in the district had run down to a point that made it commercially unfeasible to continue to pipe from them, though after the pipe line was taken up, it was still drawing gas from wells in the same field which it still owned and was piping it by another line to the same place where the old line ended, the company is liable to the other parties to the contract for the breach of the agreement for failing to provide the gas free, without prejudice to their rights in any future action, if the company continue to refuse to supply them with free gas, the covenant to supply the same being still an existing and binding one under the circumstances shewn.

Sundy v. Dominion Natural Gas Co., 4 D.L.R. 663, 3 O.W.N. 1575, 22 O.W.R. 743.

Where an owner is relieved from making further payments under a building contract by reason of defective workmanship and failure to supply materials specified, he may also recover additional damages on proof thereof, after taking into account the balance unpaid on the contract.

Donaldson v. Collins, 3 D.L.R. 359, 21 W.L.R. 56.

Not only property sold under a contract for the sale of timber rights but also the purchaser's lumbering plant found on the land at the time of the seller's re-entry for the purchaser's default, belongs to the former under a stipulation of such contract that upon such default "all plant and timber cut" as well as "all improvements shall remain the property of the" seller "without recourse or claim of any nature whatsoever in damages for compensation against" him.

Klock v. The Molsons Bank (No. 1), 3 D.L.R. 521.

The fact that property was genuinely listed for sale with a real estate exchange, which, for a monthly payment, sold a list thereof to real estate brokers, who make sales therefrom, and that the exchange acted bona fide throughout the transaction, will not relieve it from responsibility for a breach of warranty to a subscriber who made a sale of property of which, it afterwards appeared, there was no such listing as the exchange held out to its subscribers, and which could, therefore, not be carried out. [Collen v. Wright (1857), 8 E. & B. 647; Firbank v. Humphreys (1886), 18 Q.B.D. 54, 62; Starkey v. Bank of England, [1903] A.C. 114, and Yonge v. Toynbee (1910), 79 L.J. K.B. 208, followed.]

Austin v. Real Estate Exchange. 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 921.

Defendant agreed to sell a quantity of flax and deliver same on the first of November. On that date defendant stated his inability to deliver at that time, and asked an extension. No delivery was made, and the plaintiff thereupon notified defendant that delivery must be made by January 15th. The defendant on receipt of this notice did not notify the plaintiff that he did not intend to deliver. The price of flax increased considerably between November and January, and the plaintiff brought action for damages as if the final breach of the contract had been on January 15th. The learned trial Judge found the plaintiff entitled to damages only as of the 1st of November. On appeal:—Held, when there is a voluntary forbearance to enforce a contract for sale of goods by one party at the request of the other, and the party so asking such forbearance finally makes default, the party damaged by such default is entitled to damages as of the date when the final default took place. 2. That to entitle the plaintiff to such damages it is not necessary to shew a completed agreement for such extension; it is sufficient to shew forbearance at the request of the defendant, or that the plaintiff extended the time for the benefit of the defendant, and so notified the defendant, if the defendant does not dissent from such extension or then indicate his intention not to deliver at all.

Glenn v. Schaffer, 4 S.L.R. 508.

(§ IV E—368)—Waiver of breach.

Where the buyer of a motor car by sample incidentally learns after its delivery of a certain disparity in the car as to the number and sizes of its cells, and where pending further tests he maintains silence with respect to such discovery, he is not necessarily estopped thereby from setting up such disparity to establish the seller's non-compliance with the contract, especially where the seller's agent lulled him into security by giving a false reason for the difference. [Adam v. Richards, 2 H. Bl. 573; Heilbutt v. Hickson, L.R. 7 C.P. 438, referred to.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O. W.N. 445, 23 O.W.R. 563.

(§ IV E—369)—Recovery back of money paid, condition precedent to payment.

Upon the failure to sink a well to the depth specified in a contract, money advanced the contractor by the other party to the agreement may be recovered back where the contract expressly provided that boring the well to the depth specified should be a condition precedent to the contractor's right to retain any money advanced to him.

Wallace Bell Co. v. Moose Jaw (No. 1), 3 D.L.R. 273, 21 W.L.R. 36, affirmed Wallace Bell Co. v. Moose Jaw (No. 2), 4 D.L.R. 438, 21 W.L.R. 871.

F. Time.

(§ IV F—370)—Time.

Where a written order for the purchase of goods fixes a date for delivery, and the buyer having duly signed the order in transmitting same to the seller writes and mails concurrently a separate letter to accelerate the delivery, such letter has not the legal effect of varying the contract but the date of delivery is determined from the written order without reference to the letter.

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

In the absence of any statement in the agreement or of assistance from the surrounding circumstances, the law allows a reasonable time for the acceptance of an option to purchase land.

Carey v. Roots, 5 D.L.R. 670, 21 W.L.R. 795.

(§ IV F—371)—Time of the essence.

Where a person for speculative purposes purchased a ranch which was rapidly increasing in value at a price of $75,000, paying $2,000 down and agreeing to pay the balance in instalments and the contract made time of the essence and further provided that if default was made in the payment of any instalment it would avoid the contract and all payments made would be forfeited to the vendor, and the purchaser afterwards bought from the vendor other personalty on the ranch and expended somewhat less than $3,000 for surveys, etc., for irrigation purposes, he is entitled to no relief against forfeiture of the contract at the suit of the vendor upon his failure to pay the first instalment of the purchase price when due, though the vendor at his request extended the time of payment for more than three weeks and for his failure then to pay cancelled the contract and resold the ranch for $100,000. [In re Dagenham (Thames) Dock Co., L.R. 8 Ch. 1022. 43 L.J. Ch. 261, distinguished.]

B. C. Orchard Lands Co. v. Kilmer, 2 D. L.R. 306, 17 B.C.R. 230, 20 W.L.R. 892.

Where a contract calls for performance within a given period, and time is not made of the essence, or where although originally made of the essence, the time fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer must by notice fix a reasonable time for completion and allow the contractor an opportunity to complete within the so extended period before he can dismiss the contractor. [Halsbury's Laws of England, vol. 3, p. 191, approved; Taylor v. Brown, 9 L.J. Ch. 14; Lowther v. Heaver, 41 Ch. D. 268, specially referred to.]

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405.

In contracts for the sale of claims and interests of a fluctuating character time is necessarily of the essence of the contract and, if the vendor fails to use his utmost diligence to complete his part of the contract, the purchaser may withdraw therefrom. [Macbryde v. Weekes, 22 Beav. 533, applied.]

Thomson v. McPherson, 3 D.L.R. 269, 3 O.W.N. 791, 21 O.W.R. 646.

Sale of interest in mining company—Indefinite and incomplete agreement—Time deemed of essence—Abandonment—Rescission—Caution.

Thomson v. McPherson (No. 2), 6 D.L. R. 867, 4 O.W.N. 216, 23 O.W.R. 226.

Sale of land—Default by purchaser—Time made of essence—Termination of contract—Absence of fraud or waiver.

O'Hearn v. Richardson, 3 D.L.R. 886, 3 O.W.N. 1430, 22 O.W.R. 609.

Sale of land—Termination of contract for default.

O'Hearn v. Richardson, 6 D.L.R. 913, 3 O.W.N. 945, 21 O.W.R. 553.

V. Change or extinguishment.

A. In general.

(§ V A—377)—MODIFICATION BY PAROL.

Where plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, and a plea of the Statute of Frauds is entered by defendants, it is necessary for the plaintiff to shew that the alleged new agreement was in writing.

Adamson v. Vachon, 8 D.L.R. 240, 22 W.L.R. 494.

(§ V A—379)—REPUDIATION.

The inability of the plaintiff to produce invoices in many instances pursuant to a written contract whereby the defendants were to purchase a stock of merchandise at an advance over the invoice prices, justifies the latter's repudiation of the contract, and relieves them from liability to the plaintiff for a breach thereof. (Per Irving, J.A.)

Periard v. Bergeron, 2 D.L.R. 293, 20 W.L.R. 874.

(§ V A—381)—ABANDONMENT.

The contract for the sale of an interest in a mining claim of a fluctuating character must be held to have been rescinded where a caution was filed against the claim after the execution of the agreement and the vendor knowing that it was useless to try to complete the sale while the caution remained undischarged had so conducted himself as to give the vendees reasonable ground to conclude that he had abandoned the contract and they did so conclude. [Morgan v. Bain, L.R. 10 C.P. 15, specially referred to.]

Thomson v. McPherson, 3 D.L.R. 269, 21 O.W.R. 646, 3 O.W.N. 791.

B. Termination.

(§ V B—387)—BY DEATH OF PARTY.

A contract by the testator to pay a specified sum of money per annum payable quarterly in advance, so long as he was able to do so and whilst the payee was self-dependent, provided the payee would agree to place her daughter (testator's granddaughter) in a certain educational institution until she had finished her education, is not terminated by the death of the testator but continues as against his executors.

Chisholm v. Chisholm, 2 D.L.R. 57.

C. Rescission; cancellation.

(§ V C—390)—RESCISSION; CANCELLATION.

An agreement for the sale of lands may be rescinded by the parties by an agreement not in writing, notwithstanding an action could not be maintained thereon because the agreement is within the Statute of Frauds. [Goss v. Lord Nugent (1833), 5 Barn. & Ad. 58, followed.]

Frith v. Alliance Investment Co., 5 D. L.R. 491, 20 W.L.R. 551.

Where a contract for the sale of lands does not provide for its cancellation by the vendor but that it shall be ipso facto void upon non-payment of instalments of purchase money, a Court will not declare a cancellation thereof for non-payment.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W. L.R. 180.

(§ V C—391)—REGULARITY OF NOTICE.

Notwithstanding time is declared to be of the essence of a contract for the sale of lands, specific performance will be decreed where a failure to promptly make a stipulated payment was due to the inadvertence of the vendee's partner, with whom, upon his departure for England, the vendee had left funds with which to make payments which came due during his absence, and it appeared that a day or two after such payment was due the vendor called up the vendee's office and without inquiring whether the latter had left instructions regarding the payment, obtained his address in England; and after-

wards the vendor mailed a notice of forfeiture to the vendee's office in an unofficial looking envelope, addressed in a lady's handwriting, marked "private," on account of which the vendee's partner returned it to the post office; and the notice of forfeiture forwarded to the vendee's English address was not received by him until after his return to Canada, as these circumstances cast such suspicion upon the vendor's conduct as to require a strict construction of the stipulation in the contract providing that notice of forfeiture should be given by personal service, or by delivery at the vendee's place of business by registered mail.

Mills v. Marriott, 3 D.L.R. 266, 20 W.L. R. 917.

A notice by a vendor of land while the purchaser was in default in respect of some of the payments stipulated for, that unless immediate payment is made "proceedings of foreclosure will follow" is not a sufficient notice of intended cancellation under a contract providing for a notice of intended cancellation and for forfeiture in thirty days thereafter.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16.

A notice is insufficient to cancel a contract for the sale of land which, contrary to the terms of the agreement, demands compound interest, and the payment of the balance due within thirty days from the date of the notice and not from the time of its service as required by the contract, where service was not effected until the thirty-day period had about expired.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16.

(§ V C 2—396)—PROMPTNESS.

The redhibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

(§ V C 2—397)—RESTORING BENEFITS.

The repudiation by an incorporated company of a contract with one of its directors, on the ground of misrepresentation, must be made promptly after the discovery of the misrepresentation. and while the company is still in a position to restore matters, not necessarily to their precise original position, but to a position which shall be just with reference to the rights which the director had before the contract. [Adam v. Newbigging, 13 A.C. 308, referred to; see also Kerr on Fraud and Mistake, 4 ed., pp. 365 et seq.]

Denman v. The Clover Bar Coal Co., Limited, 7 D.L.R. 96, 22 W.L.R. 128.

Where an offer to sell property was accepted in writing on condition that a cash payment should be returned "if the contract was not completed," it is sufficient to permit the purchaser to rescind where it was shewn that such condition was inserted at his instance for his own benefit, since it would be difficult to perceive how it could benefit the purchaser unless it conferred the right to rescind.

Munn v. Vigeon (No. 2), 4 D.L.R. 341, 22 O.W.R. 736, 3 O.W.N. 1532.

An option for the purchase of property providing that a specified sum of money deposited by the person to whom the option was given, should be returned to him "if contract not completed" calls for a return of such sum to the person who furnished the money and for whom the person who secured the option was acting, where no further steps were taken to carry out the contract except the writing of a letter by the vendor authorizing its agent and the agent of the purchaser to insert in the option the name or names of the persons for whom the latter assumed to act.

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Munn v. Vigeon, 2 D.L.R. 246, 3 O.W.N. 811, 21 O.W.R. 660.

The leasing of an orchard upon land the lessor had been induced to purchase by false representations, does not amount to such dealing with the property as will take away his right to rescind upon the ground of fraud, where the lease had been cancelled and the vendee was in a position to restore the land to the vendor practically as he received it. [Adam v. Newbigging, 13 App. Cas. 308, and Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218. referred to.]

Stocks v. Boulter, 5 D.L.R. 268, 3 O.W. N. 1397, 22 O.W.R. 464.

(§ V C 3—400)—GROUNDS OF.

Where an appellant, the widow, had become, on the death of her husband, a life usufructuary of the husband with whom she had been in matrimonial community of property; and where, under a contract of mandate, she appointed the respondent as manager of the estate in question, stipulating to pay him for a period of ten years, to cover his work and expenses as such manager, a commission of five per

cent. annually on the net value of the entire estate to be by him administered during the ten-year period; and where part of the property consisted of bank stocks and loans which were not disturbed or realized upon; and where the respondent charged his commission annually on the total net value of the succession and of the appellant's share of the assets of the community: the appellant will be allowed the full five per cent. without deduction as claimed, and the fact that such commission absorbs the bulk of the estate and that the bank stocks and investments were never disturbed or realized upon will not operate to defeat the terms of the mandate.

Genereux v. Binet, 18 Rev. de Jur. 471.

The plaintiff in a former action against the appellant made a transfer, while that action was pending, to the respondents, his attorneys of record, of the sum for which judgment would be recovered. The former action having been decided in favour of the plaintiff, the respondents (transferees) thereupon served the transfer upon the appellant, who then took the present action to have the transfer set aside as having been made in violation of art. 1485. The respondents inscribed in law, alleging want of interest in the appellant to take the action and further setting forth that it appeared from the plaintiff's declaration that, the transfer having been signified upon the debtor only after judgment, the respondents consequently became seized of the claim, only after it had ceased to be litigious:—Held, reversing the judgment whereby the inscription in law had been maintained, that the debtor of a claim transferred in violation of art. 1485 C.C. had an interest to attack the transfer by action, and is not restricted to pleading the ground of nullity in defence as in a case of retrait litigieux and that the illegality would affect a transfer made before the judgment in the former suit though served upon the debtor only after judgment. [Talbot v. Girouard et al., 18 Rev. de Jur. 93.]

(§ V C 3—402)—For fraud or misrepresentation.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company, gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the Court, but to repudiate the contract by its own act.

Denman v. The Clover Bar Coal Co., Limited, 7 D.L.R. 96, 22 W.L.R. 128.

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but this rule does not extend to executory contracts. [Angel v. Jay, [1911] 1 K.B. 666; Abrey v. Victoria Printing Co., 2 D.L.R. 208, 3 O.W.N. 868; Reese River Co. v. Smith, L.R. 4 H.L. 64; Adam v. Newbigging, 13 App. Cas. 308, and Angus v. Clifford, [1891] 2 Ch. 449, specially referred to.]

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O. W.N. 966, 22 O.W.R. 979.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had began to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52.

Rescission of a contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth. [Derry v. Peek, 14 A.C. 337, applied.]

Eisler v. Canadian Fairbanks Co., 8 D. L.R. 390, 22 W.L.R. 888.

(§ IV C 3—406)—Undue influence, duress.

Plaintiff's husband purchased certain land from defendant, and caused it to be conveyed to plaintiff, paying a certain amount in cash and the balance by notes, without security. Plaintiff's husband having been imprisoned, the defendant appears to have become anxious about his security, and approached the plaintiff in regard thereto, and ultimately procured a reconveyance of the land. It was found on contradictory evidence that this transfer was made by plaintiff without independent advice, for an inadequate consideration, and under the influence of threats by defendant to shoot her unless she reconveyed. In an action to set aside the conveyance:—Held, that transfer having been made by an ignorant woman in distress, without independent advice, and under the influence of threats, should be set aside.

Kolp v. Hunker, 4 S.L.R. 379.

(§ V C 3—407)—Breach, repudiation or delay.

The absence of sills from doors, the faulty manner in which bricks are placed, a leaking roof, are not latent defects which can give rise to the redhibitory action in respect of the sale of real property thereon used as dwellings, latent defects being those which a buyer could not possibly have ascertained at the time of the purchase, either personally or by an expert's examination, and which are so inherent to the thing sold that they cannot possibly be remedied; it does not suffice even that they be not apparent if they could be easily ascertained.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

A sale of a gas producer, a gas engine, and an air compressor for starting it, will be cancelled by the Court, where the vendor was unable, after fair trial, to get the engine to work without a larger fluctuation of speed than the limit of fluctuation warranted against by the contract.

The Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

Where a contract for the sale of a gas producer, a gas engine, and an air compressor for starting it, provided that the vendor would furnish free of charge for a month, the services of a superintending engineer, also stipulated against liability for defects in design, material, or workmanship, and guaranteed that the engine should develop 50 horse power when operated under certain fuel conditions, and that its speed should not vary more than 2 per cent. under changing load conditions, a contract relation in respect to the right of rescission, materially different from that existing in the ordinary sale of a chattel, is created, which will permit the vendee a reasonable time for experimentation and adjustment of the machinery before electing whether he will rescind.

Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

Where the purchaser of a gas producer, a gas engine, and an air compressor for starting it, gave his notes for the purchase price, and after operating it for about two months, informed the vendor by letter that the machinery was working satisfactorily, although he stated the existence of what were then regarded as trifling defects, which were, however, of a more serious nature than they were then supposed to be, such conduct is not destructive of the right to rescind upon it subsequently becoming evident that the machinery would not comply with the written guaranty.

The Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

Where a contract for the sale of an engine is rescinded for a false representation of a material character made by the defendant's representative as to the sufficiency of the engine to do a certain class of work, and the contract itself provided that if the engine was not of sufficient horse-power to do such work the sellers would forthwith supply him with a more powerful engine which would do the work, the plaintiff cannot, in addition to rescinding, obtain damages as for a breach of contract.

Eisler v. Canadian Fairbanks Co., 8 D. L.R. 390, 22 W.L.R. 888.

(§ V C 3—409)—Non-acceptance of offer.

Where one who has given an option to purchase land, arranges to meet the holder of the option at a certain place and time, for the purpose of closing the sale, and, with the intention of evading acceptance of the option, fails to attend at the place and time arranged, he is not precluded from setting up an absence of any acceptance of the option.

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

VI. Actions; liabilities.

(§ VI A—411) — Recovering back of money.

A party is not entitled to recover back money paid for a consideration which has failed where the failure has been caused by the party's own default.

Maritime Gypsum Co., Ltd. v. Redden, 8 D.L.R. 155, 11 East. L.R. 155.

Where a land company was engaged in selling lots from land to which had been given a name similar to that of a townsite owned by a railway company and issued circulars carefully and designedly prepared to create the impression, without explicitly so stating, that they were selling lots from the railway company's townsite, a person is entitled to recover the deposit paid by him on a contract to buy one of the lots under a belief induced by the circulars that he was buying a lot in the railway company's townsite.

Dunn v. Alexander, 2 D.L.R. 553, 20 W.L.R. 902.

Where the sales agent of the defendants, an incorporated company empowered to engage in the business of company promotion and of selling corporate shares, induced the plaintiff to buy shares of another company by representing that the defendants had power to re-purchase this stock within a certain time if the plaintiff desired to sell, and the defendants received the purchase price therefor from the plaintiff and afterwards refused the purchaser's demand to re-purchase the shares, the plaintiff is entitled. upon surrendering the stock to the defendants, to recover the sum paid thereon with interest from the time of his demand on them to re-purchase, as the contract was unenforceable. [Whaley v. O'Grady (No. 1), 1 D.L.R. 224, 19 W.L.R. 885, reversed on appeal.]

Whaley v. O'Grady (No. 2), 4 D.L.R. 485, 22 Man. L.R. 379, 21 W.L.R. 617.

Under an agreement of sale of lands on the small monthly instalment plan where the purchaser after a few monthly payments abandons the contract by omitting to make any further payment for four years, and where the vendors rescind the contract owing to the purchaser's persistent default, the purchaser by such default disentitles himself to any return of the payments which he did make.

Handel v. O'Kelly, 8 D.L.R. 44, 22 W. L.R. 407.

Money cannot be ordered to be repaid as upon a failure of consideration, where the failure is the non-performance of a

promise, as the only remedy is damages for the breach.

Wood v. Grand Valley R. Co., 5 D.L.R. 428, 3 O.W.N. 1356, 22 O.W.R. 269, 26 O.L.R. 441. [This judgment varied and damages reduced, 4 O.W.N. 556.]

A purchaser, ready and willing to carry out the terms of an agreement for the purchase of an hotel property, at a stipulated price, who is prevented from carrying out the agreement, by the vendor insisting on payment being made, in addition to the stipulated price, for some goods and chattels, which were included in the subject-matter of the agreement for sale, is entitled to a return of the money paid on account of the purchase-price together with such expenses as he may have been put to by reason of the vendor's refusal either to carry out the terms of the contract or to repay the amount paid on account.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205.

B. Defences.

(§ VI B—415)—DEFENCES.

It is no defence to an action by a sub-contractor. against the contractor on a bill of exchange and two promissory notes given by the contractor for work done by the sub-contractor in connection with a portion of the contract, that the original contract with the Crown entered into by the contractor, contained a stipulation "that the parties of the first part shall not in any way dispose of, sub-let, or re-let any portion of the work embodied in this contract."

O'Toole v. Ferguson, 5 D.L.R. 868.

An agreement of a vendor to repurchase land he had agreed to sell the plaintiff, although unenforceable because within the Statute of Frauds, will constitute a good defence to an action by the vendee for damages for the vendor's refusal to convey. [MacPherson v. Warner (1893), 9 T.L.R. 397, specially referred to.]

Frith v. Alliance Investment Co., 5 D. L.R. 491, 20 W.L.R. 551.

VII. Public contracts.

(No cases.)

VIII. Wrongful interference with.

(§ VIII—440)—WRONGFUL INTERFERENCE.

Preventing owner of chattels from removing same—C.C. (Que.), Art. 1053.

Lord v. Bergeron, 7 D.L.R. 809.

CONTRADICTION.

Of witness, see Witness, III.

CONTRIBUTION.

Between partners for negligence in carrying out contract between firm and one partner, see Partnership.

Surety's rights to, see Principal and Surety; Subrogation.

Between legatees, see Wills.

CONTRIBUTORY NEGLIGENCE.

See Negligence, II.

CONVICTION.

Summary, see Summary Conviction.

Proof of, to discredit witness, see Witnesses.

COPYRIGHT.

(§ I—1)—WHAT SUBJECT OF.

Copyright does not extend to mere ideas or methods apart from their expression and there is no infringement unless the printed matter itself is copied; consequently a copyrighted "legal directory" in which a cross-reference is given to the names of the law agents of solicitors listed therein by allocating to each agent a special number and placing the same number opposite the name of the solicitor, is not infringed by another directory adopting the same plan, but using a distinct set of numbers, provided that the information is obtained from original sources. [Hollinrake v. Truswell, [1894] 3 Ch. 420, followed; see also MacGillivray on Copyright, 1st ed., p. 15.]

Cartwright v. Wharton, 1 D.L.R. 392, 3 O.W.N. 499, 25 O.L.R. 357.

(§ I—4)—WHAT COVERED BY.

It is an infringement of a copyright to make use of the copyrighted original matter of a professional directory as the basis for an opposition directory, although such use is made only after making substantial corrections and alterations due to changed conditions, the information for which was obtained from original sources by the publisher of the later book. [Compare Bain v. Henderson (1911), 16 B.C.R. 318.]

Cartwright v. Wharton, 1 D.L.R. 392, 3 O.W.N. 499, 25 O.L.R. 357.

(§ I—8)—INFRINGEMENT.

Breach of injunction restraining—Contempt of Court.

Cartwright v. Wharton (No. 3), 6 D.L.R. 890, 4 O.W.N. 210, 23 O.W.R. 214.

CORPORATIONS AND COMPANIES.

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Municipal, see Municipal Corporations.
Banking, see Banks.
Insurance companies, see Insurance.

I. Nature; creation; franchises; governmental regulation.

B. Corporate purposes.

(§ I B—5)—CORPORATE PURPOSES.

A prospectus ordered and prepared by an agent engaged by a company to sell its shares who has obtained from the directors of the company the information to be inserted therein, partly or wholly corrected by the president of the company, and received by the directors of the company without demur, will be held the prospectus of the company itself, especially when it is so described in its headline.

French Gas Saving Co., Ltd. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

(§ I B—7)—DELAY IN ORGANIZING.

Where letters patent incorporating a company have been obtained under the Ontario Companies Act, and, though no steps have been taken towards its organization, its corporate powers have not been forfeited by delay, the company is an existing legal entity, and solicitors entering an appearance on its behalf cannot be made personally liable for the costs of the action as having appeared for a non-existing client. [Simmons v. Liberal Opinion, Ltd., In re Dunn, [1911] 1 K.B. 966, distinguished.]

Campbell v. Taxicabs Verralls Limited, 7 D.L.R. 91, 4 O.W.N. 28, 23 O.W.R. 6, 27 O.L.R. 141.

C. De facto corporation.

(§ I C—10)—DE FACTO CORPORATION.

The renting of an office, payment of business tax, opening of a bank account, signing of a lease, and institution of suit by a company, constitute a commencement of operations and incurring of liabilities bringing the company within the purview of sec. 6019 R.S.Q.

French Gas Saving Co., Ltd. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

D. Names.

(§ I D—19)—RIGHT OF MAJORITY OF SHAREHOLDERS TO USE NAME.

The name of a company may be used in behalf of a majority of the shareholders in a proceeding to expel directors who were illegally elected.

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441.

E. Governmental regulation.

(§ I E—19z)—GOVERNMENTAL REGULATION.

A provision in the letters patent incorporating a loan company in Ontario, giving power to the company to sue and be sued by its corporate name only so long as it is registered under the Loan Corporations Act, R.S.O. 1897, ch. 205 (see now 2 Geo. V. (Ont.) ch. 34), is not justified by the Act, and is ineffectual. [Simmons v. "Liberal Opinion," Limited, Re Dunn, 27 Times L.R. 278, distinguished.]

Powell-Rees, Ltd. v. Anglo-Canadian Mortgage Corporation (No. 3), 5 D.L.R. 818, 3 O.W.N. 1444, 22 O.W.R. 529, 26 O.L.R. 490.

II. Consolidation; reorganization; transfer of franchises.

(§ II—27)—LIABILITY OF TRANSFEREE.

A person to whom a franchise to supply water to the citizens of a town is granted by a municipal corporation cannot have any larger or greater responsibility than the corporation would have had, had it itself exercised the powers delegated. [Brousseau v. City of Quebec, 42 Que. S.C. 91, followed.]

Quesnel v. Emard and City of Montreal; Cote v. Emard and City of Montreal, 8 D.L.R. 537.

III. Charters; articles of incorporation.

(§ III—31)—CONSTRUCTION OF.

A contract made between a company

carrying on business as implement dealers and holding a federal charter under the Companies Act, R.S.C. 1906, ch. 79, and a merchant in British Columbia whereby the latter was to sell their goods with an exclusive right within a part of the Province and with a limitation on his selling prices, and whereby the company also retained title to the goods until paid for and the merchant agreed to take lien notes from customers to the company direct if it so requested, and to hold money received in partial payments from customers as in trust for the company, involves the carrying on of business within the Province by the company under sec. 139 of the B.C. Companies Act, 10 Edw. VII. ch. 7, and if the company has not obtained a Provincial license under that statute it cannot maintain an action against the merchant upon his promissory notes payable within the Province for goods shipped by the company from another Province to him in pursuance of such agreement.

John Deere Plow Co. v. Agnew, 8 D.L.R. 65, 22 W.L.R. 243.

(§ III—32)—AMENDMENT OR REPEAL.

Under a statutory authority enabling a company to alter or add to its articles of association, it may provide that a shareholder shall not sell his shares except for cash and that sales should be subject to the approval of the directors of the company. [Borland v. Steel Brothers & Co., [1901] 1 Ch. 279, followed.]

Leiser v. Popham Brothers, Ltd., 6 D. L.R. 525, 17 B.C.R. 187.

IV. Powers, liabilities and officers.

A. Rights and powers generally.

(§ IV A—41)—IMPLIED POWERS.

A corporation has certain powers necessarily and inseparably incident to it, and among them is the power to sue or to be sued, plead or be impleaded by its corporate name. [See Conservators of the River Tone v. Ash, 10 B. & C. 349; and Blackstone's Commentaries, vol. 1, p. 475.]

Powell-Rees, Ltd. v. Anglo-Canadian Mortgage Corporation (No. 3), 5 D.L.R. 818, 3 O.W.N. 1444, 22 O.W.R. 529, 26 O.L.R. 490.

(§ IV A—49)—TO SUE FOR PENALTIES.

A corporation is not a "private person" within the meaning of sec. 131. subsec. 6 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 134, sub-sec. 6), and, therefore, cannot sue for the penalties provided thereby for default in making annual returns.

Guy Major Co. v. Canadian Flaxhills, 3 D.L.R. 312, 3 O.W.N. 1058.

B. Owning stock of other companies.

(§ IV B—51)—CONTROLLING INTEREST OR ENTIRE OWNERSHIP.

Under 63-64 Vict. (Can.) ch. 98, empowering a cotton company "to construct, acquire, operate and dispose of cotton and woollen manufactories of every description," the company has the power to lease its mills to another company formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors.

Dominion Cotton Mills Co., Ltd. v. Amyot and Brunet, 4 D.L.R. 306.

(§ IV B—52)—SYNDICATE HOLDING SHARES.

An application for shares and payment of a call thereon to a syndicate is not an application to the company whose shares this syndicate may hold and there is no contractual relation between the applicants and the company until, at any event, an allotment thereof is made.

Consumers Cordage Co., Ltd. v. Molson, 2 D.L.R. 451.

D. Contracts; ultra vires.

(§ IV D—60)—CONTRACTS; ULTRA VIRES.

Where the Legislature gives a company express power, within certain limits, to do a special thing, it is to be taken prima facie to prohibit by implication any deviation from the power so given.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876.

(§ IV D 1—65)—POWER TO CONTRACT.

A company incorporated under the Manitoba Joint Stock Companies Act has no power to bargain away paid-up shares in the company for a mere covenant or agreement by the subscriber to do certain future acts as to which upon non-performance the company's rights would lie only in damages. [Re Jones and Moore Electric Co., 18 Man. R. 549, 571, approved; and see Elkington's case, L.R. 2 Ch. 511.]

Re Winnipeg Hedge and Wire Fence Co., Ltd., 1 D.L.R. 316, 20 W.L.R. 337, 22 Man. L.R. 83.

(§ IV D—67a)—AS TO NEGOTIABLE PAPER.

Upon a bank refusing to discount a company note, which was indorsed by the directors for the sole purpose of being discounted, and insisting upon holding it as collateral security for the company's indebtedness, the managing director had power to consent to so pledging such note, where the latter had, to the knowledge of the bank, been empowered by a resolution of the company to deal with such bank, and to negotiate with, deposit with, or transfer to it for the credit of the company, bills of exchange, promissory notes, and, under such circumstances, the bank was a holder in due course for value, there being no circumstances which would place it on inquiry.

Cox v. Canadian Bank of Commerce, 5 D.L.R. 372.

(§ IV D 1—75) — "TRADING COMPANY," MEANING OF.

For the purpose of the exception to the

general rule that contracts of corporations must be made under the corporate seal, the meaning of the expression "trading company" is not confined to companies with the object of barter, and a building company is a "trading company" within the meaning of the exception.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 21 W. L.R. 949.

(§ IV D—77)—TRANSFER OF ENTIRE PROPERTY.

An agreement entered into by the directors of a company for the sale of the entire undertaking to another company, although ratified by a resolution passed at a meeting of shareholders, is ultra vires and cannot be enforced in the absence of the special resolution called for by the amending Act, sec. 5, as defined by sec. 93 of the Companies Act.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876.

The procedure prescribed by the Nova Scotia Companies Act for the sale of its whole undertaking and assets must be strictly followed.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876.

Under the provisions of the Nova Scotia Companies Act, R.S.N.S. ch. 128, as amended by N.S. Acts of 1912, ch. 47, a company, whether incorporated before or after the passage of the latter Act, may dispose of the whole of its undertaking; such sale is not limited to sales for shares, debentures or securities of other companies carrying on a business of a similar character, but covers sales for money as well.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876.

(§ IV D 1—77a)—CHATTEL MORTGAGE.

A document by which the title and right to possession of chattel property of a company is transferred to a trustee for bondholders is within the purview of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) ch. 65, although a "floating charge" passing no property in the goods and conferring no rights of possession or interference therewith, but giving preferential rights on the winding up of a company, may be created as to present and future property of a company without coming within the terms of the Bills of Sale and Chattel Mortgage Act. [Johnston v. Wade, 17 O.L.R. 372, specially considered; Re London Pressed Hinge Co., [1905] 1 Ch. 576, specially referred to.]

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 22 O.W.R. 933. 3 O.W.N. 1093, 26 O.L.R. 279.

(§ IV D 3—85)—FORMAL REQUISITES.

Section 64 of the Manitoba Joint Stock Companies Act which dispenses with the necessity for the corporate seal upon a contract or agreement made for the company by its agent, officer or servant "in general accordance with his powers" does not apply to agreements made out of the ordinary course of the company's business, even by its vice-president in the company's name; and the person dealing with the company's officer or agent in respect of agreements of that nature is put upon inquiry to ascertain that the officer or agent has in fact been duly authorized to enter into them.

Whaley v. O'Grady (No. 1), 1 D.L.R. 224, 19 W.L.R. 885, 48 C.L.J. 112.

A contract by a trading company entered into for the purpose for which the company is incorporated need not be under the common seal of the company. [Clarke et al. v. Cuckfield Union, 21 L.J. Q.B. 349; Henderson v. Royal Mail Navigation Co., 5 E. & B. 409; and South of Ireland Colliery v. Waddle, L.R. 3 C.P. 463, referred to; see also Lindley on Companies, 6th ed., vol. 1, p. 271; and Halsbury's Laws of England, vol. 8, p. 383.]

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 21 W. L.R. 949.

The fact that the financial statement of a company submitted by its treasurer and adopted by its directors enumerated as one of the assets of the company, an item as follows: "Patent $20,000" is not, in the absence of a by-law or other document under the corporate seal or of assumption or user of the patent rights by the company, sufficient evidence of a contract binding the company to take over at that price from the incorporators acting as a syndicate a patent right for the transfer of which to the company negotiations had been pending between the syndicate and the company.

Re Winnipeg Hedge and Wire Fence Co., Ltd., 1 D.L.R. 316, 20 W.L.R. 337, 22 Man. L.R. 83.

(§ IV D 4—90)—RATIFICATION.

After the incorporation of a company the personal liability of the signatories to a promissory note executed in the company's name by persons purporting to be the president and manager thereof and signed prior to the incorporation remains unaffected by the incorporation of the company. (Per Richards, Perdue and Cameron, JJ.A.)

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

A ratification by the Crown, express or implied, in Orders-in-Council, of the contract above described, makes it valid, notwithstanding what may have been lacking in the powers of the corporate body. Nor can the latter set forth, as an answer, that the Crown had no power to make such orders, as, in doing so, it violates the rule that forbids to plead a jus tertii.

Harbour Commissioners of Montreal

(plaintiffs, appellants) v. Foundry and Machine Co. et al. (defendants, respondents), 21 Que. K.B. 241.

When an incorporated company allows a prospectus ordered and prepared by a financial agent employed by them to sell their shares to be circulated amongst the public which purports to be the prospectus of the company and permits any advertisements based thereon to be published without any disclaimer on the part of the company, it will not be allowed to deny the authority of the apparent agent, who gave the orders for the printing and advertisements, whether such apparent agent be really the duly authorized agent of the company or not.

French Gas Saving Co., Ltd. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

G. Officers; meetings.

(§ IV G 2—111)—Powers of president.

Where by an agreement which is in writing but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

Wood v. Grand Valley R. Co., 5 D.L.R. 428, 3 O.W.N. 1356, 22 O.W.R. 269, 26 O.L.R. 441. [Varied and damages reduced, 4 O.W.N. 556.]

The name of an incorporated company at the foot of an agreement, followed, as part of the same signature, by the name of its president and the word "president," is the signature of the company and not of the president personally.

Wood v. Grand Valley R. Co., 5 D.L.R. 428, 3 O.W.N. 1356, 22 O.W.R. 269, 26 O.L.R. 441. [Varied and damages reduced, 4 O.W.N. 556.]

An officer of a company who is at the same time director, president and manager, cannot make the acknowledgment of insolvency specified in sub-sec. (d) of sec. 3 of the Winding-up Act, R.S.C. 1906, ch. 144, in the absence of authority so to do. [Almon v. Law, 26 N.S.R. 340, and Re Britton Medical Co., 11 O.R. 478, specially referred to.]

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

A notary public holding the position of president of an incorporated company is not competent to pass a deed in his capacity of notary whereto such company is a party: and the registration of such deed is ineffective if registration is made of it as if it were an authentic deed.

Bedard v. Phœnix Land Improvement Co. and Drolet, 8 D.L.R. 686.

(§ IV G 2—114)—Powers of vice-president.

An agreement by a company engaged in the business of company flotation and of selling shares in the companies promoted through its efforts, to give the buyer of corporate stock sold by its salesman the option of returning the shares within a limited time and of receiving back the purchase price with a premium added, is not a transaction in the ordinary course of the company's business and will not be binding on the selling company although made by the authority of its vice-president, if such contracts had been forbidden by the president and were neither made nor authorized by any document or record under the corporate seal.

Whaley v. O'Grady (No. 1), 1 D.L.R. 224, 19 W.L.R. 885, 48 C.L.J. 112.

(§ IV G 2—115)—Powers of officers.

A trading company is bound by acts of its officers done in the course of negotiations for a contract for the purpose for which it is incorporated, and its common seal is not necessary.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 21 W.L.R. 949.

(§ IV G 2—116a)—Powers of manager.

Where the managing director of an incorporated company in Saskatchewan holds himself out as having authority to do certain acts, which are not unusual for the managing director of such a company, the company will be bound by such acts.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 21 W.L.R. 949.

Where a school board calls for tenders for the construction of a building upon the terms that a marked cheque for a proportion of the tender should accompany the tender and be forfeited if the successful tenderer should fail to execute a contract within three days of receipt of notice of acceptance of his tender, and the successful tenderer, an incorporated company, refuses to sign a contract for the amount named in its tender, because of an error in its estimates, it cannot recover the amount of its deposit on the ground that it has made no contract under its seal with reference thereto, and that the authority of its managing director, who signed the tender and conducted the negotiations on its behalf, was confined to the making of the tender, and did not extend to agreeing to the condition as to the forfeiture of the deposit.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 21 W.L.R. 949.

(§ IV G 2—117)—Powers of directors.

The power to adopt by-laws relative to the voting of shares by proxy at elections of company directors is, by sec. 15 of ch. 53 of 52 Vict. (Man.), vested in the directors only, and not in the shareholders of the

company. [Kelly v. Electrical Construction Co., 16 O.L.R. 232, applied.]

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 22 Man. L.R. 441, 21 W.L.R. 815.

The directors of a company have power to defend an action in the name of a company. [See Lindley on Companies, 6th ed., vol. 1, p. 378.]

Campbell v. Taxicabs Verrals Ltd., 7 D.L.R. 91, 4 O.W.N. 28, 23 O.W.R. 6, 27 O.L.R. 141.

One who contracts with an incorporated company, of which he is a director, must shew that the contract is a fair one and that he has taken no advantage of the company.

Denman v. The Clover Bar Coal Co., Ltd., 7 D.L.R. 96, 22 W.L.R. 128.

It is not within the authority of the managing director of an incorporated company to compromise or release the liability of another director in respect of misrepresentations made by that director inducing a contract between him and the company.

Denman v. The Clover Bar Coal Co., Ltd., 7 D.L.R. 96, 22 W.L.R. 128.

The directors of a company are prevented by section 72 of the Companies (Consolidated) Act of 1908 (Imp.) from removing a managing director from office.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137.

The directors of a company may, without the sanction of the shareholders, make an acknowledgment of the company's insolvency for the purpose of winding up, as required by sub-sec. (d) of sec. 3 of the Winding-up Act, R.S.C. ch. 144. [Hovey v. Whiting, 14 Can. S.C.R. 515, applied.]

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

(§ IV G—119a)—POWERS OF AUDITORS.

An auditor appointed by an incorporated company in pursuance of the Companies Ordinance (Alta.), cannot enforce against the directors of the company a right of access to the company's books and records by means of an application to the Court instituted by an originating summons under Alberta rule 469 of the Judicature Ordinance.

Baldwin v. Bowden, 6 D.L.R. 520, 22 W.L.R. 26.

(§ IV G 3—120)—COMPENSATION.

Directors who perform mere manual labour as servants or clerks of a company are entitled to remuneration therefor at the ordinary market price, without such payments being first authorized by a by-law adopted at a general meeting as required by sec. 88 of 7 Edw. VII. ch. 34 (The Ontario Companies Act), in the case of compensation of officers whose appointment must be by by-law. [Burland v. Earle, [1902] A.C. 83, followed; Re Queen City Plate Glass Co., Eastmure's case (1910), 1 O.W.N. 863; Re Morlock and Cline Ltd., Sarvis and Canning's Claims (1911), 23 O.L.R. 165; and Benor v. Canadian Mail Order Co. (1907), 10 O.W.R. 1091, distinguished.]

Re Matthew Guy Carriage and Automobile Co., 4 D.L.R. 764, 3 O.W.N. 1233, 22 O.W.R. 34, 26 O.L.R. 377.

(§ IV G 4—127) — OFFICERS PURCHASING STOCK FROM SHAREHOLDERS.

Where directors of a corporation were approached with a view of merging or consolidating with similar interests, said merged interests to purchase the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, the directors are agents of the shareholders and cannot personally profit by the transaction in question. Hyatt v. Allen, 3 O.W.N. 370, affirmed in Hyatt v. Allen, 8 D.L.R. 79, 3 O.W.N. 1401.

Under ordinary circumstances no fiduciary relation exists between directors and shareholders of a corporation, but where directors of a corporation were approached with a view of merging or consolidating with similar interests, said merged interests to purchase the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, a trust or fiduciary relation was established between the directors of said corporation and its shareholders. Hyatt v. Allen, 3 O.W.N. 370, affirmed in Hyatt v. Allen, 8 D.L.R. 79, 3 O.W.N. 1401.

(§ IV G 5—130)—LIABILITIES.

An action against a company on a note given in part settlement of an account stated, the account being partly for wages and partly for goods supplied, is not a prior action for wages against the company under the statute 7 Edw. VII. (Ont.) ch. 34, sec. 94, so as to make the directors of the company personally liable for the amount of the note under that section, where the amount of the note was considered both by the maker and payee as an undivided sum and represents the balance due on the settlement after a payment made generally on the entire indebtedness without apportionment as between the wages and the other claims.

Olson v. Machin, 8 D.L.R. 188, 4 O.W.N. 287, 23 O.W.R. 531.

(§ IV G 5—131)—ENGAGING IN ULTRA VIRES BUSINESS.

When the directors of a company expressly or impliedly authorize the commencement of the operations of the company or the incurring of liabilities before ten per centum of the authorized capital of the company has been subscribed and paid in

in conformity with the Quebec Companies Act, R.S.Q. (1909), article 6019, they are personally, jointly and severally liable with the company for the payment of such liabilities.

French Gas Saving Co., Ltd. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

(§ IV G 5—136)—On promissory notes.

Persons who sign a promissory note as president and manager of a non-existing company are liable upon their implied warrant of its actual existence for the full face value of such note. (Per Richards and Perdue, JJ.A.) [Thomson v. Feeley, 41 U.C.Q.B. 229, and Kelner v. Baxter, L.R. 2 C.P. 174, applied.]

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

(§ IV G 5—137)—For wages.

In an action against the directors of a company for wages, under sec. 94 of the Ontario Companies Act, 7 Edw. VII., ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), owing by the company, it is sufficient if the execution against the company under the judgment first obtained against it, has been directed to the sheriff of the county where the venue is laid, or of the county where the head office of the company is situated. [Nixon v. Brownlow, 1 H. & N. 405, and Brice v. Munro, 12 A.R. 453, followed.]

Pukulski v. Jardine; Perryman v. Jardine, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 893, 26 O.L.R. 323.

In an action against the directors of a company for wages, under sec. 94 of the Ontario Companies Act, 7 Edw. VII., ch. 34 (see now 2 Geo. V., ch. 31, sec. 96), it must be shewn that there has been a bonâ fide attempt to collect the amount of the judgment from the company, and that a bonâ fide return has been made that there is nothing in the shape of assets of the company to satisfy it, a mere formal, colourable or illusory return is not sufficient. [Ilfracombe R. Co. v. Devon and Somerset R. Co., L.R. 2 C.P. 15; Moore v. Kirkland, 5 U.C.C.P. 452; Jenkins v. Wilcock, 11 U.C.C.P. 505; Brice v. Munro, 12 A.R. 453, followed; Grills v. Farah, 21 O.L.R. 457, distinguished.]

Pukulski v. Jardine, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 893, 26 O.L.R. 323.

An allowance for travelling expenses can be recovered in an action against the directors of a company under sec. 94 of the Ontario Companies Act, 7 Edw. VII., ch. 34 (see now 2 Geo. V., ch. 31, sec. 96), as a part of the wages for which the directors are personally liable on the company's default, where the employee was entitled under his contract of employment to have his travelling expenses added to the fixed salary.

Pukulski v. Jardine; Perryman v. Jardine, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 983, 26 O.L.R. 323.

(§ IV G 5—153)—Criminal liability.

An officer of a company is criminally liable under article 69 of the Criminal Code, providing, among other things, that everyone is a party to and guilty of an offence who does an act for the purpose of aiding any person to commit the offence, where on the strength of a false representation in a report made by him with intent to perpetrate the offence of obtaining credit by false pretences, goods were obtained on credit for the company.

Rex v. Amos Campbell, 5 D.L.R. 370.

(§ IV G 6—155)—Meetings.

Where a bare majority of the directors of a company call a meeting of directors at a time that does not reasonably permit of the attendance of a full board, and not acting in a bonâ fide manner or in the interests of the company, but for the purpose of defeating shareholders in respect to resolutions to be considered at a company meeting, and for the purpose of retaining themselves in office, and altogether apart from any business investigation, the parties to whom the shares are issued will be restrained from making use of them in voting at such meeting. There is no difference between preventing a threatened issue of stock for improper purposes and the use of stock improperly issued and intended for improper control.

The Glace Bay Printing Co. et al. v. Harrington et al., 45 N.S.R. 268.

(§ IV G 6—157)—Notice of.

The action of the board of directors of a company incorporated under the Imperial Companies Consolidation Act of 1908 in appointing a managing director is not invalid because two of the directors, who were temporarily in British Columbia, did not receive notice of the meeting, as the requirement as to notice will be reasonably construed so as to facilitate the efficient carrying on of the business of the company.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137.

The fact that the articles of association of a company provide for the payment of the travelling and hotel expenses of directors while attending meetings of the board, does not require that notice of meetings thereof to be held in England shall be given to directors who are temporarily in British Columbia.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137.

H. Promoters.

(§ IV H—164)—Sales by promoters to corporation.

Where shares in an incorporated company are issued to one of the promoters of the company in alleged consideration of the transfer to the company of patent rights which were already known to be of no real value to the company, the transaction may be declared a fraud upon the company and

the promoter in whose name the shares remain may be held liable as a contributory upon a liquidation proceeding under the Winding-up Act, R.S.C. 1906, ch. 144.

Re Winnipeg Hedge and Wire Fence Co., Ltd., 1 D.L.R. 316, 20 W.L.R. 337, 22 Man. L.R. 83.

V. Capital; stock and stockholders.

A. In general; issue of stock.

(§ V A—165)—CAPITAL; STOCK AND STOCKHOLDERS.

A resolution of directors ratifying and confirming issues of stock will be restricted to shares issued previously to the date of the requisition calling the meeting at which the resolution approving such issue is passed, and will not be effective in confirming shares issued subsequent to the date of such requisition.

The Glace Bay Printing Co. et al. v. Harrington et al., 45 N.S.R. 276.

(§ V A—168)—BONUS STOCK.

A company organized under the Ontario Companies Act, R.S.O. 1897, ch. 191, cannot issue shares of capital stock at a discount or as a bonus. [Ooregum Gold Mining Co. v. Roper, [1892] A.C. 125, and Welton v. Saffery, [1897] A.C. 299, followed.]

Re McGill Chair Co.; Munro's Case, 5 D.L.R. 73, 21 O.W.R. 921, 3 O.W.N. 1074, 26 O.L.R. 254.

(§ V A—170)—FRACTIONAL SHARES.

A company organized under the Ontario Companies Act, R.S.O. 1897, ch. 191, is not empowered to allot half shares of stock, and a person to whom the company purported to allot two and one-half shares is liable for two shares only.

Re McGill Chair Co.; Munro's Case, 5 D.L.R. 73, 21 O.W.R. 921, 3 O.W.N. 1074, 26 O.L.R. 254.

B. Subscriptions.

(§ V B—177)—CONDITIONS TO SUBSCRIPTION.

An applicant or subscriber for shares in a joint stock company may validly stipulate that his subscription will only take effect in the event of the company finding other bonâ fide subscribers for a given number of shares.

Edge v. Security Life Insurance Co., 8 D.L.R. 492.

(§ V B—178)—CANCELLATION OR RELEASE.

One who accepts shares of company stock as a bonus cannot, upon discovering their illegality, have their allotment cancelled on the ground that they were issued under a mistake of fact, since, if there was any mistake, it was one of law. [Ex p. Sandys (1889), 42 Ch. D. 98; Welton v. Saffery, [1897] A.C. 299, and Re Cornwall Furniture Co. (1910), 20 O.L.R. 520, followed; Burkinshaw v. Nicolls (1873), 3 App. Cas. 1004, distinguished.]

Re McGill Chair Co.; Munro's Case, 5 D.L.R. 73, 21 O.W.R. 921, 3 O.W.N. 1074, 26 O.L.R. 254.

It is competent to a company, upon discovering that it has, under a mistake of law, been illegally issuing its shares at a discount, to return the subscriptions and cancel the allotment, and the issue of stock so made.

Re Matthew Guy Carriage and Automobile Co., Ltd. (Thomas's Case), 1 D.L.R. 642, 21 O.W.R. 842, 3 O.W.N. 902.

(§ V B 2—180)—PAYMENT.

An allotment of shares of capital stock offered for public subscription is not void but voidable only, for non-compliance with the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 106 (now 2 Geo. V. ch. 31, sec. 110), as regards payment to and receipt by the company of the deposits with applications for shares to the extent of the minimum subscriptions required for organization. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed; Finance and Issue, Ltd. v. Canadian Produce Corporation, [1905] 1 Ch. 37, applied by Court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645.

C. Transfers; lien.

(§ V C—188)—TRANSFER ON BOOKS.

A transfer of shares of stock of a company is not invalidated, under sec. 64 of ch. 79 of R.S.C. 1906, by failure to have the transfer registered on the books of the company, as such section, for the purpose of exhibiting the rights of the parties toward each other, expressly preserves the validity of an unregistered transfer.

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

The directors of a company cannot refuse to register a transfer of its shares of stock, under sec. 67 of ch. 79 of R.S.C. 1906, on the ground that the transferor was indebted to the company, where the indebtedness did not exist at the time the transfer was executed, although it was incurred before the application for registry was made.

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

Refusal to register—Application for mandamus enlarged upon undertaking of company to bring action for cancellation of certificate issued to transferor.

Re Goldfields Ltd., 2 D.L.R. 885, 3 O.W.N. 928.

(§ V C 1—189)—TRANSFER OF STOCK HELD IN TRUST.

A joint stock company, organized under the Companies Act (Can.), does not wrongfully acquire its own shares, where, under an agreement of the members of the syndicate organizing it, a number of shares that were issued in trust for their benefit were re-transferred to the president and secre-

tary of the company in order to form a fund for the working capital thereof, under the control of a majority of the shareholders, since, by such agreement, the sale or distribution of the shares only was postponed, and the transaction is, therefore, permissible under secs. 26, 80 and 132 of the Companies Act, R.S.C. 1906, ch. 79.

Black v. Carson and The Crown Reserve Mines Co., Ltd., 7 D.L.R. 484.

Transfer of company share—Undertaking to re-transfer—Sale or loan of share.

Lamoureaux v. Simpson, 2 D.L.R. 917, 21 O.W.R. 64, 3 O.W.N. 569.

(§ V C 1—190)—TRANSFER OF SHARES FOR PURPOSES OF SALE.

A transfer of company shares to a person for sale to another does not amount to a sale to the transferee.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886.

(§ V C 1—192)—RIGHTS OF TRANSFEREES.

Where the members of the syndicate organizing a joint stock company agreed that a large number of the company's shares should issue to the promoters of the company in trust for the members of the syndicate, also that a portion thereof should, in order to form a fund for the organization of the company as well as such working capital as the directors should from time to time deem prudent, be retransferred to the president and secretary of the company, which was done, and a number of such shares were sold by the directors, the proceeds being used in developing the business, which became profitable, and the shares became valuable, the directors did not hold such shares in trust for the members of the syndicate, and they cannot be required to account for shares sold, or for dividends received on the shares held by them, or to distribute the remaining shares among the members of the syndicate, as they had, by their agreement, in order to form a working capital for the company, vested it with such shares without retaining any individual interest therein, and it did not appear but that the directors might at some future time need to sell the remaining shares in order to assure the necessary development of the business.

Black v. Carson and The Crown Reserve Mines Co., Ltd., 7 D.L.R. 484.

An agreement giving an option to purchase shares of stock in case the owner should desire to sell them does not create a contract with the company issuing the stock so as to justify the refusal of the directors, upon a transfer thereof to a third person, to record the transaction on the books of the company.

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

One who purchases shares of stock under an irregular sale by a pledgee will not be protected as a purchaser for value without notice, where the solicitor who acted for the former was also the solicitor for the pledgee, and had knowledge of such irregularity, as his knowledge was imputable to the purchaser.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

Transfers—Agreement for sale—Conflicting evidence.

Lazier v. MacCullough, 7 D.L.R. 851.

(§ V C—195)—PRIOR RIGHT OF PURCHASE.

A transfer of shares of stock to a trustee under a marriage settlement does not constitute a sale within the meaning of an agreement giving a third person an option for their purchase should the settlor desire to sell them.

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

E. Rights of shareholders.

(§ V E 1—212)—MINORITY SHAREHOLDERS.

Minority shareholders of a joint stock company are obliged to follow the administrative directors of the majority shareholders in the absence of legislation to the contrary.

Black v. Carson and The Crown Reserve Mines Co., Ltd., 7 D.L.R. 484.

(§ V E 1—214)—STOCK SOLD FOR ASSESSMENTS.

Where stock of a shareholder partly paid for has been improperly declared forfeited for non-payment of calls, the shareholder is not restricted to an action for damages, but is entitled to sue for his stock and for a judgment giving him the benefits of a shareholder subject to all obligations legally imposed upon him as such.

Fox v. Selkirk Land and Investment Co., 8 D.L.R. 945, 22 W.L.R. 680.

A by-law of a company, giving the board of directors the power to summarily forfeit shares and the money paid thereon upon which any call shall have remained unpaid for six months after it shall be due and payable, is not sufficient to forfeit shares upon which part payment had been made, unless notice of the intended forfeiture has been given to the shareholder.

Fox v. Selkirk Land and Investment Co., 8 D.L.R. 945, 22 W.L.R. 680.

(§ V E 1—215)—TO REMOVE OFFICER.

Under sec. 72 of the Companies (Consolidated) Act of 1908 (Imp.), only the shareholders of a company have power to remove a managing director from office.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137.

(§ V E 2—220)—ACTIONS BY.

Where a minority of shareholders are permitted by the Court to bring an action in their own name because the majority of shareholders will not permit an action to be brought in the name of the company, the plaintiffs cannot have a larger right to

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441.

(§ V G 2—295)—WHO ENTITLED TO VOTE.

The fact that a shareholder who was in arrears for calls and therefore not entitled, under sec. 12, ch. 53, 52 Vict. (Man.), to vote at elections of directors, had been permitted to vote at previous elections, will not justify his voting at a subsequent election.

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441.

A shareholder whose note given for a call is overdue cannot, under the provisions of sec. 12 of ch. 53 of 52 Vict. (Man.), vote at an election of company directors.

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441.

VI. Dissolution; forfeiture; insolvency; winding up.

A. In general.

(§ VI A—311)—SALE; REDEMPTION.

Winding-up—Purchase of assets from liquidator—Alleged misrepresentation — Appeal from Master.

Re Hamilton Manufacturing Co., Limited, Hall's Case, 4 O.W.N. 421, 23 O.W. R. 473.

(§ VI A—313)—WINDING UP GENERALLY, PROCEDURE.

The winding up of a company when ordered under the Winding-up Act, R.S.C. 1906, ch. 144, takes effect retroactively as of the date of service of the notice of motion so that the winding up of the business of the company is to be deemed to commence at that time. [Fuches v. Hamilton Tribune Co., 10 P.R. (Ont.) 409, followed.]

Bank of Hamilton v. Kramer-Irwin Co., 1 D.L.R. 475, 3 O.W.N. 603, 20 O.W.R. 999.

Under sec. 15 of the Winding-up Act, R.S.C., ch. 144, providing that if a company opposes the application for a winding-up order on the ground that it is not insolvent, the Court may make an order for an accountant to inquire into the affairs of the company, the power so conferred can be exercised only where the petitioners have made such a primâ facie case of insolvency against the company as would justify a winding-up order, and upon their failure so to do, no order for an audit by an accountant will be made.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

A petition for a winding-up order cannot be supported by statements verified by an affidavit on information and belief only. [Gilbert v. Endean, L.R. 9 Ch. D. 259, applied.]

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

Petitioners for the winding up of a company under the Dominion Winding-up Act on the ground of its insolvency must not only allege, but strictly prove, the existence of one or more of the circumstances set out in sec. 3 of the Winding-up Act, R.S.C. 1906, ch. 144, which would justify an order for winding up.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

An application for an order to proceed with the winding up of a company in the Yukon Territory is properly made pursuant to the rules of procedure made by the Judges of the Supreme Court of the North-West Territories at a time antecedent to the separation of the Yukon Territory from the North-West Territories, since no rules have been made modifying or replacing these rules.

Re the Stewart River Gold Dredging Co., Ltd., 7 D.L.R. 736, 22 W.L.R. 315.

The petitioners for a winding-up order are not entitled to a preliminary order that certain of the company's officers should produce on their examination, not yet entered upon as compulsory witnesses in support of the petition, the books of the company and the auditor's reports, as the extent to which the petitioner may be entitled to use such books and documents cannot be decided until the course of the cross-examination is known. [Re Emma Silver Mining Co., L.R. 10 Ch. 194, referred to.]

Re Baynes Carriage Co. (No. 2), 8 D.L.R. 309, 4 O.W.N. 118.

Trading company—Winding up—Insolvency.

Re Anchor Investment Co., Ltd., 7 D.L.R. 915.

The voluntary winding up of an industrial company, though under a judicial order, raises no presumption of insolvency that deprives it of the benefit of term for the discharge of its obligations.

McKinestry (plaintiff, appellant) v. Irwin (defendant, respondent), 21 Que. K.B. 139.

Proceedings for setting aside an order for winding up a company should be by petition, which need not be previously authorized by the Court.

Siche Light Co. v. Fortin, 13 Que. P.R. 235 (Sup. Ct.).

An order for winding up a company, being susceptible of appeal or opposition, cannot be set aside for irregularities by requête civile. A winding-up order made by a Superior Court Judge cannot be set aside by another Judge of the same Court, but may be by the Court of King's Bench. On a motion to set aside a winding-up order the applicant cannot, by tierce opposition, attach the legality of proceedings prior to its issue. Four days' notice to the company of the application for a winding-up order is not required when the company is a party to the application. A winding-up order may be granted in vacation. The Winding-up Act, R.S.C. (1906), ch. 144, applies to the voluntary, as well as compulsory, liquidation of an insolvent company.

Pontbriand Co. v. Cosky, 14 Que. P.R. 19 (Sup. Ct.).

C. Effect on property rights.

(§ VI C—332)—Powers of liquidator.

As money paid into a bank designated in a mortgage to receive payment thereof for the mortgagee does not become that of the mortgagee, a limited company, when accompanied by the condition that the money should not be paid out to the mortgagee except upon the delivery of either an assignment of the mortgage to a designated person, or a discharge, assented to by every stockholder of the company, a liquidator of the company could not take possession thereof as effects of the company and execute a discharge of the mortgage under sec. 33 of the Winding-up Act (Can.), notwithstanding that the condition requiring the assent of every stockholder appeared to have been imposed because of uncertainty as to the persons entitled to exercise the corporate powers of the company before the liquidator was appointed by the Court.

Re Kootenay Valley Fruit Lands Co., Ltd. (James Cooper's Case), 3 D.L.R. 428, 21 W.L.R. 309, 22 Man. L.R. 300.

A liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, being from the beginning primâ facie lawfully in possession of the property of the company sought to be wound up as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, is entitled in right of the creditors represented by him as liquidator to contest the validity of a mortgage of personal property made by the company to a trustee for bondholders without any transfer of possession having been made to such trustee and without registration under the Bills of Sale and Chattel Mortgage Act, and as liquidator to set up the invalidity of such mortgage as against the creditors in general of the mortgagor company on the ground of non-compliance with the provisions of the Bills of Sale and Chattel Mortgage Act.

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 22 O.W.R. 933, 26 O.L.R. 279.

Where one who has been employed by another to sell shares in a company belonging to that other, sells them by fraud, but procures payment of the purchase price to be made to the company, and not to the vendor of the shares, the vendor cannot recover the money from the company, since to do so would be to obtain an advantage from his agent's wrongful act, but the money is, nevertheless, not the money of the company, and, therefore, the liquidator of the company cannot recover from the vendor any part of such money which has been paid over to him by the company.

Re Gloy Adhesives, Ltd., 7 D.L.R. 454, 4 O.W.N. 350, 23 O.W.R. 348.

D. Effect on causes of action.

(§ VI D—336)—By corporation.

A liquidator of a company in winding-up proceedings must obtain leave from the Court or referee exercising the powers of the Court under the Winding-up Act, R.S.C. 1906, ch. 144, before instituting proceedings to set aside a consent judgment obtained against the company between the service of notice of motion for winding up and the pronouncement of the order on the ground that the winding-up order took effect as from the date of service of the notice and that the solicitors who had given the consent had, therefore, no authority to bind the company.

Bank of Hamilton v. Kramer-Irwin Co., 1 D.L.R. 475, 3 O.W.N. 603, 20 O.W.R. 999.

(§ VI D—337)—Against corporation.

Winding up—Sale by mortgagee—Leave to proceed with sale after winding-up order—Terms—Costs.

Re Dominion Milling Co., 3 D.L.R. 897, 3 O.W.N. 1618, 22 O.W.R. 836.

(§ VI D—338)—Return of writ of execution.

Sec. 22 of the Winding-up Act, R.S.C., ch. 144, providing that "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company," does not prevent a sheriff from making a return of nulla bonâ to a writ of execution issued prior to the winding-up order.

Pukulski v. Jardine; Perryman v. Jardine, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 983, 26 O.L.R. 323.

(§ VI D—339)—Action begun prior to liquidation.

Permission to carry on a proceeding begun by a company may be granted the liquidator thereof under order XVII. on an ex parte application, without the month's notice required by rule 973 of the B.C. Court Rules, 1906.

Goldstein and Creehan v. Vancouver Timber and Trading Co., 4 D.L.R. 172, 21 W.L.R. 561.

E. Procedure; power of equity as to.

(§ VI E—340)—Procedure.

The affiant of an affidavit in opposition to a winding-up petition is, under the Manitoba Winding-up Act and Rules, subject to cross-examination upon his affidavit, and for examination in order that his depositions might be used upon the hearing of the petition, and for the production of all books and documents in his possession.

Re Manitoba Commission Co., 19 W.L.R. 893.

A deponent who makes an affidavit in connection with proceedings under the Manitoba Winding-up Act is subject to cross-examination thereon and may be compelled to attend and submit to such cross-examina-

tion and also to examination for the purpose of his depositions being used on the hearing of a petition for a winding-up order and to produce upon such examination all books and documents in his possession as an officer of the company. The effect of sub-sec. (b) of sec. 43 of the Act is that the practice in force under the Act, in matters with respect to which no provision is made either in the Act or in the rules made under it, and in so far as such practice is not inconsistent with either, is the Chancery practice as it existed in England on 15th July, 1870, so that a subpœna and appointment should be issued in accordance with that practice. The King's Bench Act and rules do not apply to such proceedings.

Re Manitoba Commission Co., 21 Man. R. 795.

(§ VI E—344a)—EXAMINATION OF DIRECTORS.

Upon an application by a corporation for a winding-up order under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, the directors of the corporation are compellable witnesses for examination under sec. 135 of the Act supplemented by Con. Rules (Ont.) 489, 491, 492.

Re Baynes Carriage Co., 7 D.L.R. 257, 4 O.W.N. 30, 23 O.W.R. 10.

Upon an application to examine certain directors of a corporation, the provisions of sec. 135 of the Winding-up Act, R.S.C. 1906, ch. 144, control, and as read with sec. 2 (e) and sec. 134, render applicable, in the Province of Ontario, the procedure, including rules and regulations and methods of practice, current in the High Court of Justice (Ont.), adapted as nearly as may be as laid down in the Con. Rules (Ont.), it appearing that no other rules have yet been made under sec. 134 of R.S.C., ch. 144. [Re Belding Lumber Co., Ltd. (1911), 23 O.L.R. 255, specially referred to.]

Re Baynes Carriage Co., 7 D.L.R. 257, 4 O.W.N. 30, 23 O.W.R. 10.

(§ VI E—344b)—CREDITORS' RIGHT TO EXAMINE BOOKS.

An application by a creditor for permission to examine the books of a company under liquidation will not be granted unless special reasons therefor are shewn.

Colonial Engineering Co. v. Dominion Light, Heat & Power Co., 13 Que. P.R. 436 (Sup. Ct.).

F. Insolvency; right and preferences of creditors.

(§ VI F—345)—RIGHT AND PREFERENCE OF CREDITORS.

The sureties for a debt due from a company to their principal are entitled to rank on liquidation if they pay the claim before the claim is filed by the principal; but if the principal proves his claim, the sureties cannot also prove, but upon payment they would be subrogated to the rights of the principal, at the date of payment.

Re Stratford Fuel, etc., Co., Ltd., 8 D.L.R. 146, 4 O.W.N. 414.

It was held (White, J., dissenting) that sec. 8 of ch. 143, Cons. St. N.B. 1903, must be read as subject to the provisions of section 2 of the Act, and in order to obtain the benefit of the provisions of section 8 the vendor of a chattel, under a contract that the sale shall not pass the title until the chattel is paid for, must file a copy of such contract with the registrar of deeds of the county in which the conditional purchaser resided at the time of the sale within fifteen days from the delivery of possession of the chattel mentioned in the contract. (2) In a mortgage given by the N.L. Company, to secure a certain bond issue, the trustee under the mortgage deed was a foreign corporation not having a license to do business within the Province of New Brunswick, as required by Cons. St. N.B. 1903, ch. 18, and, therefore, under the provisions of the Provincial Act, 5 Edw. VII. ch. 28, was unable to take or hold property in New Brunswick. After the bonds were issued and the mortgage executed, the N.L. Company went into liquidation, and a liquidator was appointed under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144. Held, that while the mortgage deed was clear upon the face of the bonds that corporation the property it was intended, or purported, to convey, yet, inasmuch as it was clear upon the face of the bonds that the bondholders acquired the bonds under an agreement that they were to be secured by a mortgage upon the property of the N.L. Company, the bondholders, who were not responsible for the failure of the company to appoint a competent trustee, were entitled in equity as against the company and its liquidator, to a first charge, as security for the payment of such bonds, upon all the property of the company specified as intended to be so charged in the bonds themselves and in the ineffectual mortgage deed. (3) While insolvency of a company is one ground upon which the Winding-up Act provides that the company may be wound up, this does not make the Winding-up Act an "Act relating to insolvency" within the meaning of the New Brunswick Bills of Sale Act; nor does it make the liquidator an assignee for the general benefit of creditors. (4) A liquidator is in no sense a subsequent purchaser for value, but represents the company and acquires no rights as liquidator which the company itself did not possess, save those which are given to him by the Winding-up Act.

Harrison v. Nepisiquit Lumber Co., 11 East. L.R. 314.

Double ranking is not permissible on the liquidation of a company.

Re Stratford Fuel, etc., Co., Ltd., 8 D.L.R. 146, 4 O.W.N. 414.

Where under the terms of a guarantee

a creditor of a company had the right to compromise his claims against the company and still hold the sureties for the balance, the sureties are not entitled to rank on the liquidation of the company, after a compromise had been entered into between the liquidator of the company and the creditor, for a balance for which they are responsible to the creditor, since the creditor himself would not be entitled to rank after the compromise was made, the compromise being in satisfaction of all the claims against the funds in the liquidator's hands, and the rule being that the sureties can have no higher rights than the creditor himself had.

Re Stratford Fuel, etc., Co., Ltd., 8 D.L.R. 146, 4 O.W.N. 414.

(§ VI F—347)—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where a company made an assignment for the benefit of its creditors and afterwards a liquidator was appointed under the Winding-up Act, R.S.C. 1906, ch. 144, the property then in possession of the assignee for the benefit of the creditors was property to which the company "appears to be entitled," within the meaning of section 33 of such Act requiring the liquidator upon his appointment to "take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled."

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 22 O.W.R. 933, 26 O.L.R. 279.

(§ VI F 1—347a)—EXHIBITING STATEMENT SHEWING INSOLVENCY.

That a company's president threw open the books of the company to an accountant employed by a creditor, and the accountant embodied the result of his examination thereof in a report to the creditors shewing that the company was insolvent, does not bring the company within subsec. (c) of sec. 3 of the Winding-up Act, R.S.C. 1906, ch. 144, as exhibiting a statement shewing its inability to meet its liabilities.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

Where an affidavit offered in support of a petition for winding up a company stated that the deponent, an auditor designated by certain creditors, had examined the company's books and records and, in connection therewith, had obtained from time to time information as to the affairs of the company from its president, and that though the deponent was unable from the limited time at his disposal to make a complete audit or arrive at a balance, he made a sufficient examination and secured sufficient information from the president to arrive at the conclusion that the company was insolvent, such statement is but an expression of the auditor's professional opinion and is not an acknowledgment by the company of its insolvency within sub-sec. (d) of sec. 3 of the Winding-up Act, R.S.C. 1906, ch. 144.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

The acknowledgment of insolvency required by sub-sec. (d) of sec. 3 of the Winding-up Act, R.S.C. 1906, ch. 144, must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the company's behalf. [Re Qu'Appelle Valley Farming Co., 5 Man. R. 160, specially referred to; and see Parker and Clark's Company Law, 351.]

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

An offer to the company's creditors by the president of a company carrying on a grain commission business, to pay a specified sum in full of all liability upon condition that he be reinstated as a member of the grain exchange, cannot be construed as an acknowledgment of the company's inability to pay its creditors in full.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

VII. Foreign corporations; extra Provincial corporations.

B. Doing business within Province.

(§ VII B—371)—DOING BUSINESS WITHIN PROVINCE.

The defence that an extra Provincial corporation is not licensed under C.S. 1903, ch. 18, is not a matter to be pleaded, but a ground for a stay of proceedings. (The Empire Cream Separator Co. v. The Maritime Dairy Co., 38 N.B.R. 309, followed.) The plaintiff, an extra Provincial corporation, sued defendant on a contract, made in New York, by which plaintiff was to ship goods at Toronto to defendant in Sussex, N.B., by freight, defendant to pay freight. The plaintiff shipped the goods by express and prepaid the charges which were afterwards paid by the defendant. Held, this was not carrying on business within New Brunswick as the title to the goods passed in Toronto.

Culbert (defendant), appellant v. The McCall Company (plaintiff), respondent, 40 N.B.R. 385.

C. Actions by or against.

(§ VII C—376)—ACTIONS BY.

A foreign company by registration in Alberta, although clothed with all the rights, powers and privileges of companies incorporated under the Companies Ordinance, is not thereby absolved from giving security for costs as a non-resident in an action brought by it, since there is nothing in such ordinance exempting companies so incorporated from giving security for costs.

Frost and Wood Co. v. Howes, 4 D.L.R. 527, 21 W.L.R. 335.

Section 3 of the Saskatchewan Foreign Companies Act, forbidding a foreign company having gain for its object from carrying on any part of its business in the Province unless it is duly registered, cannot be relied upon to defeat an action on notes given by the defendant to the plaintiff company for the price of certain goods sold by the latter to the former on the ground that the company's statement of claim, while alleging that it was an incorporated company carrying on business in another Province, failed to allege that it was registered under the above Act, where it was shewn that the goods had originally been sold to another, from whom the defendant purchased them with the consent of the company who took the notes for the price in substitution for those given by the first purchaser, and no evidence was offered as to the place of the original contract of sale and there was no allegation that the plaintiff was such a company as to require registration under the Foreign Companies Act. [Bank of Montreal v. Bethune, 4 U.C.Q.B. (O.S.) 341, disapproved; Canadian Pacific R. Co. v. Western Union T. Co., 17 Can. S.C.R. 151, applied.]

Ontario Wind Engine and Pump Co., Ltd. v. Eldred, 2 D.L.R. 270, 20 W.L.R. 697.

The amendment made, sec. 166 of the Companies Act, 1910 (B.C.) consolidated in R.S.B.C. 1911, ch. 39, as regards the penalty on extra-Provincial companies carrying on business in British Columbia without being licensed or registered and precluding such companies from maintaining an action in any Court of that Province in respect of any contract made in whole or in part within the Province in the course of or in connection with its business, which provides that upon the granting of the license the company may maintain an action as if such license had been granted before the institution of any such action, is not a statute relating to procedure merely and does not affect the rights of defence by reason of the company's contravention of the statute previously in force which at the time of the coming into force of such amending Act were in litigation in a pending action.

Kominick Co. v. B.C. Pressed Brick Co., 8 D.L.R. 859, 22 W.L.R. 526.

Where an extra-Provincial company carried on business in British Columbia in contravention of the Companies Act, R.S. B.C. 1897, ch. 44, sec. 123, then in force (see subsequent statute R.S.B.C. 1911, ch. 39), prohibiting the carrying on of business in British Columbia by an extra-Provincial company until certain formalities were complied with and a license taken out, it has no right to maintain an action in the Province of British Columbia as against the statutory defence of want of license which had become available to the company's debtor by reason of such contravention, although, prior to the action but subsequent to the carrying out of the contract upon which the cause of action is founded, it did comply with those provisions and took out a license to do business. [North-Western Construction Co. v. Young, 13 B.C.R. 297, applied.]

Kominick Co. v. B.C. Pressed Brick Co., 8 D.L.R. 859, 22 W.L.R. 526.

(§ VII C—377)—ACTIONS AGAINST.

Where no evidence is given as to the place at which a contract for the sale of goods by an unregistered foreign company was made, the fact that the goods were afterwards purchased from the original buyer within Saskatchewan, and that his contract with the company selling the machines was, with its consent, assumed by the new purchaser, who gave his own notes for the price in place of the original buyer's notes, shews no violation of Saskatchewan Foreign Companies Act, sec. 3, imposing a fine upon foreign companies doing business for gain within the Province if they fail to register.

Ontario Wind Engine and Pump Co., Ltd. v. Eldred, 2 D.L.R. 270, 20 W.L.R. 697.

D. Winding up; insolvency of foreign corporation.

(§ VII D—380)—WINDING UP FOREIGN CORPORATION.

A foreign corporation doing business in the Yukon Territory under a license of the Dominion Government, is subject to the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, in so far as its assets situate within the Dominion of Canada are concerned.

Re The Stewart River Gold Dredging Co., Ltd., 7 D.L.R. 736, 22 W.L.R. 315.

VIII. Crimes and offences by corporation.

(§ VIII—2)—PROCEDURE.

The repeal of the North-West Territories Act (R.S.C. 1886, ch. 50) by R.S.C. 1906, does not affect the laws of the Provinces of Saskatchewan and Alberta. A corporation is not subject to a preliminary examination before a magistrate, and can be proceeded against only by one of the methods set out in the Criminal Code (R.S.C. 1906, sec. 873); therefore where by direction of the Attorney-General an order was obtained from a Judge to lay a charge against the defendant corporation, and a formal charge in writing was, pursuant thereto, presented to the Court, it was held that the proceedings were properly laid. [In re Chapman and the Corporation of the City of London, 19 O.R. 33, followed.]

Rex v. Standard Soap Co., Ltd., 7 Terr. L.R. 356.

CORPSE.

I. MUNICIPAL REGULATIONS, BURIAL PERMITS.

II. PRIVATE RIGHTS.
A. In general.
B. Custody, disposition and burial.
See also Cemeteries.

CORROBORATION.

See Evidence, XII.

COSTS.

I. RIGHT TO RECOVER; LIABILITY FOR.
II. AMOUNT; PRACTICE; COLLECTION.

(§ I—2)—ON DISMISSAL.

Where an action is discontinued before appearance the defendant is nevertheless entitled to tax against the plaintiff and recover the costs of all work reasonably and properly and not prematurely done by him.

McClorg v. Johnston, 7 Terr. L.R. 384.

Plaintiff obtained leave to join agents with the principal, suing the agents in the alternative. The principal did not appear—one of the agents defended as to all the issues; the other only as to the claim against the agents. The case was tried, and judgment given against the principal, and dismissed as to the agents. The matter of the distribution of costs having been considered:—Held, while the Court undoubtedly has the power to order an unsuccessful defendant to pay the costs of a successful defendant, yet the Court should have regard to the circumstances of the case, and here, as the plaintiff could have secured the relief to which he was entitled without proceeding to trial, the principal should not be required to pay the costs of the successful defendant. The agent who defended only as to the issues in which relief was asked as against the agents was entitled to be paid his costs by the plaintiff, but the agent who defended as to all issues should not get any costs.

Waite v. Edwards et al., 4 S.L.R. 300.

Where the owner of an automobile and the person who was running it at the time of an accident were joined as defendant and, without severing their defences, were represented at the trial by the same counsel, costs will not be granted either defendant where the damage action was dismissed as to the owner of the automobile because the person operating it was not his servant, and as to the latter because of the plaintiff's own negligence in the operation of his car.

The B. & R. Co., Ltd. v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

Upon the dismissal of an action for damages for the breach of an agreement to sell land, upon the ground that those who purported to act for the defendant had no authority to make such contract, costs will not be awarded against the plaintiff, who was misled by the defendant's conduct into the belief that he was dealing with a person who had the right to contract with him.

Boland v. Philp, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 849.

Costs of defence may be refused in an action for slander to a successful defendant who is found not to have used the alleged slanderous words, if by his pleading he has set up not only a denial of the use of the words but also a plea that if he had used them they were true, if the evidence shews that they were not true.

Lucyk v. Goski, 3 D.L.R. 805, 21 W.L.R. 581.

Where an action is dismissed on the ground that the Court is deprived of jurisdiction by a statute, the defendant may be allowed only such costs as he would have been entitled to, if he had specially pleaded the statute and then moved for judgment on the pleadings.

Sandwich Land Improvement Co. v. Windsor Board of Education, 3 D.L.R. 423, 3 O.W.N. 1150.

In an action for various sums of money claimed to be due the plaintiff from the defendant, the defendant, among other defences, asserted that no demand was ever made for one of the sums claimed to be due, and also filed a statement of account between the parties shewing the balance due the plaintiff and paid the same into Court and the statement was found to be correct, and the defences were upheld, except that the demand aforesaid was found to have been made, and there was judgment for the plaintiff for the amount paid into Court, the plaintiff should have costs up to the trial and costs of trial as to the issue on the demand and the defendant his costs of trial on the issues in which he was successful.

Chapdelaine v. Wilkinson, 4 D.L.R. 290, 20 W.L.R. 775.

The costs of the attorney for the wife who fails in an action en séparation de corps brought without the husband's consent but authorized by the Court can only be recovered from the wife personally and not from the husband as head of the community or from the community.

Hackett v. Standish, 13 Que. P.R. 210 (Sup. Ct.).

Where both the promoters of a by-law to repeal a local option by-law and the municipality were cognizant of gross irregularities in the submission and voting and did not protest, neither party is entitled to costs in an action for a declaration that the by-law was irregular.

Stoddart v. Town of Owen Sound, 8 D.L.R. 932, 27 O.L.R. 221, 4 O.W.N. 83.

The unsuccessful applicant for an order declaring lunacy may be ordered to pay the costs of an issue directed upon his application.

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

On dismissal—Absence of offering any evidence—Preference.

Gold Medal Furniture Co. v. Stephenson, 7 D.L.R. 811.

The party whose claim or process has been dismissed by the Court can take fresh proceedings without having first paid the costs incurred by the adverse party in the original claim so dismissed.

Mercure v. Bassinet, 13 Que. P.R. 379 (Sup. Ct.).

(§ I—2a)—On settlement or compromise.

A defendant who settles a case directly with the plaintiff prevents the fulfilment of the conditional right of plaintiff's attorney as incidental plaintiff to payment of his costs, and the fulfilment of such condition being so prevented by the debtor the condition becomes absolute. (C.C. 1084.)

Seale v. Bowers, 1 D.L.R. 632.

Costs of one defendant unprovided for —Remedy—Practice.

Benedict v. Brandon, 3 D.L.R. 887, 3 O.W.N. 1508.

(§ I—2b)—On adjournment.

Where immediately before the time set for the trial of an action the party who finally prevailed changed his solicitor and was therefore not ready to proceed to trial at that time, the other party will be entitled to the costs occasioned by the delay and the prevailing party will be entitled only to the same fees for the attendance of his witnesses as if the trial had proceeded on the day fixed for it.

Alfred Thien v. The Bank of British North America, 4 D.L.R. 388, 21 W.L.R. 192.

(§ I—2c)—On appeal.

Where the appellant has filed his recognizance in the statutory form on an appeal from a summary conviction he thereby submits to an award of costs against him on the quashing of the appeal for failure to prove compliance with the statutory pre-requisites, and this apart from the power given under Criminal Code 751.

Pahkala v. Hannuksela (No. 1), 8 D. L.R. 34.

Although Criminal Code sec. 755 applies to authorize an order against the appellant for costs of an appeal not prosecuted or entered only in case a valid notice of appeal has been given from a summary conviction, the Court has power under Code sec. 751 to award costs where the appeal is brought on for hearing, but the defendant (respondent) succeeds in having the same quashed or dismissed upon objection taken that notice of appeal had not been served upon him and that there was no sufficient proof of compliance with an alternative method of service available to the appellant, viz., service upon the trial justice. [Rex v. Edelston, 17 Can. Cr. Cas. 155, disapproved; Ex parte Sprague, 8 Can. Cr. Cas. 109, considered.]

Pahkala v. Hannuksela (No. 1), 8 D. L.R. 34.

(§ I—2d)—On set-off or counterclaim.

For the purposes of taxation a counterclaim must be regarded as a separate action; and, notwithstanding a statutory maximum of costs taxable in respect of the dismissal of the principal action, the defendant who succeeds on his counterclaim may be allowed separate costs and counsel fees in respect of the latter. [Les Soeurs v. Forrest, 20 Man. L.R. 301, applied.]

Cox v. Canadian Bank of Commerce, 8 D.L.R. 30.

On allowing compensation under the Workmen's Compensation Act (B.C.) it may be directed that the plaintiff receive only such costs as would have been incurred had her claim been limited to statutory proceedings under the latter Act, with a deduction therefrom of the defendant's extra costs occasioned by reason of the plaintiff proceeding by action. [Cattermole v. Atlantic Transport Co., [1902] 1 K.B. 204, 71 L.J.K.B. 173, 18 Times L.R. 102, applied.]

McCormick v. Kelliher (No. 2), 7 D. L.R. 732.

(§ I—3a)—On amendment.

Upon permitting an amendment as to the name of one defendant from the "municipality of Saanich" to its true corporate name, "the corporation of the district of Saanich," costs will not be awarded the defendants where they were not misled by the error in the name of such defendant.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235.

(§ I—3b)—In suit for account.

When the defendant ès qualité denies the right of the plaintiff to an account and asks to have the action therefor dismissed he will be personally ordered to pay the costs if the judgment declares that the account should have been rendered.

Hathorn v. O'Borne, 13 Que. P.R. 200 (Sup. Ct.).

(§ I—4)—In suit for injunction.

Where the plaintiff, a ratepayer, upon being informed by an alderman that a city council intended to carry out an illegal agreement for the exchange of land without submitting the agreement to the people, or passing a by-law in relation thereto, obtained an injunction preventing the carrying out of such agreement, the subsequent abandonment of the plan will not deprive the plaintiff of his costs.

Pringle v. Stratford, 4 D.L.R. 173, 22 O.W.R. 215, 3 O.W.N. 1293.

(§ I—4a)—Real litigant behind nominal plaintiff.

The real litigant who puts up a man of

straw in whose name the litigation is carried on in order to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be cited by notice to appear and shew cause and may thereupon be ordered in a proper case to pay the costs of the opposite party even when the nominal litigant had a legal status similar to that of the real litigant to institute the proceedings. [Sturmer v. Beaverton, 25 O.L.R. 190, affirmed on appeal; The Queen v. Greene (1843), 4 Q.B. 646, 12 L.J.N.S. Q.B. 239, applied.]

Re Sturmer and Town of Beaverton, 2 D.L.R. 501, 21 O.W.R. 55, 25 O.L.R. 566, 3 O.W.N. 613.

(§ I—7)—ON FORECLOSURE.

Where no claim was made against some of the defendants in an action to foreclose a mortgage, they are not entitled to costs against the plaintiff.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642.

While the general rule in suits for foreclosure or redemption is to allow the mortgagee all his costs even where he does not succeed in establishing his right to the full amount claimed, still where the conduct of the mortgagee has been oppressive and unconscientious the Court has a discretion to deprive him of costs and to award costs to the mortgagor.

Bank of Hamilton v. Leslie (No. 2), 7 Terr. L.R. 303.

A mortgagee is entitled to the costs of foreclosure subsequent to an offer of the mortgagor to pay the arrearages and costs, when taxed, unless the latter pays or tenders the mortgagee the amount so due him. [Hodges v. Croydon, 3 Beav. 86, followed; Greenwood v. Sutcliffe, [1892] 1 Ch. 1, specially referred to.]

The Western Trusts Co. v. Popham, 3 D.L.R. 326, 21 W.L.R. 187.

(§ I—8)—IN EMINENT DOMAIN PROCEEDINGS.

The successful owner taxing costs against a railway company in eminent domain proceedings under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, must file an affidavit of increase as regards items of disbursement which he seeks to charge as reasonable expenses actually incurred, and it is not a valid objection to their allowance that the items do not correspond to any particular items of the tariff of costs promulgated by the Court of superior jurisdiction in the province.

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

The successful owner entitled to tax costs in eminent domain proceedings under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, against the railway company in respect of the costs, fees, counsel fees and expenses of an arbitration to settle the compensation for the compulsory taking, should be allowed for everything necessarily or reasonably done, and for every disbursement necessarily or reasonably made in order to properly present his case to the arbitrators, and the taxation should be on a solicitor and client basis rather than under the practice prevailing in party and party taxations. [Canadian Northern R. Co. v. Robinson, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, followed; and see Hyde v. Mayor of Manchester, 12 C. B. 474; Malvern v. Malvern, 83 L.T. 326.]

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

Where land is expropriated for public purposes the owner is entitled to all the costs and expenses reasonably incurred by him in prosecuting his cause to a finish so that the indemnity awarded to him shall not be diminished. In an expropriation under the Quebec law the Court should tax not only the costs given by art. 79 of the tariff of attorneys but also the costs of the arbitration which comprise the disbursements and other costs reasonably incurred by the party expropriated. Therefore the advocates of the latter, although they may have been engaged in several expropriation cases at the same time, are entitled to the fees mentioned in arts. 24, 43 and 44 of the tariff and to the sum of $15 for preparing a factum for the arbitration. The arbitrators are entitled to $5 a day in each case even when they proceed with several cases on the same day if there was a prior agreement therefor between the parties. The prothonotary also, on the reply or defence of the owner being filed, is entitled to his fee as in ordinary causes.

Shawinigan Water & Power Co. v. Magnan, 13 Que. P.R. 365 (Sup. Ct.).

(1) By virtue of the law of Quebec concerning the expropriations by the railroad companies, the attorneys have the right to costs as between the parties only and not as between the attorney and client. (2) Article 79 of the tariff regulates the fees of the attorneys in the cases of expropriation, when there is no other special provision of the law which fixes such fees. (3) The railroad company which abandons the expropriation will be held to pay the stenographic fees if it has consented that the depositions should be thus taken. (4) The attorney for the party against whom the proceedings have been started, when the company abandons its expropriation, has no right to the fee of $80 provided by article 24 of the tariff for litigation, neither to one of $25 provided by article 43, for general fee of inquiry, neither to one of $50 for additional fee in an action exceeding $10,000, such as provided by article 5 of the tariff. [Re "Frais" v. Blackwood v. Percival, 14 B.R. 445, referred to.]

Lachine, Cartier & Maisonneuve R. Co. v. McArthur & Co., 13 Que. P.R. 254 (Sup. Ct.).

(§ I—8a)—INTERPLEADER ISSUE.

In an interpleader issue in respect of

an automobile seized by judgment creditors on execution which was found to be the property of the debtor's wife no costs should be taxed against the creditors where the wife permitted the machine to be registered in her husband's name.

Kelly v. Macklem, 3 D.L.R. 58, 3 O.W.N. 873.

A plaintiff who is entirely successful is primâ facie entitled to his costs of interpleader. A claimant who is partially successful is primâ facie entitled to his costs antecedent to the issue and also to his subsequent costs incidental to the portion of his claim to which he so succeeds, and must pay the costs incidental to the portion of his claim not proven, but when the claimant sets up false allegations in his affidavit, thereby rendering a cross-examination on such affidavit necessary, he will, although successful as to half of his claim, be ordered to pay the costs of and incidental to such cross-examination.

Brown v. Thompson and Thompson, claimant, 7 Terr. L.R. 479.

(§ I—9a)—TRUSTEE'S COSTS.

A person appointed by the Court as sequestrator to an immoveable concerning the ownership of which two or more parties are litigating has a joint and several recourse for the costs of his administration against all the parties to the said litigation.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 La Rev. de Jur. 470.

(§ I—10)—DISCRETION OF COURT IN GIVING OR REFUSING.

Upon holding that the plaintiff who plowed and improved land under a contract which required it to be plowed to a certain depth, was not entitled to compensation, since the inspector, whose decision was, by the terms of the contract, to be final, refused to approve of the work, the Court may exercise its discretion in refusing to award costs to the successful defendant where it appears that, notwithstanding the defective manner of carrying out the contract, the defendant would be able to raise a fair crop of the class for which the work was done.

Schultz v. Faber & Co., 4 D.L.R. 707, 21 W.L.R. 163.

Where a jury have assessed the damages at a sum within the jurisdiction of the County Court, but it appears to the Court that any solicitor advising that there was liability would have considered the case a proper one for the High Court, the Court may, in its discretion, award costs to the plaintiff on the High Court scale.

Moran v. Burroughs, 3 D.L.R. 392, 3 O.W.N. 1214, 22 O.W.R. 12.

Costs will be awarded against the purchaser on a summary application as to title under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) ch. 58, if the title is such as in an action by the vendor for specific performance the purchaser would have been forced to accept.

Re Jones and Cumming, 2 D.L.R. 77, 3 O.W.N. 672, 21 O.W.R. 248.

Where an action is dismissed solely on grounds not raised in the statement of defence, the Court has a discretion to order payment of plaintiff's costs by the defendant. [See Manitoba Statutes, 7-8 Edw. VII. ch. 12, sec. 3.]

Mansfield v. Toronto General Trusts Corporation, 1 D.L.R. 503, 20 W.L.R. 344, 22 Man. L.R. 49.

The landlord may be refused his costs of successful defence of an action by the tenant for damages for wrongful ejectment if the ejectment be shewn to be wrongful, but the plaintiff fails by reason of omission to prove any damage therefrom.

Shepherd v. Ross, 4 D.L.R. 432, 21 W. L.R. 259.

Where the prevailing party to an action raised untrue and uncalled for issues by his pleadings, costs as to such issues will be awarded against him.

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408.

On the disposal of the purchaser's objection to close his purchase by a vesting order in his favour of the right and title of both the vendor, plaintiff, and of the adverse claimant made a co-defendant with the purchaser in an action for specific performance, and on security being provided by payment into Court or to a receiver to answer the claimant's demand should he substantiate it, the purchaser who was not at fault may be dismissed from the litigation and his costs ordered to be paid by the unsuccessful party on the future determination of rights between the other litigants in respect of the adverse claim.

Jennison v. Copeland, 3 D.L.R. 52, 21 O.W.R. 689, 3 O.W.N. 795.

An allocatur is not necessarily an order to tax costs, but only as fixing the amount, and it is within the discretion of the registrar to judge whether it is a proper case to tax a counsel fee.

Rainsford v. McVey et al., 40 N.B.R. 381.

Gross misconduct of the defendant causing the death for which damages are awarded against him under the Fatal Accidents Act (Ont.) constitutes a good ground for refusing a set-off in favour of defendant against the verdict of his extra costs of defending in the High Court in which the action was brought when the verdict was for an amount within County Court jurisdiction.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

The rule that, where a taxing officer has not made any mistake in principle, and the amount allowed by him as re-

muneration for a solicitor's services is not so grossly large or so extremely small as to be beyond all question improper, the Court should not interfere with his discretion, is not applicable to services not governed by any authorized tariff, but in such cases the principle is that the solicitor is to be allowed the value of his services, and such value is a question of fact to be determined by proper evidence, and, while the taxing officer is at liberty freely to apply his own special knowledge and experience, his conclusion is just as much open to review as that of any other judicial officer dealing with a question of fact, e.g., the assessment of damages by a Judge at a trial without a jury. [Re Solicitor. 12 O.W.R. 1074, distinguished.]

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

It is only in exceptional cases for which the reasons should be given that the Court may exercise its discretion and avoid charging all costs to the losing party (C.P. 549). [Canadian Pacific R. Co. v. Couture, 2 Que. Q.B. 502, specially referred to.]

Martin v. Madore, 3 D.L.R. 441.

Discharge of order—Costs of garnishees—Salary of judgment debtor paid in advance.

Bartlett v. Bartlett Mines, Ltd., 2 D. L.R. 904, 3 O.W.N. 1155.

Discretion—Reference.

McDonald v. Trusts and Guarantee Co., 6 D.L.R. 916, 4 O.W.N. 192, 23 O.W.R. 192.

(§ I—11a)—THIRD PARTY PROCEEDINGS.

Costs incurred by a defendant in obtaining leave to issue and take out a necessary third party notice, may be taxed by the taxing officer where the plaintiff, before trial, discontinues his action without leave. and the propriety and reasonableness of such costs, and the fact that they were reasonably and properly incurred, will be assumed in the absence of material to the contrary. [Harris v. Leutner, 16 Ch.D. 559, specially referred to.]

Butler v. Bank of Ottawa, 5 D.L.R. 200, 21 W.L.R. 406.

The Court has jurisdiction to order a third party to pay the costs of both the plaintiff and defendant. [Hornby v. Cardwell, 8 Q.B.D. 329; Piller v. Roberts, 21 Ch.D. 198; Edison and Swan United E. L. Co. v. Holland, 41 Ch.D. 28, specially referred to.]

Stoness v. Anglo-American Insurance Co., 3 D.L.R. 63, 3 O.W.N. 886, 21 O.W.R. 405.

Third parties—Claim of indemnity—Set-off.

Walker and Webb v. MacDonald (No. 2), 6 D.L.R. 851, 4 O.W.N. 64, 23 O.W.R. 244.

(§ I—12)—CRIMINAL AND PENAL CASES.

Where an information was laid before a police magistrate for the publication of a defamatory libel and the accused was committed for trial but was discharged at the assizes because the prosecutor did not appear and an order was made in general terms by the Court for the recovery by the accused from the prosecutor of his costs occasioned by the proceedings, the same to be taxed, such order was made under sec. 689 of the Criminal Code, 1906, and therefore included the costs of the preliminary inquiry as provided in such section.

Re Constantinuea and Jones, 5 D.L.R. 483, 3 O.W.N. 1030, 26 O.L.R. 160, 21 O. W.R. 880.

Prosecutions under the Alien Labour Act, R.S.C. 1906, ch. 97, being subject to the summary conviction procedure of the Criminal Code, 1906, no costs can be awarded to the successful party on the allowance of an appeal from a summary conviction thereunder. in excess of the costs taxable under the summary convictions clauses, Part 15 of the Criminal Code.

Windsor Hotel Co. v. Hinton (No. 2), 5 D.L.R. 228.

It is proper to award costs in quashing convictions on cases stated by justices, even when the prosecutor is a member of the police prosecuting in the discharge of his duty.

Rex v. Ollie Nugent (No. 2), 7 Terr. L.R. 239.

Costs will not be granted against the informant and the magistrate on quashing a summary conviction in certiorari proceedings, unless misconduct is proved against them. [Kennedy v. Kokoliades, 17 Can. Cr. Cas. 4, reversed on appeal.]

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495.

(§ I—14)—SECURITY FOR COSTS.

A demand of security for costs is a dilatory exception and, therefore, must be offered within the delay and with the formalities of preliminary exceptions. [Canada General Electric Co. v. Canadian Rubber Co., 13 Que. P.R. 324.]

Alter Lax et al. (plaintiffs) v. The Calgary Fire Insurance Co. (defendant), 13 Que. P.R. 233 (Sup. Ct.).

A motion for security for costs served after the legal delays notwithstanding the fact that it appears by the writ of summons that the company plaintiff had its principal office outside the Province, will be dismissed if the conclusions of said motion are those of a dilatory exception. (2) Such motion will be dismissed without costs.

The Canadian General Electric Co. v. The Canadian Rubber Co., 13 Que. P.R. 334 (Sup. Ct.).

The registration of a foreign company in a Province and the appointment of an attorney upon whom process may be served, does not give it any residential status, so as to absolve it from liability to give security for costs as a non-resident

in an action brought by it in such Province. [Ashland v. Armstrong, 11 O.L.R. 414, and Canadian Railway Accident Co. v. Kelly, 5 W.L.R. 412, followed.]

Frost & Wood Co. v. Howes, 4 D.L.R. 527, 21 W.L.R. 335.

Action brought by creditor in name of assignee for creditors—Creditor out of the jurisdiction—Affidavit of assignee—Dispute as to place of residence.

Skill v. Lougheed, 1 D.L.R. 899.

On an application for security for costs made by a newspaper proprietor in respect of an alleged libellous news item for which he is sued, his affidavit that he has a good defence on the merits is not a compliance with the Ontario statute, 9 Edw. VII. ch. 12, sec. 40, which enables the Court to order security where the publication has been made in good faith and where it is "shewn on affidavit" that the defendant has a good defence on the merits; the newspaper proprietor claiming the benefit of the statute must state the facts under oath and not merely his conclusion as to their legal effect which is a question to be decided by the Court.

Duval v. O'Beirne. 1 D.L.R. 78, 3 O. W.N. 513, 20 O.W.R. 884.

Plaintiff out of the jurisdiction—Con. Rule 1198 (a)—Moneys in hands of defendants—Reduction of amount of security.

Coyne v. Metropolitan Life Insurance Co., 1 D.L.R. 900.

Property in jurisdiction—Onus.

Harrison v. Knowles, 1 D.L.R. 904, 3 O. W.N. 688.

A foreign corporation with a branch office within the jurisdiction, will not be absolved from giving security for costs on bringing an action if its only asset immediately exigible under execution within the jurisdiction and apart from bills receivable, is the office furniture as to which the landlords' preferential lien might defeat any judgment which the defendant might secure for costs against it.

Miller v. Winn, 1 D.L.R. 35, 3 O.W.N. 496.

Plaintiff out of jurisdiction—Property in jurisdiction—Company-shares—Undertaking.

Wallberg v. Jenckes Machine Co., 3 D. L.R. 888, 3 O.W.N. 1509.

To relieve a non-resident plaintiff from giving security for costs on the ground that he is the owner of property of sufficient value within the jurisdiction, the property must be liable to seizure under the ordinary execution of the Court. The plaintiff, therefore, although he was the owner in fee simple of a one-third interest in land held in the name of another in trust, was ordered to give security under rule 714. [Slack v. Malone, 4 W.L.R. 549; Clark v. Fawcett, 4 W.L.R. 529, and Canadian Pacific R. Co. v. Silzer, 3 S.L.R. 162, followed.]

Young v. Lewis, 7 D.L.R. 477, 22 W. L.R. 297.

Nominal plaintiff—Former application—Res judicata—Costs of interlocutory motion unpaid.

Rickart v. Britton, 3 D.L.R. 890, 3 O. W.N. 1512.

Where a counterclaim in respect of the same matter or transaction upon which the claim is founded the Court will consider whether the counterclaim is not, in substance, put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and where the counterclaim is in substance a defence, the Court may in its discretion refuse to order security for costs against a non-resident plaintiff by counterclaim.

Cartwright v. Pratt, 3 D.L.R. 460, 3 O. W.N. 1279, 22 O.W.R. 92.

Prior action between same parties—Property in controversy, only relied on—Suggested consolidation.

Moore v. Thrasher, 6 D.L.R. 910, 4 O. W.N. 302.

A claimant in an issue to determine the right to a fund in Court, if resident out of the jurisdiction, may be required to give security for costs. [Boyle v. McCabe, 24 O.L.R. 313, followed.]

Re Riddell, 3 D.L.R. 401, 3 O.W.N. 1232, 22 O.W.R. 40.

Where a counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and the Court may order security for costs to be given by him.

Cartwright v. Pratt, 3 D.L.R. 460, 3 O. W.N. 1279, 22 O.W.R. 92.

Ontario Con. Rule 1198 (d)—Costs of former action unpaid.

Warner v. Norrington, 1 D.L.R. 915.

An affidavit to support an application for security for costs is sufficient if based on information and belief, and where the source of the information and belief is the copy of the writ of summons served, it is not necessary to produce such copy as an exhibit to the affidavit.

Balcovski v. Olson, 7 Terr. L.R. 421.

Extension of time—Insufficient affidavit—Con. Rules 1203, 518, 524, 312.

Nieminen v. Dome Mines, 6 D.L.R. 899, 4 O.W.N. 301.

Where an order is made directing security for costs to be given and providing that in default the action stand dismissed with costs without further order, default in compliance therewith ipso facto, puts an end to the action.

Hutchinson v. Twyford. 7 Terr. L.R. 420.

Libel—Insolvent plaintiff—Libel involving criminal charge—Report of proceed-

ing before magistrate—Animus—Implication.

McVeity v. Ottawa Citizen Co., 5 D.L.R. 882, 4 O.W.N. 37, 23 O.W.R. 15.

Security for costs—Dismissal of application—Assets within jurisdiction.

It is only in cases where an interlocutory motion by the defendant for security for costs was rendered necessary by the fault of the plaintiff that the latter should be called upon, on security being ordered, to pay the costs of the motion in any event; ordinarily the costs of a motion for security in which fault cannot be attributed to either party should be made costs in the cause. [Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466, distinguished.]

McEwan and Dougherty v. Marks, 4 D.L.R. 369, 21 W.L.R. 34.

Plaintiffs residing out of Ontario—Action by unincorporated association and members—Class action—Addition as plaintiff of member residing in Ontario.

Rickert v. Britton, 2 D.L.R. 893, 3 O.W.N. 1008.

(§ I—16)—Out of fund or estate.

Where, upon the payment into Court, on the sale of land, charged with the payment of a legacy, of the amount thereof, costs will be deducted therefrom where no claim was made to the money and the whereabouts of the legatee, if living, were unknown.

Re Gallagher, 3 D.L.R. 729, 3 O.W.N. 1302, 22 O.W.R. 226.

The residuary legatee should pay the costs upon the granting of an order declaring the construction of a will resulting in the legacy claimed by the mover of the order being given to him, where the residuary legatee and the executor of the estate made no reply to letters written them on behalf of the legatee requesting the payment of his legacy and on the argument of the motion his claim was strenuously resisted, though there was filed after the motion was launched a letter from a solicitor of the residuary legatee disclaiming any dispute as to the right of the legatee to his legacy.

Re Craig, 3 D.L.R. 59, 3 O.W.N. 870.

(§ I—16a)—Actions respecting wills.

Where an action for the revocation of the probate of a will raised the question of testamentary capacity and certain of the next of kin joined as co-defendants with the executor filed pleas merely submitting their rights to the Court, they will properly be refused their costs against the unsuccessful plaintiff if, notwithstanding their formal pleading, they made common cause with the plaintiff at the trial.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

Where an action to establish a will is dismissed as the statutory requirements as to the mode of execution required by the statute (Wills Act, R.S.B.C. 1911, ch. 241, sec. 6) had not been fully complied with, but the plaintiff's conduct as regards the defective execution was held to be exemplary, the Court may allow him his costs out of the estate.

Peden v. Abraham, 8 D.L.R. 403.

When an executor is justified in bringing an action in the High Court, having regard to the information in his hands before action, he is entitled as against the estate to costs out of the estate, as between solicitor and client, upon the High Court scale, though the amount recovered in the action is within the County Court jurisdiction.

Little v. Hyslop, 7 D.L.R. 478, 4 O.W.N. 285, 23 O.W.R. 247.

Where a daughter was by the terms of her father's will displaced as one of his universal legatees by her brother by her inheritance of land supposed to belong to her brother under their grandfather's will, it is their duty to give active effect to the terms of their father's will, and where she remained passive after the brother had served upon her a notarial notice to sign a deed establishing his rights upon replacing her as such legatee under their father's will, and had provided for the costs thereof, if it became necessary for him to resort to an action to establish such rights the sister must pay the costs incurred by him. [Greece v. Greece, 39 Que. S.C. 233, affirmed upon other grounds.]

Greece v. Greece, 3 D.L.R. 841.

(§ I—18)—Amount of recovery as affecting.

Where, in an action in the High Court to recover weekly instalments under an accident insurance policy, the total amount of the instalments accrued at the date of the issue of the writ is a sum within the jurisdiction of the County Court, but the plaintiff has not, at that date, recovered from his injuries, and the judgment in his favour deals also with the instalments yet to accrue, costs may be awarded on the High Court scale.

Wallace v. Employers' Liability Assurance Corporation (No. 2), 3 D.L.R. 546, 3 O.W.N. 1179, 21 O.W.R. 845.

An action under the Workmen's Compensation Act when the amount claimed is not stated, is of the second class, even when the verdict against the defendant is for $300 and $32.50 per month for twenty-four months.

Rivet v. Grand Trunk R. Co., 13 Que. P.R. 334 (Sup. Ct.).

(§ I—19)—Apportionment; division.

Where the defendant in an action of trespass defends as to the whole of the area in dispute and fails as to part, the plaintiff being successful in part should not be ordered to pay the whole of the defendant's costs as well as his own costs of action.

Swinehammer v. Hart, 5 D.L.R. 106, 11 E.L.R. 260.

The fact that the material upon a motion was defective and that the moving party

would in consequence have had to submit to a dismissal or have asked a postponement to supplement the material had not the opposing party by his counsel admitted the material fact which the affidavits did not shew, will be taken into consideration on the disposal of the costs when the motion is allowed.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

Since the Nova Scotia Judicature Act, where the success is divided between the parties, the costs may be apportioned in accordance with the findings on the several issues.

Swinehammer v. Hart, 5 D.L.R. 106, 11 E.L.R. 260.

In an action on a fire insurance policy where two issues are raised by the defence, one of fraud in overvaluation of the loss, as to which the plaintiff succeeds at the trial, and one of the quantum of damages as to which a reference is directed, the plaintiff is entitled to costs up to the hearing only so far as they have been incurred upon the issue in which he has succeeded; the costs of the other issue, and of the reference, should be reserved until after the Master shall have made his report. [See also Calvert v. Canadian Northern R. Co., 18 Man. R. 307, 1 Can. Ten Year Digest 875.]

Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222, 3 O.W.N. 551, 20 O.W.R. 898.

Where the success is divided in an action by the plaintiff against an insurance company setting up a claim for a fire loss, the Court will apportion the costs, each case being governed by its circumstances, under judicial discretion. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222, referred to.]

Nassar v. Equity Fire Insurance Co. (No. 2), 8 D.L.R. 645, 4 O.W.N. 340, 23 O.W.R. 340.

Where an apportionment of costs becomes necessary because of divided success of two of the parties defendant represented by the same solicitor, the proportionate part of the costs of the joint defence to be awarded against the plaintiff in respect of the successful defence of one defendant should be settled by the trial Judge in preference to its being left to be disposed of by the taxing officer.

Duryea v. Kaufman, 2 D.L.R. 468, 3 O.W.N. 651, 21 O.W.R. 141.

(§ I—19a)—On stated case.

Where a special case is stated in a pending action for the opinion of the Court on a preliminary question of law arising therein, the practice is for the costs of the hearing of the special case to be disposed of by the judgment in the action and not at the hearing of the stated case unless the question of costs was also referred and ordered to be then disposed of. [Attorney-General v. Toronto General Trusts Corporation (1903), 5 O.L.R. 607, referred to.]

Sarnia Gas and Electric Light Co. v. Sarnia, 4 D.L.R. 19, 3 O.W.N. 1455, 22 O.W.R. 558.

(§ I—19c)—Specific performance.

Costs will be granted against a defendant in an action for the specific performance of an agreement to sell land, who, although in fact he was an agent for the owner, negotiated a sale with the plaintiff, claiming an interest in the land without disclosing that it was that of an agent only.

Edgar v. Caskey, 4 D.L.R. 460, 21 W.L.R. 444.

(§ I—19c)—Land titles procedure.

Where the application by the registered owners of land for an order vacating the registration of a caveat against it was denied and instead an order was made directing the caveator to bring an action to establish his claim against the land, the costs of the application will be costs in the cause if the action is brought, and, if, through the default of the caveator the action is not brought or is dismissed for his default in proceeding to trial as directed by the order, the costs of the application will be to the owners.

Re MacCullough and Graham, 5 D.L.R. 834, 21 W.L.R. 349.

Since a contract executed by the plaintiff giving the defendant an option to purchase land, although void under C.O. (N.W.T.) 1898, ch. 91, sec. 3, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, because made on the Lord's Day, is not malum in se but is malum prohibitum only, a caveat filed thereon by the defendant will be vacated upon the application of the plaintiff upon condition that the latter pay the costs of the application.

Fallis v. Dalthaser, 4 D.L.R. 705, 21 W.L.R. 171.

(§ I—19d)—Issues.

Issue directed on an appeal—Insufficient record.

Independent Lumber Co., Ltd. v. David and Hurlburt, 7 D.L.R. 876, 22 W.L.R. 465.

II. Amount; practice; collection.

(§ II—20)—Amount, practice, collection.

In an action for alimony the plaintiff's costs up to judgment are an execution debt only, but where an application is made by way of petition for sale of the lands of the husband to enforce the statutory charge for arrears of alimony due under the judgment, the costs of such application and of the sale are to be paid in priority out of the fund realized by the sale.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

Where expenses or costs are incurred for the benefit of one creditor alone and not for the creditors generally, there can be no privileged claim therefor.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 La Rev. de Jur. 470.

There is a preference or privilege only for those law costs or expenses incurred for

the seizure and sale of the property of a common debtor and those of judicial proceedings for enabling creditors generally to obtain payment of their claims.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 La Rev. de Jur. 470.

A sequestrator's costs of administration, however, are not privileged law costs within the meaning of C.C. 2009 and cannot be recovered hypothecarily from a third party who buys the immovable from the person declared to be the true owner by the Court.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 La Rev. de Jur. 470.

Where the party entitled to oppose a taxation was not represented because of the sudden illness of his solicitor and the taxation proceeded ex parte and a certificate was issued, the Court may invoke its inherent jurisdiction upon an appeal from the taxation to vacate the certificate and extend the time for filing objections, so as to conform to a general order of Court which limits such appeals to items concerning which objections were filed before the close of the taxation.

Caron v. Bannerman, 1 D.L.R. 24, 19 W.L.R. 881, 48 C.L.J. 112, 22 Man. L.R. 24.

The limitation of costs provided for by sec. 1 of ch. 12 of 7 and 8 Edw. VII., applies to all costs up to and inclusive of the final determination of the action in the Court of King's Bench, and, although there has been an expensive trial followed by a reference to the Master and a hearing on further directions, the costs of all of which were given to the plaintiff and, as ordinarily taxable, would largely exceed said limit, the taxing officer could not, without such a certificate from the trial Judge as that section requires, allow the plaintiff in all more than $300 and disbursements.

Buchanan v. City of Winnipeg, 21 Man. R. 714.

The costs of an unsuccessful summary application to remove an arbitrator made before the writ was issued in an action for that purpose which failed for want of jurisdiction, may be disposed of in the subsequent action under Ontario Con. Rule 1130 (Rules of 1897).

Plaunt v. Gillies Brothers (Ltd.), 3 D.L.R. 283, 3 O.W.N. 921, 21 O.W.R. 509.

The Manitoba King's Bench Rules 968 and 969 as to carrying in written objections to the ruling of the taxing officer, specifying the items objected to upon the taxation of any bill of costs has a general application to solicitor and client taxations as well as to taxations between party and party.

Re Phillipps and Whitla, 1 D.L.R. 291, 20 W.L.R. 229, 48 C.L.J. 198, 22 Man. L.R. 150.

In the absence of a mention on the writ of execution and on the proceedings of notice to a sheriff of the consent of the solicitors that the party should distrain for their costs, such party has no right to a writ of execution permitting him to distrain for costs of such solicitors, unless such a consent should appear on the fiat to obtain such a writ.

Jetter v. Grand Trunk R. Co. of Canada, 18 Rev. de Jur. 204.

The fee chargeable by the prothonotary on the return of an action is a single fee, no matter how many writs are issued and addressed to bailiffs of different districts.

Eastern Townships Bank v. The Alliance Assurance Co. and Macdonald et al., 13 Que. P.R. 409 (Sup. Ct.).

(§ II—25)—COSTS OF COUNSEL APPOINTED BY COURT.

Where an order is made under Alberta rule 57, for the representation as defendant of the estate of a person presumed to be dead because he had not been heard from in seven years, the Court may at the same time direct that the costs of such counsel in attending at the hearing and examining witnesses shall be paid by the plaintiff.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281.

(§ II—28)—SCALE OF COSTS.

Upon an arbitration in eminent domain proceedings in reference to damage occasioned to land by railway construction, the "costs of the arbitration" under the Railway Act, R.S.C. 1906, ch. 37, to be allowed to the owner who succeeds in the arbitration are not to be restricted to costs upon the scale or tariff applicable to ordinary litigation in the province, although the latter may be accepted as a general guide. [Canadian Northern R. Co. v. Robinson, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, applied.]

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

In taxing costs in the County Court on the dismissal of the action, the defendant is entitled to tax his costs upon the scale determined by the amount of the plaintiff's claim. [County Court Act, R.S.N.S. 1900, ch. 156, sec. 78, considered.]

McGillivray v. Conroy, 3 D.L.R. 398, 11 E.L.R. 111.

The common law rule as to solicitor and client costs being payable to a successful party, out of the estate, is limited to the executor or trustee representing the estate and may not be extended to a successful beneficiary. (Per Moss, C.J.O.)

Re Mountain, 4 D.L.R. 737, 3 O.W.N. 1011, 21 O.W.R. 866, 26 O.L.R. 163.

The Court of Chancery had and the High Court of Justice in Ontario now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client; but even in equity did not do so, except in special cases such as suits affecting charity by funds, administration suits, actions as to trusts, etc., and an action by trustees, as landlords only, does not fall within such

class of cases and the rule should not be extended. [Andrews v. Barnes, 39 Ch. 133, Cockburn v. Edwards, 18 Ch. D. 499, and Willmott v. Barber (1881), W.N. 107, specially referred to.]

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 21 O.W.R. 325, 25 O.L.R. 588.

Where the jury has given a verdict for a nominal sum only, the Court will not, under ordinary circumstances, interfere by special order to raise the scale of costs which would be applicable to such verdict under general rules of Court.

Hastings v. Dunbar; Davies v. Dunbar, 4 D.L.R. 168, 20 W.L.R. 200.

Where an action for the foreclosure of a mortgage against the mortgagor and two purchasers from him who had each bought a third of the land, was dismissed as to the purchasers because they were bonâ fide purchasers for value and without notice of the mortgage, due to the fact that the mortgage had been recorded in the land titles office, by an oversight by someone therein, only as against the remaining third of the land and not against the two-thirds so bought, it is proper under such circumstances for the Court to give such purchasers costs as against the plaintiff on the County Court scale and not on the High Court scale which ordinarily they would be entitled to claim.

Ramsay v. Luck, 5 D.L.R. 416, 3 O.W.N. 1053.

In an action for damages for flooding lands where the ownership of the land is not admitted, the Court properly ordered that costs be paid on the High Court scale, although the amount of damages recovered might have been within the jurisdiction of an inferior Court. [Cain v. Pearce Co., 2 O.W.N. 1496, 1498, affirmed on appeal; McGrath v. Pearce Co., 2 O. W. N. 1496, 19 O.W.R. 904, affirmed on appeal.]

Cain v. Pearce Co., 5 D.L.R. 23, 3 O. W.N. 1321, 22 O.W.R. 174.

Where a defendant to buy his peace pays to plaintiff a certain sum after suit brought, he will also be condemned to pay costs of an action of the amount paid, as such payment is equivalent for this purpose to a confession of judgment; and this, even if on the merits of the case defendant would have obtained the dismissal of the action.

Seale v. Bowers, 1 D.L.R. 632.

The commission and disbursements allowed in lieu of taxed costs in partition actions (and administration suits) under Con. Rules (Ont.) 1897, rule 1146, include all future costs to the close of the case as well as the costs up to the date of the report whereby the amount is certified, the proper future disbursements being included therein and fixed in advance.

Welsh v. Harrison, 7 D.L.R. 116, 4 O. W.N. 139, 23 O.W.R. 120.

(§ II—29)—Review of taxation.

A question of the scale of costs of the whole bill as distinguished from the separate consideration of items, is one of principle and may be brought up in a County Court case in Nova Scotia by a motion to review the taxation and an appeal from the refusal instead of by an appeal direct from the taxation itself. [Canadian Bank of Commerce v. Colwell (unreported); Sparrow v. Hill, 7 Q.B.D. 362; and Tupper v. Wright, James' R. 303, specially considered.]

McGillivray v. Conroy, 3 D.L.R. 398, 11 E.L.R. 111.

The delay for applying for review of the taxation of a bill of costs in the Superior Court is suspended while the cause is before the Court of Review. The motion for dismissal of an opposition to judgment as frivolous is not a contestation but a preliminary exception giving the right, in an action of the third class, to a fee of $6 in addition to the same fee for appearance.

Courchesne v. Talbot, 13 Que. P.R. 197 (Sup. Ct.).

Where in an action to recover a liquidated sum of money, defendants do not deny the plaintiff's claim, but set up a counterclaim, and the plaintiff instead of entering judgment upon his claim and going to trial on the counterclaim alone, sets the action down for trial on both claims, and judgment is rendered allowing plaintiff's claim with costs and dismissing defendant's counterclaim with costs, the plaintiff is allowed to tax only the costs on the counterclaim, and where costs were taxed on both claims, they will be readjusted on review and sent back to the taxing officer for revision, so that the plaintiff will get only those items which he could properly have taxed in respect of his defence to the counterclaim.

Cooney v. Jickling (No. 2), 7 D.L.R. 728.

Under Manitoba K.B. Rule 684, allowing "any party who may be dissatisfied with the certificate of a taxing officer, as to any item or part of an item which may have been objected to," to apply to a Judge in Chambers for an order to review the taxation, written objections are not a pre-requisite to the right of appeal; oral objections being sufficient.

Cooney v. Jickling (No. 2), 7 D.L.R. 728.

(§ II—30)—Recovery on security bond.

A judgment dismissing an action with costs grants an advocate distraction of his costs for defending the suit, and vests him with ownership of his bill of costs so as to permit him to maintain an action in his own name on a security bond given by the plaintiff in the former action notwithstanding it ran in favour of the defendant therein, under the laws of Quebec

Province. [Millette v. Gibson, 17 R.L. 600, specially referred to.]

Rioux v. Proulz, 4 D.L.R. 162, 41 Que. S.C. 430.

(§ II—31)—BLOCK TARIFF.

The limitation of the amount of costs taxable upon an appeal under a statute (7 & 8 Edw. VII. (Man.) ch. 12, sec. 2), whereby no greater sum than $100 and disbursements shall be allowed for costs of appeal to the successful party in any appeal to the Court of Appeal, applies not only to costs ordered directly by the Court of Appeal, but to costs ordered in favour of the ultimately successful party upon the reversal of the judgment of the Court of Appeal upon a further appeal to the Supreme Court of Canada.

Williams v. Box. 3 D.L.R. 684, 21 W. L.R. 590, 22 Man. L.R. 258.

(§ II—32)—POWERS OF TAXING OFFICER.

Taxation—Award under Railway Act (Can.)—Reasonable expenses.

Re Vancouver, Victoria and Eastern R. Co., and Ingram, 7 D.L.R. 912.

A taxing officer has jurisdiction to order the cross-examination of a party on his affidavit of disbursements.

Johnson v. Moore, 4 D.L.R. 399, 17 B.C.R. 219, 21 W.L.R. 569.

(§ II—35)—STATUTORY FIXING.

Where, by private Act of Parliament (2 Geo. V. ch. 125, sec. 6) the costs of the plaintiff in an action against a township, were fixed "as between solicitor and client" at $1,800, which was to be paid by the township, a statutory contract was thereby created between the plaintiff and the township only, and the plaintiff's solicitor acquired from the Act no right against his client as to compensation. and he cannot maintain an action against the latter until after the delivery of a detailed bill of costs as required by the Solicitors Act, R.S.O. 1897, ch. 174. [Re Solicitor, 22 O.L.R. 30, specially referred to; Belcourt v. Crain, 22 O.L.R. 591, considered.]

Gundy v. Johnston, 7 D.L.R. 300, 4 O. W.N. 121, 23 O.W.R. 101.

(§ II—37)—SEVERAL DEFENDANTS, SAME CONTESTATION.

The Court may restrict the costs of the successful defendants to those of one contestation where each filed a separate defence in identical form instead of a single defence for all, when all of the defendants were in the same interest. [Hétu v. Humphrey, 32 Que. S.C. 169, and Van Felson v. Boudreau, 18 Rev. de Jur. 216, applied.]

Black v. Carson and The Crown Reserve Mines Co.. Ltd., 7 D.L.R. 484.

Only one bill of costs will be taxed on appeal to the Court of Review when the parties by tacit if not formal consent have treated two causes as one and the Court of Review, as well as the Superior Court, have pronounced one judgment only.

Beaudry v. Lavigne, 13 Que. P.R. 229 (Sup. Ct.).

(§ II—38)—ON ACCEPTING PAYMENT INTO COURT.

Where the plaintiff sets up two alternative claims, and the defendant pays money into Court in satisfaction of one of them, the plaintiff on taking money out of Court in satisfaction of that claim must abandon the other claim if he wishes to tax his costs of the action and sign judgment for such costs under rule 425 (Ont. C.R. 1897).

Frost & Wood Co., Limited v. Leslie, 8 D.L.R. 941, 23 O.W.R. 567, 4 O.W.N. 472.

(§ II—50)—OF UNNECESSARY PROCEEDINGS.

Money disbursed as expenses in the preparation of the owner's case to the arbitrators upon an arbitration under the Railway Act, R.S.C. 1906, ch. 37, may be disallowed if they appear to have been incurred through over-caution or unnecessarily.

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

COUNTERCLAIM.

See Set-off and Counterclaim.

Costs where counterclaim in nature of defence, see Costs, I.

COUNTIES.

I. AS POLITICAL DIVISIONS; ORGANIZATION; COUNTY SEAT.
- A. In general; organization.
- B. County seat.

II. RIGHTS AND LIABILITIES.
- A. In general.
- B. Warrants; indebtedness.
- C. Power to tax; county purposes.
- D. Contracts; power and procedure of officers.

I. As political divisions; organization; county seat.

B. County seat.

(§ I B—10)—COUNTY SEAT.

The county seat of the county, by terms of the Municipal Code, is the place where the County Council holds its sessions and, in consequence, it is the business of the council to hold its session in an appropriate place to establish a county seat. Following the provisions of the Municipal Code, the county seat of the county, once established, may be changed only by a by-law passed by two-thirds of the members of the council in office, nevertheless, if it appears that such a by-law has been passed, without being adopted by the requisite majority, and which said by-law has been always followed so that all the sessions of County Council, during thirty years, were continually held in a place within the limits of the

municipality which was defined by said by-law, such a place of holding sessions, by the force of circumstances, will be declared as determined legally, de facto.

La Corporation de Ste. Foye v. La Corporation Du Comte de Quebec, 18 Rev. de Jur. 99.

II. Rights and liabilities.

C. Power to tax; county purposes.

(§ II C—33)—ROADS AND BRIDGES.

A County Council may cause to be homologated a procès-verbal for opening a road situate part in one and part in another municipality of the county, declaring it by the procès-verbal to be a county road. When the municipalities have passed by-laws, under the provisions of art. 535 M.C., for the maintenance of the road, the declaration in the procès-verbal that each of them will maintain the part situate in its territory is sufficient. The County Council can, by the procès-verbal, order that the expenses thereof shall be borne in equal proportions by the two municipalities.

Parish of Lotbinière v. County of Lotbinière, Q.R. 42 S.C. 148 (Sup. Ct.).

The powers conferred by article 762 on the County Council, in case of the roads to be made, may be exercised in regard of a road already made by a competent authority, and as to those the completion of which is not yet effected; in other words, a County Council may not establish, on its proper authority, a local road, which has not existed in any form but for the said County Council, after having itself established a local road, to convert, thus established, into a county road.

Brunet and Hainault v. Corporation Du Comte De Beauharnois, 18 Rev. de Jur. 141.

In case a special inspector named by a local council, should appeal, in violation of article 782, to contribute to opening and completing of a local road, the corporation and the taxpayers of a neighbouring municipality may not authorize the County Council to assume the jurisdiction, before having regularly and suitably disposed of the requirements of articles 758 and 761 of the Municipal Code.

Brunet and Hainault v. Corporation Du Comte De Beauharnois, 18 Rev. de Jur. 141.

COUNTY COURT.

Removing action from County Court to High Court in Ontario, see Courts, II.

COURTS.

I. JURISDICTION AND POWERS IN GENERAL.
- A. In general; inherent powers.
- B. Over non-residents; territorial limitations.
- C. Relation to other departments of Government.
- D. Jurisdiction over associations, etc.; conclusiveness of decisions of their tribunals.
- E. Legislative power as to.
- F. Power of municipality over.
- G. Loss of jurisdiction.

II. PROVINCIAL COURTS.
- A. Jurisdiction.
- B. Terms; place of sitting.
- C. Transfer of cause.
- D. Opinions.

III. FEDERAL COURTS.
- A. Suits by or against Government officers.
- B. Suits against Crown.
- C. Federal questions.
- D. As dependent on citizenship.
- E. As dependent on amount.
- F. In equity; following state practice; effect of state laws.
- G. Ancillary jurisdiction.
- H. Crimes.
- I. Districts.
- J. Transfers between districts and Courts.

IV. CONFLICT OF AUTHORITY; RELATION OF PROVINCIAL TO FEDERAL.
- A. Exclusiveness of jurisdiction first acquired.
- B. Interference with other Courts; injunction.
- C. Property in custody of Courts or officers.
- D. When Provincial jurisdiction exclusive; limitations upon.

V. RULES OF DECISION.
- A. In general.
- B. Stare decisis; previous decisions of same Court.
- C. Construction and constitutionality of statutes or ordinances.
- D. Provincial Courts following Federal decisions.
- E. Following decisions of Courts of other Province or country.
- F. Federal Courts following Provincial decisions.

I. Jurisdiction and powers in general.

A. In general; inherent powers.

(§ I A—2)—INHERENT POWERS.

On the sale of a moveable right for a fixed sum, as on the sale of the right to operate a mine, without any stipulation as to the time within which such right is to be exercised, i.e., within which the purchaser is to remove the balance of the mineral sold, the Courts have no jurisdiction under Quebec law to fix a term or delay within which the purchaser shall be restricted in the exercise of the rights contracted for. [Begin v. Carrier, 33 Que. S.C. 1, specially referred to.]

Houle v. Quebec Bank and Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

The Court has inherent power to grant

relief against any manifest hardship in respect of proceedings taken upon default where the default was accidental and without blame on the part of the person seeking to set aside the adjudication made in his absence.

Caron v. Bannerman, 1 D.L.R. 24, 19 W.L.R. 881, 48 C.L.J. 112, 22 Man. L.R. 24.

A Judge has jurisdiction to entertain a motion for a foreign commission to take testimony, notwithstanding that the original summons had been made by the registrar of the Court and that the application should therefore have been first made to the registrar.

Cluff v. Brown, 8 D.L.R. 688, 11 East. L.R. 78.

The Supreme Court of Alberta has inherent jurisdiction to grant interim alimony.

Secrest v. Secrest, 5 D.L.R. 833, 22 W. L.R. 51.

Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the Court or a Judge in the manner in use in the Superior Courts of common law prior to the Judicature Act 1881, is intended to deal with the consolidation of actions in the strict sense of that term, that is, to stay absolutely all actions but one and in that to require the party to include the whole of his claims, the jurisdiction to stay actions as part of the inherent power of the Court over its own process, being recognized and confirmed by sub-sec. 9 of sec. 57 of the Judicature Act, R.S.O. 1897, ch. 51. [Kuula v. Moose Mountain (No. 1), 2 D.L.R. 900, 3 O.W.N. 1085, affirmed on appeal.]

Kuula v. Moose Mountain, Ltd. (No. 2), 5 D.L.R. 814, 3 O.W.N. 1203, 22 O.W.R. 64, 26 O.L.R. 332.

Where, on a motion by a subsequent mortgagee to obtain payment from the proceeds of sale of mortgaged premises which had been paid into Court, there was no abstract of title shewing that the applicant was prior in title to the other defendants, the motion was properly denied, since the Local Master was not obliged to search the records of the office of the registrar for material necessary to support the motion.

Allin v. Ferguson, 5 D.L.R. 19, 21 W. L.R. 246.

The Master in Chambers has no jurisdiction under a statute, unless he is expressly named therein.

Re Solicitor, 3 D.L.R. 718, 21 O.W.R. 948, 3 O.W.N. 1132.

The powers, jurisdiction and authority conferred upon the Court by sec. 3 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, or its inherent jurisdiction, as representing the King, over the persons and estates of lunatics or persons of unsound mind, can be exercised only after a declaration, upon due inquiry, that the person in question is of unsound mind.

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

(§ I A—6)—POWER OF PARTIES TO AFFECT.

Although all the parties interested consent to the making of an order or even ask for it, a Court should not grant it unless it appears that the order is a proper one to make, since a Court is not to be made a mere convenience for achieving some desired end.

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

B. Over non-residents; territorial limitations.

(§ I B—10)—OVER NON-RESIDENTS.

Where it appears that an action brought under sec. 72 of the Division Courts Act (Ont.) should have been entered in some other Court of the same or some other county, the provision of sec. 79 of the Act that the action "shall not fail for want of jurisdiction," but may be transferred to "any Court having jurisdiction in the premises," does not give the Court in which the cause was improperly brought any jurisdiction to hear and determine the case, even where no objection is taken or if taken is wrongly passed upon or not tried.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

Although Ontario C.R. 162 (Ont. Practice Rules of 1897) gives power to the Ontario Courts to allow service of process out of the jurisdiction under certain conditions if the defendant has "assets of $200" within the jurisdiction, the Court, in its discretion, may stay proceedings in an action upon which the right to proceed depends on such assets within the jurisdiction and where the Court of an adjoining Province of Canada, where the contract is made and was to be performed, is the more convenient forum, particularly where the "assets" within the jurisdiction consist solely of debts due to the defendant by residents within the jurisdiction.

Gibbons, Ltd. v. Berliner Gramaphone Co., Ltd., 8 D.L.R. 471, 4 O.W.N. 381, 23 O.W.R. 544.

(§ I B—17)—TRANSITORY ACTIONS.

Where, in an action in its nature transitory, a writ is issued and served upon the defendant whilst he is within the territorial jurisdiction of the Supreme Court of British Columbia, that Court has jurisdiction over the action. [Jackson v. Spittall, L.R. 5 C.P. 542, followed.]

Parshley v. Hanson, 5 D.L.R. 658, 21 W.L.R. 969.

(§ I B 3—27)—REAL PROPERTY IN OTHER COUNTRY.

A Michigan Court of Chancery may em-

power the executors of a resident of that State to sell and execute the necessary conveyances to themselves of land of their testator situated in Ontario. [Penn v. Lord Baltimore (1750), 1 Ves. Sr. 444, referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

(§ I B 3—28)—VACATION OF REGISTRATIONS.

A decree or judgment for rescission of a contract for the sale of land upon non-payment of the purchase money, may direct that all registered instruments depending thereon be vacated unless all arrearages are paid within a time limited by the judgment.

Southwell v. Williams and Schank, 4 D. L.R. 1, 21 W.L.R. 771, 17 B.C.R. 209.

(§ I B 3—32)—SPECIFIC PERFORMANCE OF CONTRACT.

A contract to convey land will be enforced by the Courts of one Province where the parties are within its jurisdiction, notwithstanding that the land is located in a different Province. [Smith v. Ernst (No. 2), 2 D.L.R. 213, affirmed on appeal; see also annotation thereto, 2 D.L.R. 215-218.]

Smith v. Ernst (No. 3), 3 D.L.R. 736, 22 Man. L.R. 363, 21 W.L.R. 483.

(§ I B 4—42)—ACTIONS AGAINST CORPORATIONS.

Ontario Courts have no jurisdiction to restrain by injunction acts of a foreign corporation in the country of their origin, although the foreign corporation may transact business within Ontario in such a way as to enable Ontario process to be served in conformity with the Consolidated Rules of Practice in respect of business transactions within the jurisdiction. [See Dicey on Conflict of Laws, 2nd ed., 160-163; 17 Halsbury's Laws of England, 204.]

Capital Mfg. Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ I B 4—43)—ACTION AGAINST INSURANCE COMPANY.

An insurance company that was registered in British Columbia cannot be sued therein on a cause of action which arose in the Province of its organization, where it had its head office and principal place of business, notwithstanding the British Columbia Companies Act provides that for the purpose of sec. 67 of ch. 53 of R.S.B.C. 1911, a company registered therein shall be considered as carrying on business in such Province.

Pearlman v. Great West Life Assurance Co., 4 D.L.R. 154, 21 W.L.R. 557.

(§ I C—47)—RAILWAY COMMISSION.

Where a municipality is entitled to relief by reason of the unauthorized act of a telephone company in proceeding with the erection of poles and wires on the highway without complying with the conditions imposed by the Railway Act of Canada, which Act also provides that municipalities have the right to apply to the Board of Railway Commissioners in respect to matters arising in connection with the undertakings of telephone companies. this latter provision is not to be deemed the exclusive remedy and does not oust the jurisdiction of the High Court of Justice of Ontario to deal with the trespass thereby committed by the telephone company. [Kemp v. London and Brighton R. Co. (1839), 1 Railway Cas. (Eng.) 495, 504; Simpson v. South Staffordshire Waterworks Co. (1865), 34 L.J. Ch. 380; River Dun Navigation Co. v. North Midland R. Co. (1838), 1 Railway Cas. (Eng.), 135, 154, referred to.]

County of Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 3 O.W.N. 607, 21 O.W.R. 194, 25 O.L.R. 467.

C. Relation to other departments of government.

(§ I C 2—60)—TO DETERMINE QUESTION OF CONFLICT OF LEGISLATION.

The Court of King's Bench (Que.), may, on its own motion or on behalf of any person interested, in a matter properly before it, determine whether a Provincial Act conflicts with an Act of the Dominion Parliament.

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

(§ I C 2—62)—POWERS OF LEGISLATURE.

Parliament may take away the right of an accused person to be tried in the district, county or place where a criminal offence is supposed to have been committed.

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

(§ I C 2—81)—PUBLIC PURPOSES, TAXES.

The provisions of the Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 89, whereby a municipal corporation is declared to have a special lien on lands for tax arrears confers no jurisdiction upon the Court to pronounce a decree declaratory of such lien unless consequential relief can be given in the case. [Mutrie v. Alexander, 23 O.L.R. 396, followed.]

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

(§ I C 3—102)—MUNICIPAL MATTERS, AS TO OFFICES.

The Court cannot, under the provisions of R.S.N.S. 1900, ch. 71, secs. 121-124, interfere where a resolution was passed by the Town Council reducing the salary of its stipendiary magistrate not in the exercise of the bonâ fide discretion of the Council, but for the purpose of forcing him to resign, with the intention of securing the appointment of a successor in the hope that the latter's decisions in connection with liquor license prosecutions would be more in

accordance with the wishes of certain members of the Council.

Re Pelton, 7 D.L.R. 465.

(§ I C 3—104)—MUNICIPAL MATTERS; NECESSITY OF TAKING OR ACQUIRING PROPERTY.

The Court has no jurisdiction to rescind a sale actually carried out to a municipal corporation at the suit of a ratepayer, or to compel the vendor to repay the price if the municipality had statutory power to purchase lands for the object specified, although the actual user of the lands for that object could only be carried out with the consent of another municipality which consent had not yet been obtained.

Verner v. City of Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

D. Jurisdiction over associations, etc.; conclusiveness of decisions of their tribunals.

(§ I D—120)—JURISDICTION OVER CORPORATIONS.

The Court has no jurisdiction to interfere with the internal management of joint stock companies acting within their powers. [Burland v. Earle, [1902] App. Cas. 83, followed.]

Dominion Cotton Mills Co., Ltd. v. Amyot and Brunet, 4 D.L.R. 306.

(§ I D—124b)—ONTARIO RAILWAY AND MUNICIPAL BOARD.

A formal agreement between municipalities which is not of a voluntary character but which is executed in conformity with a direction of the Ontario Railway and Municipal Board as to the operation of a municipal railway is within the exclusive jurisdiction of the board as to adjustment of differences arising thereunder between the municipalities in the accounting for the profits of the operation of the road, and an action in the High Court will be dismissed.

Town of Waterloo v. City of Berlin, 7 D.L.R. 241, 4 O.W.N. 256, 23 O.W.R. 337.

II. Provincial Courts.

A. Jurisdiction.

(§ II A 1—150)—JURISDICTION OF PROVINCIAL COURTS.

The jurisdiction of a District Court is not ousted merely by reason of the fact that defendant resides, and the cause of action arose, without the limits of the judicial district in which the action is brought.

Reid v. Taber Trading Co., 7 D.L.R. 229, 22 W.L.R. 283.

A personal action for the recovery of school taxes or assessments is of the exclusive jurisdiction of the Circuit Court, whatever be the amount thereof.

School Commissioners of Westmount v. Galarneau, 7 D.L.R. 407.

A hypothecary action to secure recovery of school taxes or assessments, whatever be the amount thereof, is of the exclusive jurisdiction of the Superior Court.

School Commissioners of Westmount v. Galarneau, 7 D.L.R. 407.

The Supreme Court of Alberta cannot entertain an application to vary the finding of a clerk of the Court on a reference to him to ascertain damages, since that can be done only on an appeal from the final judgment in the action. [Marson v. G.T.P. R., 17 W.L.R. 693, on appeal, 1 D.L.R. 850, 20 W.L.R. 161, followed.]

Lavallee v. Canadian Northern R. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

Under Con. Rule 1322, on an application to a Judge in Chambers, pursuant to sec. 110 of the Judicature Act (Ont.), he must exercise his judgment as to whether a case shall be tried with or without a jury, as he cannot pass that responsibility over to the trial Judge, and if it appears to him that a case should be tried without a jury he must so direct. [Ont. C.R. 1322 (6 January, 1912) construed.]

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

When an order of estreat of a recognizance is made by the Court of Queen's Bench, Crown side, for a breach of its condition, the subsequent entering up of a judgment by the prothonotary of the Superior Court, under article 1115 Cr. C., is not a judicial, but a purely ministerial, act of that officer, and does not vest the Superior Court with jurisdiction to inquire into, or in any wise to deal with, the order of estreat.

The King (plaintiff, appellant) v. Hogue et al. (defendants, respondents), 21 Que. K.B. 24.

The civil liability, in a matter of délit or quasi-délit, is subject to the rule lex loci regit actum. Therefore, workmen engaged in Quebec to work in Quebec and Ontario, who are injured through the act or fault of their employers in Ontario, have only the remedy given by the laws of that Province. When the evidence shews that the foreign law does not recognize the right to the proceedings taken by the plaintiff, and upon which a verdict was found in his favour, his action should be dismissed non obstante veredicto, a new trial being useless.

Grand Trunk R. Co. v. Maclean, Q.R. 21 K.B. 269, reversing 38 S.C. 394.

While the Consolidated Rules of Practice, 1897, govern the practice and procedure in County Courts as well as in the High Court of Justice and Court of Appeal for Ontario, the Consolidated Rules confer no jurisdiction on the County Courts, and a County Court has no jurisdiction to entertain an application for the prerogative writ of mandamus to a public body to perform a public duty even where the amount in dispute, if it could be treated as a debt, would be within County Court jurisdiction.

Rich v. Melancthon Board of Health, 2 D.L.R. 866, 3 O.W.N. 826, 21 O.W.R. 516, 26 O.L.R. 48.

(§ II A 2—155)—ORIGINAL JURISDICTION OF APPELLATE COURT; SUPERINTENDING CONTROL.

The High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court.

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

Mandamus does not lie to compel an inferior Court to reconsider a decision where the matter decided was within the jurisdiction of the inferior Court, notwithstanding that the decision of the lower Court may have been erroneous. [In re Long Point Co. v. Anderson, 18 A.R. (Ont.) 401, applied; see also Township of Ameliasburg v. Pitcher, 13 O.L.R. 417.]

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

(§ II A 3—160)—AS DEPENDENT ON AMOUNT.

The amount of the claim of a mortgagee upon the covenant for payment in the mortgage is ascertained by the signature of the defendant within the meaning of sec. 62 of the Division Courts Act, 10 Edw. VII. ch. 32, in spite of the fact that, in order to establish his right to sue in his own name, the plaintiff must establish by evidence other than documentary that an alleged assignment of the mortgage, though absolute in form, was only by way of collateral security.

Renaud v. Thibert, 6 D.L.R. 200, 27 O.L.R. 57, 3 O.W.N. 1649, 22 O.W.R. 923.

A claim for the loss or goods through the negligence of a servant of the Crown in the operation of the Intercolonial Railway alleging damages caused by negligence of an officer and servant of the Crown, is within the purview of the Government Railway Small Claim Act, 9-10 Edw. VII. (Can.) ch. 26, and is within the jurisdiction of a Provincial County Court.

Williams v. Government Railway Managing Board, 11 E.L.R. 10.

Clause (d) of sub-sec. 1 of sec. 62 of the Division Courts Act, 10 Edw. VII. (Ont.) ch. 32, has reference to cases where, after production of the document and proof of the signature, something further is necessary to shew the liability of the defendant thereunder, such as proof of the fulfilment of a condition on which the document was to take effect, and does not apply to a case in which evidence is necessary to establish the plaintiff's status with reference to the document.

Renaud v. Thibert, 6 D.L.R. 200, 27 O.L.R. 57, 3 O.W.N. 1649, 22 O.W.R. 923.

(§ II A 4—165)—MATTERS OF TITLE.

The Court may, on a motion by one defendant, whose interest was distinct and severable from the rest of the defendants, to vacate a lis pendens filed by the plaintiff in an action against several defendants, made as upon a motion for judgment upon admissions under rule 615 of the Manitoba King's Bench Rules, 1902, render a final judgment dismissing the action as to such defendant without waiting to determine the matter as between the other parties. [Re Barker's Estate, 10 Ch. D. 162, at p. 165, specially referred to; Holmested & Langton's Judicature Act, 3rd ed., 817.]

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

A Judge of the Supreme Court only, and not a Judge of the District Court acting as District Judge or as local Master, can grant an order under sec. 129 of the Land Titles Act continuing a caveat under sec. 130 of such Act. [See also Nicholson v. Drew, 3 D.L.R. 748.]

In Re Caveat, 3 D.L.R. 590, 21 W.L.R. 575.

Under sec. 357 of the Town Act, R.S.S. 1909, ch. 85, a Judge of a District Court is without jurisdiction to confirm a tax sale.

Nicholson v. Drew, 3 D.L.R. 748, 21 W.L.R. 189.

Where a purchaser from the person holding the registered title receives notice before closing the purchase that another party claims to have a partnership interest with the vendor and that the vendor is not entitled to fix the price at which the property is to be sold because of such claimant's right to one-half of the profits on the joint venture of erecting the building, the Court has jurisdiction in an action in which all the interested parties are before it, to make an interim order before the trial to carry out, with the consent of the purchaser, the sale made to him by the person holding the registered title on sufficient of the purchase money being paid into Court or to a receiver to answer the claimant's demand should he succeed at the trial.

Jennison v. Copeland, 3 D.L.R. 52, 21 O.W.R. 689, 3 O.W.N. 795.

(§ II A 5—172)—ESTATES OF DECEDENTS.

In the administration of estates the jurisdiction of the Supreme Court of Nova Scotia is concurrent with that of the Probate Court, and, in matters of difficulty or importance, it is desirable that questions should be dealt with in a summary way under the procedure in the Supreme Court, but where, in the opinion of the Court, the application is needless in view of the questions at issue or the smallness of the amount involved, costs will be refused.

Re De Blois Trusts (No. 2), 8 D.L.R. 68.

It is against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise, and, therefore, the Court will not, either upon an originating notice under Ont. Con. Rule 938, or in an action, deal with questions as to the construction of a

will relating to the devolution of the estate in events which have not yet happened.

Re Galbraith, 5 D.L.R. 174, 3 O.W.N. 869, 21 O.W.R. 446.

The Surrogate Court is one of probate only, without inherent jurisdiction, and possesses only such powers as are conferred by the Surrogate Court Act.

Re Mercer, 4 D.L.R. 589, 3 O.W.N. 1292, 22 O.W.R. 217, 26 O.L.R. 427.

(§ II A 5—174)—As to infants.

The Surrogate Court is without jurisdiction to order an administrator upon his discharge, to pay into that Court money belonging to an infant, and the Trustees Act, 1 Geo. V. sub-sec. 2, of sec. 36, ch. 26, does not confer jurisdiction on such Court to make an order of that character, but only to order it paid into the High Court, which is the only Court entitled to receive money belonging to infants and lunatics.

Re Mercer, 4 D.L.R. 589, 3 O.W.N. 1292, 22 O.W.R. 217, 26 O.L.R. 427.

(§ II A 6—176)—Violation of by-laws.

A person charged with having sold an alimentary substance, in this case milk, which does not contain the requisite proportion of aliment, he may be summoned to appear before the police magistrate; the Recorder's Court has exclusive jurisdiction only when the offence charged is in violation of a city by-law.

Belanger v. Emard, 14 Que. P.R. 84 (Sup. Ct.).

(§ II A 6—177)—Summary trial by consent.

In determining whether secs. 777 and 778 of the Criminal Code, as to conferring jurisdiction of summary trial by consent on a magistrate, has been complied with in a case in which the record does not state that the consent was given, and the consent is denied by the accused under oath, affidavits will not be received on the part of the prosecution to supplement the omission from the formal record by shewing, in contradiction of the accused, that he did in fact consent.

The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

A conviction upon summary trial for an indictable offence before a magistrate, under secs. 777 and 778 of the Criminal Code, 1909, as amended, under which jurisdiction is acquired only by consent of the accused, will be quashed, with leave to the Crown to begin de novo, where the magistrate's record shews only that the accused "consented to jurisdiction" and pleaded guilty, that not being a substantial compliance with the provisions of the Criminal Code, which require that, in such respect, the record shall shew what actually transpired before the magistrate.

The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

A defendant's consent to summary trial by a magistrate as an alternative to a jury trial should be a specific consent in the statutory form and not a mere consent to the "jurisdiction" of the magistrate which might have reference only to the territorial jurisdiction of the magistrate as to summary convictions for minor offences apart from his special jurisdiction to try certain indictable offences with the consent of the accused. [Rex v. Crooks, 17 W.L.R. 560, explained; see also Tremeear's Criminal Code, 2nd ed., p. 635.]

The King v. Mali (No. 2), 1 D.L.R. 484, 20 W.L.R. 601, 19 Can. Cr. Cas. 188.

(§ II A 6—178)—In habeas corpus proceedings.

A Court sitting under the Habeas Corpus Act may, without inquiring into the justice of a sentence imposed on a person, take notice of the minutes of proceedings against him in order to satisfy itself that the provisions of the law relating to the warrant of commitment have been observed.

Lafleur v. Vallee, 5 D.L.R. 57.

(§ II A 6—179)—Appeal from summary conviction.

A County Court Judge hearing an appeal from a summary conviction under the Liquor License Act, R.S.N.S. 1900, ch. 100, sec. 149, is a statutory officer and, as such, is strictly limited to the authority which the statute confers.

Rex v. Ackerson, 7 D.L.R. 95.

B. Terms; place of sitting.

(§ II B—181)—Adjourned sittings.

The dates fixed by the Surrogate Courts Act, 10 Edw. VII. (Ont.) ch. 31, sec. 29 (1), for the commencement of the four annual sittings of the Court for the hearing of contentious business must be adhered to; but there is no provision that these sittings shall end on any fixed dates, and it is, therefore, not improper for the Surrogate Judge to appoint for the trial of a contentious case a day subsequent to the statutory date for the commencement of a sittings, as part of the sittings commencing on that date.

Eyers v. Rhora, 3 D.L.R. 637, 3 O.W.N. 1136.

C. Transfer of cause.

(§ II C—185)—Transfer of cause.

Under the Surrogate Courts Act, 10 Edw. VII. (Ont.) ch. 31, sec. 33, providing that any cause or proceeding in the Surrogate Courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to the cause or proceeding into the High Court by order of the Judge of the latter Court, but that no cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the juris-

diction of the Surrogate Court and disposed of by the High Court and unless the property of the deceased therein exceeds $2,000 in value, a cause should be removed where a fair case of difficulty is made out so that there will be a real contest, provided the value of the estate brings the case within the above section of the statute. [Re Wilcox v. Stetter (1906), 7 O.W.R. 65; Re Graham v. Graham (1908), 11 O.W.R. 700; Re Reith v. Reith (1908), 16 O.L.R. 168, specially referred to.]

Re Pattison v. Elliott, 4 D.L.R. 330, 3 O.W.N. 1327, 22 O.W.R. 232.

It is not a valid objection to the jurisdiction of a drainage referee in Ontario to whom an Assize Judge had ordered a transfer of the action for trial, that no question of drainage arose in the case, as by the Municipal Drainage Act, 10 Edw. VII. (Ont.) ch. 90, sec. 99, the Court has the power, where the action is brought within two years from the occurrences of the damage, to so refer for trial, not only where proceedings for the relief sought might properly have been taken before the drainage referee but also in cases where the Court is of opinion that the action might more conveniently be tried by him.

Wigle v. Township of Gosfield South, 2 D.L.R. 619, 25 O.L.R. 646, 3 O.W.N. 708, 21 O.W.R. 483.

D. Opinions.

(§ II D—190)—OPINIONS.

County Court Judges should incorporate the reasons for their conclusions in decisions which are subject to appeal.

Re St. David's and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, 23 O.W.R. 12.

III. Federal Courts.

Appeals to Supreme Court of Canada, see Appeals.

Jurisdiction of Exchequer Court of Canada, see Public Money; Public Works; Patents, Trade Marks.

(§ III—195)—FEDERAL COURTS.

The Supreme Court of Canada will not entertain an appeal in which a mere question of procedure is involved.

Cameron v. Cuddy, 7 D.L.R. 296.

B. Suits against Crown.

(§ III B—206)—IN EMINENT DOMAIN PROCEEDINGS.

The Exchequer Court of Canada has jurisdiction to award damages for the taking of property by the Crown for the purpose of erecting an ice pier on riparian land, by virtue of sub-sec. (b) of sec. 20 of the Exchequer Court Act (Can.), providing for claims "against the Crown for damage to property injuriously affected by the construction of any public work," and sec. 19 of the same Act, giving the Court jurisdiction where "the land of the subject is in the possession of the Crown."

Pickels v. The King, 7 D.L.R. 798.

IV. Conflict of authority; relation of Provincial to Federal.

(No cases.)

V. Rules of decision.

B. Stare decisis; previous decisions of same Court.

(§ V B—295)—STARE DECISIS; ERRONEOUS DECISION.

Where a decision upon the construction of a statute, though doubtful, has been acted upon for many years by those acquiring rights under the statute construed, and has received legislative recognition by the re-enactment of the statute in the same terms, the principle of stare decisis should be applied, and the decision should not be disturbed. (Per Anglin and Brodeur, JJ.)

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

The Court of Appeal of British Columbia will not follow decisions as to practice in habeas corpus appeals of the former full Supreme Court of British Columbia to whose appellate jurisdiction such Court of Appeal succeeded, if to do so would establish in the Province of British Columbia a practice in conflict with the practice in England and would prejudicially affect the liberty of the subject.

Re Hoessan Rahim, 4 D.L.R. 701, 19 Can. Cr. Cas. 94, 17 B.C.R. 276.

E. Following decisions of Courts of other Province or country.

(§ V E—315)—FOLLOWING DECISIONS OF COURTS OF OTHER PROVINCES OR COUNTRIES.

Under the British Columbia Railway Act upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Canadian Railway Act, 1888, which is, so far as material, identical in language with the British Columbia Statute, that construction will be adopted. [Atlantic and North-west Railway Co. v. Wood, [1895] A.C. 257, 64 L.J.P.C. 116, applied.]

Canadian Northern Pacific R. Co. v. Dominion Glazed Cement Pipe Co., Ltd., 7 D.L.R. 174, 22 W.L.R. 335.

Upon a question of practice under the Winding-up Act, R.S.C. 1906, ch. 144, English cases decided upon different conditions of practice may not be applied to frustrate the clear intent of the Act itself.

Re Baynes Carriage Co., 7 D.L.R. 257, 4 O.W.N. 30, 23 O.W.R. 10.

F. Federal Courts following Provincial decisions.

(No cases.)

COVENANTS AND CONDITIONS.

I. In general.
II. Construction; validity; effect.
A. In general.
B. Encumbrances and assessments.
C. Warranty.
D. Restricting use or disposition of property.
III. Performance; breach; enforcement; who liable.
A. In general.
B. What constitutes a breach; effect.
C. Who may enforce.
D. Who liable or bound.
IV. Running with the land.
V. Extinguishment of, or discharge of covenant.

Condition precedent to suit, see Action, I.

Not to engage in business, see Contracts, III.

As to conditions generally in insurance policy, see Insurance, III.

In lease, see Landlord and Tenant, II.

Condition in mortgage. see Mortgage.

Notice of, from record, see Records and Recording Laws.

Condition of sale, see Sale, I.

In contract for sale of land, see Vendor and Purchaser.

Pleading implied covenant to pay prior mortgage on taking land titles transfer, see Pleading, II.

I. In general.

(No cases.)

II. Construction; validity; effect.

A. In general.

(§ II A—5)—Construction; validity; effect.

In order to ascertain the scope and effect of covenants, regard must be had to the object which they were designed to accomplish.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

The language of a covenant is to be read in an ordinary or popular and not in a legal or technical sense.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

Piling, capping or woodwork, as well as the filling in thereof with earth or stone, placed by the lessee upon demised premises with intention of using it at some future time, but not in actual use as a foundation of a building at the expiration of the lease, does not fall within the terms of a covenant that the lessor should compensate the lessee, at the expiration of the lease, for "buildings and erections placed on the premises by the lessee for manufacturing purposes."

City of St. John v. Gordon, 3 D.L.R. 1, 46 Can. S.C.R. 101, 11 E.L.R. 177.

(§ II A—6)—Covenant or condition.

No particular form of words is necessary to create a covenant, but it is sufficient if, from the construction of the whole deed, it appear that the party meant to bind himself, and, if that appear, it does not matter whether the words relied upon are in the recital or in any other part of the deed.

Pearson v. Adams (No. 2). 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

If it be doubtful whether a clause in a deed be a covenant or a condition, the Court will always incline to construe it as a covenant. [Rawson v. Inhabitants of School District, 89 Mass. 125, referred to and approved.]

Pearson v. Adams (No. 2). 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

A covenant for quiet enjoyment of demised premises is to be construed as subject to the termination of the tenancy on a sale of the premises where the right of cancellation in such event is reserved in the lease.

Wood v. Saunders, 3 D.L.R. 342, 21 W. L.R. 195.

Where a sale of demised premises is made under a right reserved in a lease for a term of years to terminate the lease on a sale being made, it is unnecessary that the lessor should give three months' notice of intention to terminate it as provided in such lease at the expiration of any year, such two provisions being separate and distinct and not inconsistent.

Wood v. Saunders, 3 D.L.R. 342, 21 W. L.R. 195.

Lease of apartments—Quiet enjoyment—Breach—Running sewing machines and noisily using pressing irons in rooms overhead—Vacation of premises—Liability for rent of unexpired portion of term.

Walton v. Biggs, 7 D.L.R. 843, 19 W.L. R. 895.

III. Performance; breach; enforcement; who liable.

A. In general.

(§ III A—27)—Waiver of breach; loss of right to enforce.

Where an opening had been made in a party wall of part of the demised premises by a lessee in breach of a condition in the lease, without the knowledge of the lessor, although the latter was aware that extensive alterations were contemplated, the receipt of rent eleven days subsequent to the date of making the opening, but prior to the lessor's knowledge of such fact, does not operate as a waiver of the breach of the condition or covenant of the lease.

Holman v. Knox, 3 D.L.R. 207, 25 O.L. R. 588, 3 O.W.N. 745, 21 O.W.R. 325.

Receipt of rent with knowledge of a breach of condition in the lease by the lessee will not operate as a waiver of the breach when received under a special

agreement. that such rent should be received without prejudice to the respective contentions and rights of the parties.

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

(§ III A—28)—CONTINUANCE OF BREACH.

The cause for the rescission of a lease for breach of a covenant to repair, claimed under art. 1641 of the Civil Code (Que.), must exist at the moment when rescission is pronounced. (Per Brodeur, J.)

Consumers Cordage Co. v. Bannerman, 2 D.L.R. 419.

B. What constitutes a breach; effect.

(§ III B—32)—RESTRICTIONS AS TO USE OF PROPERTY.

The words "to be used only as a site for a detached brick or stone dwelling house" between the description and the habendum in a deed of land constitute a covenant by the grantor to erect no building other than a building of the kind mentioned, a breach of which will be restrained by injunction.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

C. Who may enforce.

(§ III C—35)—WHO MAY ENFORCE.

Where a lessor has made an agreement with a tenant, giving him the exclusive privilege of selling refreshments, etc., in a theatre for a fixed period, and such agreement stipulates that in case of sale, lease or transfer of the said theatre, the rights and privileges of the lessee will be protected, and the theatre is transferred by the lessor and the assigns undertake to respect all the obligations entered into by the lessor, and the assigns transfer their rights, the lessee has a direct action against the assigns first mentioned to compel the fulfilment of obligations entered into in his favour by the lessor, and need not direct his suit against such lessor.

Authier v. Driscoll, 3 D.L.R. 797.

(§ III C 1—36)—RESTRICTIONS AS TO USE OF PROPERTY.

Where land is sold with a restrictive covenant, one who subsequently buys neighbouring land from the same owner can enforce the covenant.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

An action by a lessor for an injunction restraining a lessée from building upon the land demised in breach of the terms of the lease may be maintained without proof of damage to the lessor.

Audet v. Jolicoeur, 5 D.L.R. 68.

(§ III C 1—37)—PARTY PREVENTING PERFORMANCE.

A party to a contract cannot take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself. [See also Roberts v. Bury Commissioners, L.R. 5 C.P. 310.]

Brown v. Brown, 1 D.L.R. 228, 3 O.W.N. 543, 20 O.W.R. 986.

(§ III C—38)—PERSONAL COVENANTS.

A second mortgagee, releasing his security to a first mortgagee claiming for default in payments due under the first mortgage, but reserving his rights under the covenant to pay the mortgage money, has a good cause of action upon the covenant against the mortgagor. [In re Richardson, L.R. 12 Eq. 398; Bell v. Rowe (1901), 26 Vict. L.R. 511, followed.]

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145, 3 O.W.N. 990.

A covenant to pay the purchase money in a contract for the sale of land is a personal covenant and not a covenant running with the land. [Haywood v. Brunswick Building Society, L.R. 8 Q.B.D. 403, and Rogers v. Hosegood, [1900] 2 Ch. 388, specially referred to.]

Coté v. Olson, 2 D.L.R. 392, 20 W.L.R. 690.

(§ III C 2—42)—ASSIGNEES.

The assignee of a lessee, as well as the sub-lesse, has a right of action against the lessor for non-performance of his obligations under the lease or agreements attached thereto.

Smith v. Rosenberg, 41 Que. S.C. 165 (Ct. Rev.).

D. Who liable or bound.

(§ III D—46)—ON IMPLIED COVENANT.

Inability of a mortgagee to reconvey the mortgaged premises will not bar the mortgagee's rights of action upon the covenant if such inability arises from any default of the mortgagor. [See Coote's Law of Mortgages, 7th ed., vol. 2, page 982; and In re Burrell, Burrell v. Smith (1869), L.R. 7 Eq. 399-466.]

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145, 3 O.W.N. 990.

(§ III D 2—50)—COVENANTS RUNNING WITH THE LAND.

Covenants in a lease which touch or concern the land run with the land and are binding upon the assignee of the term demised.

Rudd v. Manahan, 5 D.L.R. 565, 21 W.L.R. 929.

Where a transferee of rights under a promise of sale acquired these rights under a promise of sale and the transfer stipulates that the transferee shall fulfil all the charges, clauses and conditions imposed on the transferor, the transferee will not be entitled to obtain a deed of sale before he has fulfilled every condition mentioned, even though he have paid the entire purchase price; nor can he compel the vendor to sign him a complete deed of a sale unless such deed contains every clause and obligation mentioned in the promise of sale.

Lapierre v. Magnan and Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

If a transferee of rights under a promise of sale of lands has built a portion of a house on territory which was to be left free from building, such transferee is not entitled to a deed formally transferring the ownership of the immovable, and the original vendor is entitled to have that portion of the building encroaching on the prohibited territory demolished, and this by direct action against the transferee if he so choose. [Delorme v. Cusson, 28 Can. S.C.R. 66, distinguished.]

Lapierre v. Magnan and Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

IV. Running with land.

(No cases.)

V. Extinguishment.

(No cases.)

CREDITORS' RELIEF ACT.

As to distribution of fund realized on execution, see Assignment for Creditors; Execution; Insolvency; Levy and Seizure.

CREDITORS' ACTION.

I. When maintainable.
II. Exhausting legal remedies.
III. What property may be reached.
IV. Liens; priorities between creditors.
V. Decree; relief generally.
VI. Procedure.

See Fraudulent Conveyances.
See Debtor and Creditor.
See Insolvency.

I. When maintainable.

(No cases.)

II. Exhausting legal remedies.

(No cases.)

III. What property may be reached.

(§ III—10)—What property may be reached.

Where the creditors of an insolvent debtor attack a transfer of certain personal property as fraudulent and as hindering and delaying the creditors, and where some of the property in question could never have become exigible to answer the claims of the creditors, the attack fails as to the non-exigible property. (Per Idington, J.)

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Where a debtor gave certain creditors an agreement for an absolute sale of his property as security with the necessary result of hindering and delaying his other creditors under circumstances which would support the preference, the judgment creditors are entitled to such order and directions from the Court as will enable them to reach in the preferred creditors' hands all the property of the debtor that remains after the preferred claims are satisfied.

Beliveau v. Miller, 1 D.L.R. 819, 20 W.L.R. 96.

IV. Liens; priorities between creditors.

(No cases.)

V. Decree; relief generally.

(No cases.)

VI. Procedure.

(§ VI—30)—Procedure.

Under the Alberta Judicature Act it is no longer necessary for a non-judgment creditor in order to maintain an action against the debtor to sue on behalf of all creditors. (Per Beck, J.) [Scane v. Duckett, 3 O.R. 370, and Pacific Investment Co. v. Swan, 3 Terr. L.R. 125, specially referred to.]

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

CRIMINAL CONVERSATION.

See Husband and Wife; Damages.

CRIMINAL LAW.

I. Criminal liability.
A. In general.
B. Capacity to commit; irresponsibility; intent; knowledge; and insanity.
C. Attempts.
D. Solicitation.
E. Parties to offences.
F. Instigation or consent, as defence.
II. Procedure.
A. In general.
B. Protection and rights of accused generally; electing mode of trial.
C. Warrant; commitment.
D. Necessity of indictment, presentment or information.
E. Concurrent proceedings.
F. Pleading; motions; demurrer.
G. Former jeopardy.
H. Determining sanity of accused; proceeding with trial.
III. Offences against different Sovereignties.
IV. Sentence and imprisonment.
A. In general.
B. Cruel and unusual punishment.
C. Extent of punishment generally; excessive fines.
D. Time of imprisonment; cumulative and indeterminate sentences.
E. Place of imprisonment.
F. Punishment of second offences and habitual criminals.
G. Suspension or stay of sentence; time of imposing.
H. Parole; reprieve; pardon; ticket of leave.
V. Record.
VI. Removal for trial.

Aiders, abettors and accessories generally, see Accessory.

Former jeopardy on criminal trial as a defence to charge of professional misconduct for same offence, see Physicians and Surgeons.

Rights as to place of trial, see Venue.

Various particular crimes, see Assault and Battery; Bigamy; False Pretences; Forgery; Game Laws; Gaming; Homicide; Intoxicating Liquors, Malicious Mischief; Nuisances, III.; Obstructing Justice; Perjury; Receiving Stolen Property; Robbery; Seduction; Theft.

As to arrest, see Arrest.

Conspiracy to commit crime, see Conspiracy.

Extradition, see Extradition.

Civil liability for false arrest and imprisonment, see False Imprisonment.

Habeas corpus to secure release of prisoner, see Habeas Corpus.

Criminal jurisdiction of justice of the peace, see Justice of the Peace; Summary Conviction.

Civil liability for bringing prosecution, see Malicious Prosecution.

I. Criminal liability.

B. Capacity to commit; irresponsibility; intent; knowledge; insanity.

(§ I B—6)—INSANITY; IRRESISTIBLE IMPULSE.

A person is not to be acquitted of a criminal charge on the ground of his insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was forbidden by law; it is not a sufficient defence that it may be proved that, notwithstanding the existence of such appreciation and knowledge on the part of the accused, he had at the time of the offence lost the power of inhibition and had an impulse which he could not resist to commit the crime.

The King v. Jessamine, 1 D.L.R. 285, 3 O.W.N. 753. 21 O.W.R. 392, 48 C.L.J. 105, 19 Can. Cr. Cas. 214.

II. Procedure.

A. In general.

(§ II A—30)—PROCEDURE.

Where a prosecution for a criminal offence was instituted by a private prosecutor and he is still in charge of the prosecution, he has the same right to be heard on the trial, both as to the question of guilt and the quantum of punishment as the Attorney-General would have on a Crown prosecution. [Stephen's History of the Criminal Law, 419, 495, referred to.]

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

(§ II A—31)—PRELIMINARY EXAMINATION.

As a justice of the peace of Saskatchewan is an officer of the whole province he may hold a preliminary examination and commit an accused person for trial, notwithstanding the offence with which he is charged was supposed to have been committed in another judicial district in which there was no gaol to which the accused could be remanded to custody.

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

Where there is no gaol in the judicial district in which an offence was supposed to have been committed, a justice of the peace of another district may, under sec. 577 of the Criminal Code, commit an accused person to custody for trial in the latter district without an order under sec. 884 of the Criminal Code from a Court or Judge directing trial to be held in such district. [Regina v. Ponton (1898), 2 Can. Cr. Cas. 192; Mallet v. The Queen, 1 B.C. R. (Part LL) 212; Rex v. Smith (1858), 1 F. & F. 36; Rex v. James (1836), 7 C. & P. 553; and Queen v. Burke (1900), 5 Can. C.C. 29, referred to.]

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

(§ II A—33)—LEAVE TO FILE INFORMATION.

It is within the discretion of the Manitoba Court of Appeal to order a criminal information to be exhibited against a magistrate for alleged unlawful conduct in the discharge of his duties. [As to proceedings by criminal information generally, see annotation to this case.]

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

Though it appears that a magistrate was guilty of illegal acts in the performance of his duties, a criminal information will not be ordered to be exhibited against him unless it is made to appear that he did such acts from corrupt motives.

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

(§ II A—34)—SECOND INDICTMENT.

Notwithstanding the use of the disjunctive word "or" in sec. 872 Criminal Code, counsel acting for the Crown are not, by preferring an indictment for the charge on which the accused has been committed, precluded from at the same time preferring another indictment against him for any other charge founded on the facts disclosed in the depositions.

King v. Montminy, 18 Rev. de Jur. 309.

(§ II A—37)—REGULARITY OF SUMMONS OR WARRANT.

It is only when the allegations of the complainant do not convince the magistrate that a summons should issue, that there is any need of witnesses for the complainant, and until that time there are no persons who can be termed "his witnesses" under Cr. Code (1906) sec. 655, as amended in 1909, which directs the justice to hear and consider the allegations of the complainant "and the evi-

dence of his witnesses if any," and, on a case for same being made out, to issue a summons or warrant. [Ex. p. Archambault, 16 Can. Cr. Cas. 433, approved.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

(§ II A—38)—READING OVER TO, AND HAVING WITNESS SIGN DEPOSITION.

The requirement of sub-sec. 4 of sec. 682 of the Criminal Code, R.S.C. 1906, ch. 146, that the depositions of a witness shall be read over to him by the magistrate, and signed by him, is directory only, and the omission to comply with this requirement does not involve loss of jurisdiction.

Rex v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17.

B. Protection and rights of accused generally; electing mode of trial.

(§ II B—40)—ELECTING MODE OF TRIAL.

The recital of consent contained in Code form 55 is the method prescribed by law of shewing a magistrate's jurisdiction to summarily try for an indictable offence under Part XVI. of the Criminal Code 1906, and where such a recital is contained in the conviction there is, in the absence of anything to impeach such record, a necessary implication that conditions precedent were observed.

The King v. Mali (No. 2), 1 D.L.R. 484, 20 W.L.R. 601, 19 Can. Cr. Cas. 188.

A person charged with a capital offence is not entitled to examine the register of jurors in the possession of the sheriff, since such list is to be kept secret and not disclosed to anyone except under an order of a Judge, granted on cause justifying it.

Trepanier v. The King, 19 Can. Cr. Cas. 290.

When the prisoner consents to be tried summarily by a magistrate under the summary trials clauses of the Criminal Code and an entry of this appears on the record it will be presumed on a habeas corpus motion, unless the contrary is shewn, that the consent of the prisoner to be tried summarily was regularly obtained and that his option to elect summary trial was exercised only after the magistrate had stated his right of election in the manner prescribed by Cr. Code sec. 778, and it is not essential that the magistrate's statement to the accused of the option in the statutory form should also be recited in the conviction or in the commitment. [Rex v. Howell, 19 Man. R. 317; Rex v. Walsh, 7 O.L.R. 149; Rex v. Crooks, 17 W.L.R. 560, distinguished.]

The King v. Mali (No. 1), 1 D.L.R. 256, 20 W.L.R. 217, 48 C.L.J. 157, 22 Man. L.R. 29.

(§ II B—44)—RIGHT TO HAVE EVIDENCE TRANSLATED AND TO MEET WITNESSES.

A prisoner who is ignorant of the language in which the trial proceedings are conducted has no inherent right to be furnished with a literal translation of all that takes place at the trial; where the substance of the evidence in chief of a witness called on behalf of the prisoner is explained to him, the omission to explain to him in like manner what the witness said on cross-examination is not a ground for quashing a conviction, the prisoner having been represented by counsel and having suffered no prejudice by the omission. [The King v. Meceklette, 18 O.L.R. 408, 15 Can. Cr. Cas. 17, followed.]

The King v. Sylvester, 1 D.L.R. 186, 19 Can. Cr. Cas. 302, 45 N.S.R. 525.

(§ II B—49)—TRIAL ON CONSENT; SUMMARY OR SPEEDY TRIAL.

Where the depositions and the committal for trial were both ignored by the prosecution, and instead, the County Crown Attorney, under Cr. Code sec. 873, obtained the written consent of the Judge to prefer the indictment on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty" and the depositions taken before the magistrate were not made a part of the case reserved for the opinion of the Court of Appeal in respect of the regularity of a refusal of a claim by the accused to be tried without a jury under the speedy trials clauses, the Court of Appeal may properly assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment. (Per Maclaren, J.A.)

Rex v. Sovereen, 4 D.L.R. 356, 3 O.W.N. 779, 21 O.W.R. 618, 26 O.L.R. 16, 20 Can. Cr. Cas. 103.

Under the Criminal Code it is not competent for a magistrate who is holding a summary trial after hearing all the evidence on both sides to decide to commit for trial instead of disposing of the case himself; the right to commit for trial being limited as to time by the terms of Cr. Code, sec. 786, directing that the magistrate may "before the accused person has made his defence" decide not to adjudicate summarily upon the case.

Rex v. Roger Hicks, 7 D.L.R. 171, 22 W.L.R. 236.

A summary conviction by a police magistrate is not invalid where it appears that the prisoner, on being arraigned, was informed by the magistrate's clerk in the words of the statute that he might at his option be tried forthwith by such magistrate without a jury or remain in custody or under bail as the Court directed, to be tried in the ordinary way by the Court having criminal jurisdiction, although the date of the sittings of the latter Court was not specified.

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

A summary conviction by a police magistrate will be sustained where the prisoner was not, on the day of trial, informed in the words of the statute that he could elect to be tried forthwith by such magistrate or be held for trial in the ordinary way by the Court having criminal jurisdiction if the prisoner had been duly notified of such privilege upon his arraignment on a previous date.

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

A conviction before a police magistrate upon a summary trial is not vitiated by the fact that the clerk of the Court and not the magistrate, informed the accused in the words of the statute that he might elect whether he would be forthwith tried by the magistrate or be held for trial in the ordinary way by the Court having criminal jurisdiction. [Rex v. Ridehaugh, 7 Can. Cr. Cas. 340, referred to.]

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

A person charged under secs. 227 and 228 Criminal Code, 1906, ch. 146, with keeping a common betting house, may without his consent, under secs. 641, 773 and 774 of the Code, as amended by 8 and 9 Edw. VII., be summarily tried by a police magistrate, absolute jurisdiction to try such offence without a jury having been conferred upon such official by secs. 641, 673, and 674 of the Cr. Code, 1906. [Rex v. Lee Guey, 13 Can. Cr. Cas. 80, 15 O.L.R. 235, specially referred to.]

Rex v. Honan, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 3 O.W.N. 1412, 26 O.L.R. 484, 20 O.W.R. 527.

The absolute jurisdiction conferred upon a police magistrate to try certain indictable offences upon summary trial without the consent of the accused is exercisable where the accused is present, whether or not an information has been sworn in respect of the offence which is the subject of the trial, if the "charge" is reduced to writing and is read to the accused and a full opportunity is given for making defence thereto.

Rex v. Crawford, 6 D.L.R. 380, 22 W.L.R. 107, 20 Can. Cr. Cas. 49.

Where a statute expressly requires certain things to be done before a magistrate acquires the jurisdiction of summary trial, the record must shew that such things were actually done, or that the statute was substantially complied with, otherwise the conviction cannot stand.

The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

It is not necessary that a police magistrate should, when informing a prisoner that he may elect whether he will be tried summarily by the magistrate or held in custody for trial in the ordinary way by the Court having criminal jurisdiction, personally address the prisoner in the words of sec. 773 of the Criminal Code, 1906 (amendment of 1909); it is sufficient that the statutory words were addressed to the prisoner by the magistrate's clerk on the magistrate's behalf in open Court.

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

C. Warrant; commitment.

(§ II C—51)—SUFFICIENCY OF WARRANT OF COMMITMENT.

A warrant of commitment is not void because it does not shew that the prisoner consented to be tried summarily for an indictable offence and where the conviction, which was before the Court on an application by the prisoner for his discharge from custody on habeas corpus, shewed that he consented to be so tried, the commitment is validated under sec. 1121, Crim. Code, 1906, which provides that no warrant or commitment shall be held void by reason of any defect therein, if it is therein alleged that the defendant has been convicted and there is a good and valid conviction to sustain the same. [Reg. v. Sears, 17 C.L.T. 124, distinguished.]

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

(§ II C—52)—EXAMINATION OF WITNESSES PRIOR TO ISSUING WARRANT.

The magistrate may, under Crim. Code, sec. 655, hear witnesses for his own information upon the application for a warrant. [Ex parte Coffon, 11 Can. Cr. Cas. 48, specially referred to.]

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

D. Necessity of indictment, presentment or information.

(§ II D—58)—CHARGE ON SPEEDY TRIAL.

It is not necessary that the consent of the Judge should be required by sec. 834 of the Criminal Code as amended by ch. 9 of 8 and 9 Edw. VII. (Can. 1909), should be formally expressed, either verbally or in writing before proceeding with the trial of the prisoner on a substituted charge; such consent may be inferred from the fact that the Judge himself drew attention to the new charge, put the prisoner to his election, and proceeded with the trial. [The King v. Cohn, 36 N.S.R. 240; The King v. Cohon, 6 Can. Cr. Cas. 386, distinguished.]

The King v. Sylvester, 1 D.L.R. 186, 19 Can. Cr. Cas. 302, 45 N.S.R. 525.

The probable effect of Part XVI. of the Criminal Code, R.S.C. ch. 146, dealing with summary trials of indictable offences, is to give to the magistrate trying such offence without indictment the same powers of amendment as are given to the Courts upon the trial of the same offence under an indictment.

Rex. v. Crawford, 6 D.L.R. 380, 22 W.L.R. 107, 20 Can. Cr. Cas. 49.

F. Pleading; motions; demurrer.

(No cases.)

G. Former jeopardy.

(§ II G 2—81)—Two offences founded on one act.

Where the defendant was convicted of begging on a charge brought under a municipal by-law, and on the same day was charged and convicted of vagrancy as being without visible means of maintenance, it will not be assumed that both convictions are for the same offence.

The King v. Munroe, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

(§ II G—82)—Identity of offences.

To support a plea of autrefois acquit the accused must shew that the offence for which he is on trial is the same as that for which he was convicted, and the plea will not be allowed merely on the ground that the second offence might have been proved instead of the first on the trial of the first information. [See also Rex v. Sutherland, 2 O.W.N. 595; Rex v. Hazen, 20 A. R. (Ont.) 633.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

H. Determining sanity of accused; proceeding with trial.

(§ II H—85)—Determining sanity of accused.

Where a person was brought before a magistrate upon a written complaint for an assault upon his wife, who, in her deposition, swore that the accused had twice been confined in an insane asylum, and that since his release therefrom he had continually threatened her with death, and the magistrate remanded the accused to gaol after directing an examination to be made by experts as to his sanity, the magistrate has discretion under sub-sec. 4 of sec. 722 of the Crim. Code (1906), eight days later, on their report not having been made, to sign another remand in the absence of the accused. [Re Sarault, 9 Can. Crim. Cas. 448, distinguished.]

Rex v. Bouchard, 4 D.L.R. 317, 20 Can. Cr. Cas. 95.

III. Offences against different sovereignties.

(§ III—93)—Different Provinces.

A railway conductor may be prosecuted in Alberta under sec. 355 of the Criminal Code, for the theft of cash paid him therein by a passenger as fare, notwithstanding it was his duty to account for it in British Columbia, where, in Alberta, he denied to the railway company the receipt of the money, since such denial amounted to a refusal to account therefor in the latter province.

Rex v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 21 W.L.R. 658.

IV. Sentence and imprisonment.

A. In general.

(§ IV A—95)—Sentence and imprisonment.

A sentence to a penitentiary imposed by a magistrate acting under the summary trials clauses of the Criminal Code is subject to the provisions of sec. 44 of the Penitentiary Act and a duly certified copy of the sentence is a sufficient warrant of commitment, without a recital of the preliminaries of the trial. [See also Reg. v. Peterson, 6 Man. R. 311.]

The King v. Mali (No. 1), 1 D.L.R. 256, 20 W.L.R. 217, 48 C.L.J. 157, 22 Man. L. R. 29.

(§ IV A—99)—Correction of judgment.

The defendant was convicted under the Speedy Trials Act, Part 18 of the Criminal Code, of fraudulently abstracting electricity to the value of some $13.40 from the St. J. Co., contrary to sec. 351 of the Code, and was sentenced to two years' imprisonment and to pay a fine of $1,000, one-half of which was ordered to be paid to the St. J. Co. On appeal:—Held, the sentence was erroneous in law and the case was remitted to the Court below with directions to impose a sentence of six months' imprisonment and a fine of $500.

The King v. Sperdakes, 40 N.B.R. 428.

C. Extent of punishment generally; excessive fines.

(§ IV C—117)—Excessive fine.

The costs imposed on a summary trial are a part of the fine and a fine of $100 without costs is not authorized under Code sec. 781, which in effect declares that the money penalty in cases to which it applies shall not exceed "with the costs $100;" but if a fine of $100 is imposed without any mention of costs it will be presumed that the costs formed a part of the sum of $100 and the conviction will be upheld.

The King v. Stark, 19 Can. Cr. Cas. 67, 18 W.L.R. 419.

(§ IV G—136)—Power to suspend.

Two justices of the peace sitting for the trial of indictable offences under sec. 782 of Part XV. of the Criminal Code. 1892, are a Court, and as such have power to suspend sentence under sec. 971 and impose costs. A railway conductor whose duty is to account to his employers for cash fares received, commits theft if, having accepted from a passenger for transportation a sum of money less than the regular fare, he fails to account therefor, and (Harvey, J., dissentiente) it is immaterial that the passenger paid the money and the conductor received it as a bribe for committing a breach of duty and allowing the passenger to travel without paying the prescribed fare.

Rex v. McLennan, 7 Terr. L.R. 309.

H. Parole; reprieve; pardon; ticket of leave.

(§ IV H—153)—TICKET OF LEAVE.

Where a convict has been released on ticket of leave from a provincial prison, and, while still under license, is convicted and sentenced to a term in a penitentiary, the remainder of the original sentence which he must serve out on forfeiture of his ticket of leave cannot be added to his penitentiary sentence, but he must, on the expiry of the latter, be sent to the gaol or prison named in the original sentence or, if the second conviction is in another province, then to a gaol or prison of the same class.

The King v. McColl, 19 Can. Cr. Cas. 59, 21 Man. L.R. 552.

V. Record.

Of summary conviction, see Summary Conviction; Certiorari.

One case reserved or stated for appeal, see Appeal.

(No cases.)

VI. Removal to other Federal district for trial.

(No cases.)

CROSS-EXAMINATION.

Of witnesses, see Witnesses, II.

CROWN.

Crown land, see Public Lands.

Constitutional questions, see Constitutional Law.

Expropriation by, see Eminent Domain.

Officers of, see Officers.

Right to bring action, see Attorney-General; Courts.

See also Public Moneys; Public Works.

I. IN GENERAL.

II. RIGHTS; POWERS; LIABILITIES.

I. In general.

(No cases.)

II. Rights; powers; liabilities.

(§ II A—25)—GOVERNMENTAL RAILWAYS.

Where an engine driver of a train on a Government railway in the manner of moving his train at a station transgressed the regulations of the railway, and a passenger was injured in alighting from the train by reason of the wrongful conduct of the engine driver, a case of negligence was established for which the Crown was liable under the provisions of sec. 20 of the Exchequer Court Act, R.S. 1906, ch. 140. (2) The rule as to the preponderance of affirmative evidence over evidence of a merely negative character as laid down in Lefeunteum v. Beaudoin, 28 S.C.R. 89, applied.

Delia Hamilton v. The King, 14 Can. Ex. R. 1.

The Crown in its operation of the Intercolonial Railway is not a common carrier, and apart from its statutory duties is not subject to the duties imposed by the common law upon common carriers. [The Queen v. McLeod, 8 Can. S.C.R. 1; The Queen v. McFarland, 7 Can. S.C.R. 216, referred to.]

Williams v. Government Railway Management Board, 11 East. L.R. 10.

To render the Crown liable upon a petition of right for acts of negligence of servants of the Crown in the operation of a government railway within the provisions of the Exchequer Act, R.S.C. 1906, ch. 140, sec. 20 (f) (amendment of 1910), such negligent acts must be the proximate, determining and decisive cause of the injury.

Charlton v. The King, 8 D.L.R. 911, 14 Can. Ex. 41.

CURTESY, (TENANCY BY THE).

See Descent and Distribution.

CUSTODY.

Of children, see Divorce and Separation, VI.; Infants, I.

CUSTOMS DUTIES.

See Duties.

DAMAGES.

I. GENERAL PRINCIPLES; NOMINAL DAMAGES; PREVENTING UNNECESSARY AMOUNT.

II. EXEMPLARY OR PUNITIVE.
- A. In general.
- B. For act of servant; carrier's liability.

III. MEASURE OF COMPENSATION.
- A. On contracts.
- B. For telegrams.
- C. Expulsion of or failure in duty to, passenger.
- D. In respect to freight or baggage.
- E. Torts generally; breach of promise.
- F. Fraud.
- G. Assault; false imprisonment; malicious prosecution; abuse of process.
- H. Libel or slander.
- I. Personal injuries; death.
- J. Injury; taking or detention of personal property.
- K. Injury to real property; nuisance.
- KK. Injury to business.
- L. Condemnation or depreciation in value by eminent domain.
- M. In injunction.
- N. In trademark, patent, and copyright cases.
- O. Mental anguish.
- P. Loss of profits.

Q. Time for which recoverable; prospective.
R. Counsel fees.
S. Mitigation; reduction.
T. Aggravation.
U. Apportionment.
IV. Assessment; double or treble damages.
V. Division of damage.

Review of, on appeal, see Appeal, VII.
Discretion in submitting damages to be awarded, various parties to one jury, see Appeal, 289.
Discretion as to granting new trial on excessive damages, see Appeal.
Prejudicial error as to measure of, see Appeal.
Assignment of right of action for, see Assignment.
Relevancy of evidence as to, see Evidence, XI.
Interest as, see Interest, I.
Liability of municipality for, see Municipal Corporations, II.
Allegations as to, see Pleading, II.
Right to set-off, see Set-off and Counterclaim.

I. General principles; nominal damages; preventing unnecessary amount.

(§ I—3a) — Substantial damages; difficulty in assessing.

Substantial damages may be awarded in spite of the fact that some speculation and uncertainty is necessarily involved in the assessment thereof. [Chaplin v. Hicks, [1911] 2 K.B. 786, followed.]

Wood v. Grand Valley R. Co., 5 D.L.R. 428, 3 O.W.N. 1356, 22 O.W.R. 269, 26 O.L.R. 441. [Varied, and damages reduced, 4 O.W.N. 556.]

(§ I—4a) — Damages in lieu of injunction; injury not committed.

Where an injury has not been actually committed, but is threatened, it is still a matter of doubt, whether the Court which might grant an injunction to restrain the threatened injury has any jurisdiction to award damages in lieu of an injunction which would have been preventive only and not mandatory. [Martin v. Price, [1894] 1 Ch. 276, considered.]

Canadian Pacific R. Co. v. Canadian Northern R. Co., 7 D.L.R. 120, 22 W.L.R. 289.

II. Exemplary or punitive.

A. In general.

(§ II A—6)—Torts or negligence generally.

Punitive damages will not be awarded a tenant for an eviction by his lessor from demised premises, where all loss might have been avoided if the tenant had acted diligently.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

III. Measure of compensation.

A. On contracts.

(§ III A 1—40)—Measure of compensation on contracts generally.

Damages that may be recovered by an injured party, are only those which have been or might have been foreseen when the obligation is contracted, provided the breach is not tainted with fraud.

Belanger v. Town of St. Louis, 8 D.L.R. 601.

(III A 1—42a)—Building contract.

Where a tender for the construction of work accompanied by plans and specifications has been accepted and a contract made accordingly, but the contract is not carried out through the fault of the party calling for tenders, the contractor is entitled to recover the value of the plans and specifications, especially when the opposite party has retained them and made no offer to return them.

Poutres Siegwart v. Deschambault, 5 D.L.R. 395, 41 Que. S.C. 453.

One for whom a building is constructed by a contractor, cannot recover damages for delay in completing it within the time limited by the contract, where the delay was due to changes for extra work ordered by the owner, as, under such circumstances, the contractor is required only to complete the building within a reasonable time. [Grey v. Stephens, 16 Man. L.R. 189, referred to.]

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

Money paid by a school district for teachers' salaries for the time they were unable to teach, because of the non-completion of a school-house within the time stipulated in the contract for its erection, cannot be recovered by the district, as non-liquidated damages for delay in the completion of the building, where, at the time the teachers were engaged, the school officers knew that the building would not be ready for occupancy at the beginning of the school term.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

(§ III A 1—44)—To construct railroad or side track.

Where a railway company was unable to definitely award the plaintiff a contract for construction of so much road as he could agreed with him, that in order to keep his teams employed during the winter, he might put in supplies necessary for the construction of so much road as he could complete during the working portion of the following summer, and that the company would guarantee him, in the event of

its being unable to award such contract, the cost of such supplies, together with ten per cent. advance thereon, the company upon not being able to award the plaintiff such contract, is liable to him for such advance upon a total cost of the supplies, and also for the loss sustained by him on a sale thereof, after due notice to the company. [Alfred v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, affirmed on appeal.]

Grand Trunk Pacific R. Co. v. Alfred, 5 D.L.R. 471.

Where a railway company, upon its failure to award the plaintiff a contract for constructing a piece of railway, did not pay him the value of construction supplies he had provided, and for which the railway company had agreed upon that contingency to pay for, the plaintiff becomes entitled upon the company's default to the cost of insurance carried on the supplies only after the time when the defendant became liable to pay for such supplies, when such insurance would be justifiable as in protection of the plaintiff's lien as an unpaid seller. (Per Simmons, J.)

Alfred & Wickham v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, 20 W.L.R. 111.

(§ III A 1—45)—Advertising contracts.

Where a written contract between the plaintiffs and the defendants by which the former were to place the latter's advertising, which contained nothing as to the time it was run, though there was a verbal contract that it should continue for a year, was unjustifiably cancelled by the defendants, the plaintiffs are not entitled to the commission which would have been earned on a year's business, but may recover a reasonable allowance for the services rendered by them.

McConnell v. Vanderhoff, 2 D.L.R. 841, 3 O.W.N. 800, 21 O.W.R. 653.

While the policy of the law is against making actionable certain classes of slight omissions, yet where a publishing firm contracts to publish, in a city directory issued by it from year to year, the name and calling and office address of a business man in the city, the publishing firm will be answerable in damages for the omission, although it was entirely unintentional and furthermore was against the firm's own general business interests, where the omission by its very nature must have caused loss to the other party to the contract, and that without proof of specific damages.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

(§ III A 1—51)—By agent.

The damages recoverable for the breach of an agreement by which an exclusive right of sale of property was given for thirty days, cannot be based upon the conjecture that the agent would have made a sale within that time; and the fact that he had money of a client in his hands and that he might have induced him to purchase the property, will not change the rule.

Cadwell v. Stephenson, 3 D.L.R. 759, 21 W.L.R. 199.

(§ III A 3—62)—Breach of contract to convey.

A vendor who after making a valid contract for the sale of land and receiving part payment, sells the land to a third person, is liable to the original vendee for the amount paid on account with interest, and in addition thereto damages for the breach of the contract.

Smart v. McIntosh, 8 D.L.R. 871, 22 W.L.R. 883.

(§ III A 3—63)—Breach of covenants.

Where a conveyance of land is made in part consideration for the support for life of the grantor by the grantee at the latter's place of residence, and the grantee, by his conduct, makes it impossible for the parties to live in the same house, the grantor is entitled to such damages as will compensate him once for all, that is for the future as well as for the past, for the breach of the contract. [Schell v. Plumb, 55 N.Y. 592; Amos v. Oakley, 131 Mass. 413; Parker v. Russell, 133 Mass. 74, applied; Parsons on Contracts, 111, 211, specially referred to.]

Zdan v. Hruden (No. 2), 4 D.L.R. 255, 22 Man. L.R. 387, 21 W.L.R. 620.

(§ III A 3—64)—Breach of lessor's contract.

Upon the refusal of a lessor to deliver possession of demised premises at the commencement of a term that was subsequently terminated, under a power reserved in the lease, by a sale of the premises, the lessee can recover damages for deprivation of possession from the commencement of the term to the date of such sale only, and not for the whole term.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

A lessor is not liable in damages for failing to supply a tenant with a team for working demised premises, where the lessor required them for working other land, which use was justified by an exception or reservation for that purpose provided by the terms of the lease.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

Where the plaintiff in an action for breach of an agreement to lease a hotel and sell its furniture and fixtures does not shew that his bargain was a good one, or the amount he lost by the defendant's refusal to fulfil his agreement, seventy-five dollars damages only was awarded.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

The measure of damages for the breach of a lessor's covenant to furnish a lessee with a horse for working demised premises, is the cost of supplying another, and not

the value of crops lost by reason of such default.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

(§ III A 4—70) — SELLER'S FAILURE TO DELIVER.

The measure of damages for the unwarranted refusal of a vendor to carry out the terms of an agreement to sell a hotel property, includes the expenses to which the purchaser was put in endeavouring to induce the vendor to carry out his contract or to refund the money paid on account of the purchase-price and the purchaser may be allowed his travelling expenses from his place of residence to the place where the property was situate in the same province.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205.

(§ III A 4—71)—MANUFACTURED ARTICLE.

Where a dredge was not delivered within the time specified in a contract of sale the net earnings thereof for the time delivery was delayed may be awarded the purchaser as general damages, notwithstanding that the plaintiff's pleading claimed only special damage, if such loss was included in the items of special damage claimed, although not allowed under that heading.

Brown v. Hope, 2 D.L.R. 615, 20 W.L.R. 907, 17 B.C.R. 220.

The non-delivery of a dredge within the time stipulated therefor does not entitle the purchaser to recover as damages a sum of money paid by him as a bonus to ensure the completion of scows, necessary for use with the dredge, before the date fixed for delivery of the dredge, as such loss was not within the contemplation of the parties at the time the contract of purchase was entered into.

Brown v. Hope, 2 D.L.R. 615, 17 B.C.R. 220, 20 W.L.R. 907.

(§ III A 7—75)—BUYER'S FAILURE TO COMPLETE PURCHASE.

Whether a stipulated liability for default in keeping alive an option is a penalty or liquidated damages may depend upon whether the damages though inevitable (1) are an enigma and incapable of exact calculation, or (2) are such that proof of them is extremely complex, difficult, and expensive, or (3) are such that the very thing intended to be provided against by the stipulation is to preclude the necessity of the minute, difficult, and complex proof. [McManus v. Rothschild (1911), 25 O.L.R. 138, applied.]

Kennedy v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, 23 O.W.R. 179.

(§ III A 4—76)—MANUFACTURED ARTICLE.

Breach by buyer—Measure of compensation—Attempted cancellation.

Somervell v. Trotter, 7 D.L.R. 813, 21 W.L.R. 143.

Where the seller under a conditional sale lien for the balance of the purchase-price of personal property re-takes and re-sells the goods, and on the trial of his action for damages against the original purchaser for neglect and refusal to accept and pay for the goods, introduces no evidence as to the amount of the purchase price upon the re-sale, it will be presumed against him that they brought the same price on re-sale as at the original sale.

Corey & Carmichael v. American-Abell Co., 6 D.L.R. 103, 21 W.L.R. 940.

In an action by the seller under a conditional sale contract, after the re-taking and re-sale of the goods, the measure of damages for which the conditional purchaser is liable in respect of his breach of contract where there is an available market for the goods, is, primâ facie, the difference between the contract price and the price realized on the re-sale. [Section 48 of the Sale of Goods Ordinance, N.W.T. Ord. (Alta. Consol. 1911), ch. 39, referred to.]

Corey & Carmichael v. American-Abell Co., 6 D.L.R. 103, 21 W.L.R. 940.

Under a contract for the sale of goods giving the purchasers no right to cancel the same, an attempt at cancellation by them before tthe date fixed for shipping the goods, does not deprive the vendors of the right to carry out their part of the contract and, if they afterwards shipped the goods, they are entitled to recover damages for their non-acceptance.

Sawyer-Massey Co., Ltd., v. Fedo Szlachetka, 4 D.L.R. 442, 21 W.L.R. 580.

(§ III A 4—80)—BREACH OF WARRANTY.

The measure of damages for the breach of warranty on the sale of a stallion that he was a 60 per cent. foal-getter, is the service charges the purchaser lost by reason of a large number of mares served by the horse not proving to be in foal.

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

Where the evidence shewed that the buyer of fruit could have realized a higher price at the time he discovered the fraudulent packing and labelling of grades and in consequence had to re-pack and grade the fruit, the loss necessarily caused by the delay is properly taken into consideration in assessing damages. [Weir v. Bissett, 3 N.S.R. 178, specially referred to.]

Graham v. Bigelow, 3 D.L.R. 404, 11 E.L.R. 114.

In awarding damages for breach of warranty as to fitness of an engine for certain work a loss of additional profits which the plaintiff anticipates he would have made had the engine been available for his work by reason of certain competing firms going out of business subsequent to the date of the contract of sale, will not be presumed to have been in the contemplation of the parties and will not be allowed.

Alabastine Co. (Paris), Ltd. v. Canada Producer and Gas Engine Co., Ltd., 8 D.L.R. 405, 4 O.W.N. 486.

(§ III A 4—82)—Failure of seed to grow.

The damages recoverable for breach of warranty where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, and was in consequence not reasonably fit for the purpose for which it was intended, include deterioration of the lands in which the seed was sown, as well as the wages of the help employed in pulling out the wild mustard.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

(§ III A 4—83)—Defects causing loss of use of property.

A stipulation in a contract for the sale of machinery that the vendor should not be liable for damages on account of delays or defects of design, material, or workmanship, other than to furnish, without charge, repairs or new parts therefor, does not preclude the recovering of damages by the vendee for delay in operating a mill, due to the vendor's failure to install an engine complying with a guaranty that its speed should not vary more than 2 per cent. under varying load conditions.

The Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

Damages may be recovered upon a vendor's agreement made after the completion of a contract of sale upon the discovery that a portion of the goods sold were defective, to compensate the vendee for any loss resulting therefrom.

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

(§ III A 5—85)—Of employment.

Under an employment "at the rate of" a stated sum per annum, the salary is apportionable, and upon the discharge of the employee before the expiration of the year, he is entitled only to such proportionate part of his salary as he has actually earned.

The King v. McLeod, 4 D.L.R. 491, 17 B.C.R. 189, 21 W.L.R. 517 and 804.

(§ III A 5—87) — Wrongful dismissal; seeking other employment.

An engineer who is engaged to superintend a mine and who is also as incidental to his employment housed by the company employing him, is also entitled to damages in lieu of housing expenses for the balance of such contract.

Silver v. Standard Gold Mines, Ltd., 3 D.L.R. 103.

A professional man (e.g., an engineer with managerial functions) is not obliged to seek for menial work if he cannot find a position equal in importance to that from which he has been dismissed unjustly, and the employer in that event is responsible for the payment of the salary for the entire period of the contract up to the date of its expiry.

Silver v. Standard Gold Mines, Ltd., 3 D.L.R. 103.

(§ III A 7—95)—Liquidated damages.

Where a contract contains a provision that either party to it may terminate it on payment of $500 to the other party, said amount may be either a penalty or liquidated damages; such question is one of law to be determined by taking into consideration the intention of the parties from the language used and the circumstances of the case taken as a whole as at the time the contract was made. [Law v. Local Board of Redditch, [1892] 1 Q.B. 127, referred to.]

Ellis v. Frughtman, 8 D.L.R. 353, 22 W.L.R. 776.

(§ III A 7—97)—Liquidated damages; delay in completing building contract.

A stipulation in a building contract for the payment by the builder to the property owner of a fixed sum per day as liquidated damages for delay in completion of the building after the time limited for completing the work will be presumed to apply only where the work of building has been entered upon, not where there has been a total failure to perform the contract.

Lembke v. Chin Wing, 4 D.L.R. 431, 17 B.C.R. 218, 21 W.L.R. 895.

A stipulation for liquidated damages for delay in the completion of a school-house by a contractor, applies only to the completion of the building as a whole and not to the finishing of two rooms therein, as required by the contract, at a date earlier than that fixed for the completion of the entire building.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

A contractor for the construction of a work cannot be held liable under a contract for a penalty thereby provided for delay in finishing the work, if a settlement has already been made with him in full for the work as far as it has proceeded, without deduction for the delay, as the failure to deduct this penalty operates as a waiver of the right to the same. [Halsbury's Laws of England, vol. 3, p. 246; Duckworth v. Alison (1836), 1 M. & W. 412, and Clydebank Engineering and Shipbuilding Co. v. Castaneda, [1905] A.C. 6, specially referred to.]

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405.

Liquidated damages stipulated for in a contract for the building of a schoolhouse, for delay in completing it, cannot be awarded where the school district secured the use of rooms therein sufficient to accommodate all of the pupils of the district, which were finished before the time fixed by the contract for the completion of the entire building.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827.

A stipulation in a construction contract for liquidated damages for delay beyond a certain day, is not applicable where the delay was caused by the performance of extra work ordered by the owner of the building. [Dodd v. Churton, [1897] 1 Q.B. 562, followed; Westwood v. Secretary of State, 7 L.T.N.S. 736, 11 W.R. 261, 262; Roberts v. Bury Commissioners, L.R. 4 C.P. 755, L.R. 5 C.P. 310; Jones v. St. John's College, L.R. 6 Q.B. 115; Grey v. Stephens, 16 Man. L.R. 189; Holme v. Guppy, 3 M. & W. 387, specially referred to.]

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

E. Torts generally; breach of promise.

(§ III E—135a)—AUTOMOBILE OPERATION.

Where a motor collides with a waggon and in a negligence action against the motorist, the jury assess damages against him taking into consideration upon the evidence (1) repairs to the waggon; (2) necessary painting and that it would still be a patched-up waggon; (3) a valuable horse made lame and still lame; a verdict of $100 will not be disturbed as excessive. [Wentworth v. Hallett, 4 N.B.R. 560; Haden v. White, 4 N.B.R. 634; Prescott v. Wallace, 13 N.B.R. 230, referred to; see also Vanhorn v. Verral, 4 D.L.R. 624, upon the quantum and increasing of damages.]

Campbell v. Pugsley, 7 D.L.R. 177.

(§ III E—140)—NEGLIGENCE IN BUILDING.

A contractor who negligently misplaces a window in the building of a house is liable in damages therefor.

Iredale v. Drewey, 4 D.L.R. 868, 19 W.L.R. 931.

(§ III E—142)—BREACH OF PROMISE.

Where the Judge trying an action for breach of promise of marriage without a jury finds in favour of plaintiff, but also finds that the defendant's refusal to marry the plaintiff caused her no anxiety or suffering, the damages will on that account be assessed at a lower figure than otherwise.

Chizek v. Tripp, 4 D.L.R. 369, 20 W.L.R. 648.

(§ III E—142a)—SEDUCTION; MEASURE OF DAMAGES FOR.

A new trial will not be granted where the trial jury awarded $5,000 damages to the plaintiff in an action for damages for assaulting and ravishing plaintiff without her consent, on the ground of excessive damages, where, by reason of the outrage, plaintiff became pregnant.

Dunn v. Gibson, 8 D.L.R. 297, 4 O.W.N. 329, 23 O.W.R. 356.

Where, in an action to recover damages for assaulting and ravishing plaintiff without her consent, the plaintiff's counsel, without objection, was allowed to urge upon the jury large damages on account of the expense plaintiff would be put to for the bringing up of a then unborn infant, while as a matter of fact the infant when born lived only a day, a new trial will not be granted, since the jury must have had in mind the possible contingency of an early death.

Dunn v. Gibson, 8 D.L.R. 297, 4 O.W.N. 329, 23 O.W.R. 356.

(§ III E—143)—MARINE TORTS; INJURY TO SCOW.

McLean v. Downey, 3 D.L.R. 893, 3 O.W.N. 1592, 22 O.W.R. 782.

(§ III E—144)—WRONGFUL SEIZURE.

Where the lien note of a buyer of horses was transferred to a bank by the payee thereof as security for money borrowed for him from the bank endorsing thereon an assignment of all his interest in the horses which was invalid and an agent of the bank seized an old crippled team for the horses covered by the note and the plaintiff admitted that he was willing that the bank should take such team in place of the one covered by the note, he is not entitled to damages for the illegal detention of that team.

Alfred Thien v. The Bank of British North America, 4 D.L.R. 388, 21 W.L.R. 192.

(§ III E—144a)—WRONGFUL EVICTION.

A tenant who was wrongfully evicted by his landlord, and suing for damages must prove the value of the unexpired portion of his term, if damage is claimed in respect of the latter for the excess in the value thereof over the share of rent from payment of which the tenant was absolved by the eviction.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

G. Assault; false imprisonment; malicious prosecution; abuse of process.

(§ III G—152) — FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

Upon the quantum of damages, in an action for false imprisonment, where the person and character are injured, it is difficult to fix the limit, and a new trial will only be granted on the ground of excessive damages where the verdict of a jury is so large as to be perverse and the result of gross error or there were undue motives or misconception. [Gough v. Farr, 1 Y. & J. 477; Praed v. Graham, 24 Q.B.D. 53, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

The jury may take into consideration as to the quantum of damages, in an action for false imprisonment the following elements: time lost, business interrupted, physical and mental suffering, the indignity, circumstances of family, and condition of gaol, cost of release as well as the illegal restraint itself as distinct from all else. [Sedgwick on Damages, secs. 461-463, and sec. 49, specially referred to.]

men's Compensation Act has the option of accepting the annual income specified in the Quebec Workmen's Compensation Act or of demanding that the capitalization thereof (not exceeding $2,000) be handed over to an insurance company in order to purchase an annuity therewith, but no similar option is available to the employer to confess judgment for $2,000 or for the annuity which that sum would purchase, as in satisfaction of his liability. [Grand Trunk R. Co. v. McDonnell, 5 D.L.R. 65, followed.]

McDonnell v. Canadian Pacific R. Co., 7 D.L.R. 138.

Under the Quebec Workmen's Compensation Act the annual payment to be made for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity.

McDonnell v. Canadian Pacific R. Co., 7 D.L.R. 138.

(§ III I 4—195)—DEATH.

In an action under the Fatal Accidents Act (Ont.), 1 George V. ch. 33, for damages for the death of a son the following are proper matters of consideration upon the quantum of damages: (a) the age of deceased; (b) his length of absence from home; (c) what help he had given his parents during that absence; (d) what interest he had shewn in his parents; (e) his wages and habits as to economy.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

J. Injury; taking or detention of personal property.

(§ III J—203)—CONVERSION.

Where an automobile was delivered to the defendants with authority to make all repairs thereon at a cost not to exceed a specified sum and they put a greater amount of repairs on it and then converted it to their own use they must answer for its value at the time of its conversion and cannot reduce their liability by any increased selling value attributable to the unauthorized repair. [Greer v. Faulkner, 40 Can. S.C.R. 399, applied.]

Gallagher v. Ketchum & Co., Ltd., 2 D.L.R. 871, 3 O.W.N. 843, 21 O.W.R. 696.

Where the plaintiff in an action for trover, has repossessed himself of the goods and chattels alleged to have been converted, without it appearing that he had suffered any appreciable damages, he is entitled to nominal damages only.

Delbridge v. Pickersgill, 3 D.L.R. 786, 21 W.L.R. 285.

(§ III J—203a)—RELIEF AGAINST DAMAGES ON RETURNING GOODS.

Notwithstanding that there may have been a technical conversion of the plaintiff's goods by the defendant, the Court has power to relieve the defendant from payment of damages for the conversion on terms whereby the goods are returned.

Duryea v. Kaufman, 2 D.L.R. 468, 3 O.W.N. 651, 21 O.W.R. 141.

(§ III J—204a)—DESTRUCTION OF PROPERTY: KILLING DOGS.

The sum of $125 is not an excessive sum to award as damages for the loss of a half-bred collie dog, which is shewn to have been of more than ordinary intelligence, kind and affectionate, a good watch-dog, useful about the farm, and well trained to herd and attend to cattle.

McNair v. Collins, 6 D.L.R., 510, 3 O.W.N. 1639, 22 O.W.R. 891, 27 O.L.R. 44.

K. Injury to real property; nuisance.

(§ III K 1—206)—FORCIBLE ENTRY OR POSSESSION.

The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect.

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

(§ III K 1—206a)—TRESPASS TO LAND.

The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved, and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land. [France v. Gaudet, L.R. 6 Q.B. 199, followed.]

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

Where several animals, belonging to different owners, have at various times trespassed upon the plaintiff's land, and the whole damage done by all of them can be ascertained, but the defendant's animal has sometimes been among those trespassing and sometimes not, and there is no proof that any particular damage was done by any particular one of the animals, the Court will, nevertheless, assess the damages against the defendant as best it can.

Broderick v. Forbes, 5 D.L.R. 508.

(§ III K—210)—ILLEGAL DISTRESS.

The measure of damages for illegal seizure is not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby the tenant is thrown out of employment or is prevented from engaging in his ordinary business; the value of the goods is the "fair value to the tenant."

Jarvis v. Hall, 8 D.L.R. 412, 4 O.W.N. 232, 23 O.W.R. 282.

(§ III K 1—214)—Opening up ditch.

A municipality is answerable in damages for its wrongful act in casting water into a ravine on the land of the plaintiff, the result of which was to cause a more rapid erosion of the land at the mouth of the ravine, and to keep the land about it wet and impassable for a longer period than formerly.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881.

(§ III K 1—214a)—Wasteful method of working land.

Upon denying a vendee rescission of a contract for the purchase of timber lands where the price to be paid was based upon the number of feet of lumber cut, the vendor's counterclaim for loss occasioned by the wasteful method adopted by the vendee for working the lands, will also be denied in the absence of some obligation on the part of the latter as to the method of operation, since, in any event, under the contract of purchase, the land belonged to the vendee.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52.

(§ III K 2—216)—Cutting timber.

The measure of damages in an action by a patentee of mining lands in Ontario for trespass in cutting and removing pine timber is the full value of the timber so cut and removed.

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

The measure of damages for a wilful and deliberate trespass in cutting and removing timber from the timber limits of another, where the evidence does not warrant the application of any other rule, is the value of the timber after it was severed and manufactured while on the plaintiff's land. [Union Bank of Canada v. Rideau Lumber Co., 4 O.L.R. 721, specially referred to.]

Laursen v. McKinnon, 4 D.L.R. 718, 20 W.L.R. 384.

(§ III K 2—218)—Fall of water tank.

A sub-contractor who constructed a steel support for a water tank that was erected on the roof of a building, which fell, by reason of the defective construction of the supports, must indemnify the principal contractor to whom he supplied it for all damages the latter may be condemned to pay by reason of the fall of the tank.

Wilson v. The H. G. Hogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

(§ III K 3—220) — Injuries to water rights; overflows.

The owner of certain mining claims for which a certificate has been issued by a mining recorder shewing that all the requirements of the Mining Act of Ontario, 8 Edw. VII. ch. 21, had been complied with, though the title thereto acquired was inchoate because the Government charges had not been paid, may recover damages for the wrongful flooding of the mining claims by the raising of the waters of a certain river by a dam constructed by a water power company holding a lease from the Crown of a water power location on the river, granted pursuant to 61 Vict. (Ont.) ch. 8, though the waters of the river had not been raised to a height exceeding that authorized by the lease, which lease, while it conferred the right to flood any Crown land along the river and its expansions, contained another provision that the lessee should not, by virtue of the lease, have the power to overflow or cause to be overflowed any lands other than those demised.

Bucknall v. British Canadian Power Co., 5 D.L.R. 574, 3 O.W.N. 1138.

L. Condemnation or depreciation in value by eminent domain.

(§ III L 1—231) — Extent of property affected.

Where the Crown erects an ice pier on land of a riparian owner, the measure of damages, under the Expropriation Act, R.S.C., 1906, ch. 143, in addition to the value of the land taken, is compensation for injurious affection to the remainder of the property.

Pickels v. The King, 7 D.L.R. 698.

Where the owner of riparian land becomes entitled, under the Expropriation Act, R.S.C. 1906, ch. 143, to compensation for injurious affection to his property, because of the erection of an ice pier upon his land, the damages that he is entitled to recover are such as are inherent to the land and not to the person or to the business of the owner.

Pickels v. The King, 7 D.L.R. 698.

(§ III L 1—235)—Percentage for compulsory taking.

In addition to the damage for expropriation of lands by the Crown for harbour improvements, ten per cent. may be added by the Exchequer Court (Can.) for the compulsory taking.

The King v. Kendall, 8 D.L.R. 900, 14 Can. Ex. 71.

(§ III L 2—240)—Value; estimate of.

The expenses incurred in an expropriation of land for purposes of public utility form part of the proper indemnity payable to the owner.

Town of Saint-Oues v. Marchessault, Q.R. 42 S.C. 375 (Sup. Ct.).

The value of lands expropriated for a public work is to be determined prima facie upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation. [Brown v. The King, 12 Ex. C.R. 463, and Dodge v. The King, 38 Can. S.C.R. 149, specially referred to.]

The King v. Moncton Land Co., 1 D.L.R. 279, 13 Ex. Ct. R. 521.

(§ III L 2—241)—ESTIMATED AS OF WHAT TIME.

Compensation for the expropriation of lands for the purpose of a public work is to be measured by the market value of the lands as a whole at the time of expropriation, in respect of the best uses to which it can be put, taking into consideration any perspective capabilities and any inherent value it may have, and the damage to the remainder of the property held in unity therewith.

The King v. Kendall, 8 D.L.R. 900, 14 Can. Ex. 71.

(§ III L 2—244) — CUTTING OFF TERMINAL FACILITES.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

Robinson v. Canadian Northern R. Co., 5 D.L.R. 716, 21 W.L.R. 916.

(§ III L 2—250)—VALUE FOR SPECIAL USE.

The market price of lands expropriated by the Crown for public works is prima facie the basis of valuation in eminent domain proceedings, but where a use for a special purpose is shewn on the part of the owner a reasonable allowance must be added in respect thereof. [Dodge v. The Queen, 38 Can. S.C.R. 149, applied; and see annotation to this case.]

The King v. Rivers, 1 D.L.R. 505.

(§ III L 4—265) — RAILROADS AND STREET RAILROADS IN STREETS.

A contractor who constructs a railway is responsible for the damages caused to the adjoining proprietors by the works, even though these latter are indispensable and are provided for in the plans and specifications.

Marcotte v. Davis, 3 D.L.R. 851.

(§ III L 5—276) — ESTABLISHMENTS OF STREETS.

The fact that upon the opening of a public street across the plaintiff's property, a small triangular piece of land, left on one side of the street, was reduced in value, does not entitle him to special compensation over and above the general damage awarded for the injury sustained by the whole tract of land. (Per Howell, C.J.M.).

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

In a proceeding to take land for a public street, special damages cannot be awarded for shortening the remaining land between the street and a river bank, thereby injuring it for sub-division into city lots, where the street was laid out in the best possible manner in view of the topographical surroundings of the land. (Per Cameron and Richards, JJ.A.).

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

Where it was impossible to open a public street across a tract of land without leaving a small triangular piece separated from the remainder, or without the street crossing diagonally on one side of the land so as to leave it in bad shape to be divided into city lots, substantial damages cannot be awarded in addition to the general damages awarded for injury to the entire tract of land.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

A provision of a city charter that arbitrators in awarding damages for land taken for public streets should determine "(1) the intrinsic value of the property taken; (2) the increased value of the residue, and (3) the damage to the residue; and (that) the difference between (1) and (2) or (1) and (3) shall constitute the compensation" to which the landowner shall be entitled, amounts to a limitation as to the damages that may be awarded, and there cannot be included in an award the portion of the cost of opening a public street which would be assessed against the landowner. (Per Cameron and Richards, JJ.A.). [Christie v. Toronto, 25 Can. S.C.R. 551; Pryce v. Toronto, 20 O.A.R. 16; Richardson v. Toronto, 17 O.R. 491, distinguished.]

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

(§ III L 6—284) — CONSTRUCTION OF RAILROAD.

Upon an arbitration in eminent domain proceedings in reference to damage to land by railway construction, in cases in which sec. 198 of the Railway Act (Can.) requires the amount of benefit to be "set-off" against the amount of damage, it is necessary that the arbitrators should specify the amount of each in their award.

Re False Creek Flats Arbitration, 1 D.L.R. 363, 20 W.L.R. 387, 17 B.C.R. 282, affirmed Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 21 W.L.R. 761.

M. In injunction cases.

(§ III M—290)—IN INJUNCTION CASES.

Where, in an action for specific performance there is a counterclaim for damages caused by the plaintiff's injunction restraining the defendant from using the land during the pendency of the action, and the plaintiff's action is dismissed, the proper practice is to apply in chambers for a determination of damages on the counterclaim. (Per Stuart, Walsh and Scott, JJ.) [Albertson v. Secord, 1 D.L.R. 204, referred to.]

Evans v. Norris, 8 D.L.R. 652, 22 W.L.R. 818.

(§ III M—292) — Upon undertaking or bond.

Where the plaintiff in an injunction suit had reasonable grounds for instituting his action but the injunction was dissolved without reference to the merits because improperly launched, no damages should be awarded upon the usual undertaking given upon its issue. (Per Scott, J.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

N. In trademark, patent, and copyright cases.

(§ III N—298)—Copyright cases.

Cartwright v. Wharton (No. 2), 6 D.L.R. 876, 4 O.W.N 248, 23 O.W.R. 218.

O. Mental anguish.

(§ III O 1—306)—To passengers.

Where as a result of a collision between a railway train and a street car due to negligent operation of the train, a passenger on the street car was thrown into a subway, a verdict for substantial damages may be given against the railway company whose negligence caused the injury, although the only substantial injury proved was that the plaintiff had in consequence suffered from traumatic neurasthenia and caused the plaintiff to be subject to insomnia and nerve troubles incapacitating him for his usual occupation, although such result is attributable to the mental shock as well as to the physical. [Victorian Railways Commissioners v. Coultas (1888), 13 A.C. 222, and Dulieu v. White, [1901] 2 K.B. 669, considered; Geiger v. G.T.R. Co., 10 O.L.R. 511, and Henderson v. Canada Atlantic, 25 O.A.R. 437, specially referred to.]

Ham v. Canadian Northern Railway Co., 1 D.L.R. 377, 20 W.L.R. 359. [Varied by disallowing claim for interest. Ham v. Canadian Northern R. Co. (No. 2), 7 D.L.R. 812.]

P. Loss of profits.

(§ III P 1—331) — Due to personal injuries.

A reduction in wage-earning capacity is to be established according to the ordinary rules, and the employer cannot, by offering a higher wage or a new employment at the old figures, prevent the workman from obtaining compensation under the Quebec Workmen's Compensation Act.

The Grand Trunk R. Co. of Canada v. McDonnell, 5 D.L.R. 65, 18 La Rev. de Jur. 369.

(§ III P 1—334)—Exclusion from land.

Where excavations and other trespasses by a railway company prevented the land owner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and unhealthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damage as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced number.

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

(§ III P 2—340) — From breach of contract.

Where one who has agreed to cut and deliver at a given point a certain quantity of hay belonging to another fails to deliver all the hay agreed upon, the owner may recover the profit which he would have made by a sale of the hay not delivered.

Webber v. Copeman, 7 D.L.R. 58, 21 W.L.R. 961.

(§ III P 2—342)—By seller.

Where one agrees for good consideration with the owner of securities to sell the securities for him within a limited time for a certain price, and fails to fulfil his agreement, the owner of the securities is entitled to recover the agreed price less the amount for which the securities can be sold, and a statement of the last mentioned amount in a letter from the owner's solicitor to the registrar of the Court may be accepted as sufficient evidence thereof.

Martin v. Munns, 3 D.L.R. 435, 3 O.W.N. 1055.

In an action by the buyer of goods for damages for breach of contract in failure to deliver goods promptly, where the buyer gives the seller written notice prior to the dilatory delivery that his loss by the delay will be $40 per day and afterwards introduces evidence of a greater daily loss, the notice prevails and limits the damages to the $40 per day.

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

Where, upon an agreement of sale of a boiler and its attachments, with stipulation for delivery on a fixed date, the seller violated the contract by being late with the delivery and when delivered one of the essential attachments was a misfit, the buyer is bound to be reasonably prompt in minimising, so far as in his own power lies, the damage resulting from such violation of the contract by the seller, and this especially where the buyer is claiming a very large daily loss therefor.

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

Where the seller of a boiler and attachments agrees to deliver at a certain time, and at the time of the agreement of sale knows the purpose for which the buyer is purchasing and that prompt delivery is essential and subsequently before the date for delivery is warned by the buyer of the

necessity for prompt delivery, and where the goods are shipped twenty days later than the date agreed upon and there is additional delay because one of the essential attachments had not been shipped at all and another of them was a misfit, the seller is liable in damages for each of these failures to deliver promptly in violation of his contract.

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

(§ III P—343)—By purchaser.

Loss of probable rentals from houses in course of construction because of the contractor's delay in completing can be allowed to the owner in abatement of the price only when a time has been specified for doing the work or after the owner has given notice to proceed with it. [See 2 Canadian Ten Year Digest, 4279, 4315.]

Elford v. Thompson, 1 D.L.R. 1, 19 W.L.R. 809.

Supposed or estimated profits that might have been made had the defendant performed his agreement to lease a hotel and sell its furniture and fixtures, are too uncertain to be made the basis for a recovery of damages for the breach of the agreement.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

Where it would have been necessary for the plaintiff to have sent a man from Scotland to Canada in order to have purchased goods similar to those the defendant failed to deliver under a contract of sale, the expenses of such trip will be awarded as damages in an action for breach of the contract. [See also Leake on Contracts, 6th ed., p. 776, 778.]

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

The damages for breach of warranty on the sale of goods which were not returned, is the difference between their value and the value which they would have borne without the defect warranted against; and it is no answer to shew that by reason of advantageous re-sales the purchaser made a profit on the transaction, notwithstanding the defect.

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

Damages for the failure to deliver goods sold in Canada for shipment to Scotland, the purchasers paying the transportation charges, will be based on the Canadian market price, and not on the prices ruling in Scotland. [See also Leake on Contracts, 6th ed., p. 778, 785.]

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

The measure of damages for misinformation contained in a list of property listed for sale with a real estate exchange, which was sold by it to the plaintiff, a real estate broker, who secured a purchaser for property improperly listed by the defendant, is the commissions the latter would have earned had the sale been completed. [Spedding v. Nevell, L.R. 4 C.P. 212; and Meek v. Wendt & Co., 21 Q.B.D. 126, followed.]

Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 921.

(§ III P 2—344)—By contractor for work on dismissal.

Where a contractor claims damages for being prevented from completing his contract where time is not of the essence, after being in default for not completing within the contract time, and without being allowed a reasonable time within which to complete subsequent to notice fixing a fresh date for completion, the measure of damages is the difference between the contract price of the unfinished portion of the work, and the cost of completing it within the period of time which would have been a reasonable time for completion after default.

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405.

S. Mitigation; reduction.

(§ III S—357)—Effect of insurance.

Where the widow or heirs of a person killed as the result of an accident sue the person responsible for such death in damages the defendant is entitled to have the amount of damages suffered diminished by whatever sums the heirs may have received under the terms of accident policies carried by the deceased.

Canadian Northern Quebec R. Co. v. Johnston, 7 D.L.R. 243.

U. Apportionment.

(§ III U—365)—Apportionment.

Where a municipality and a power company have been jointly condemned to pay damages to the heirs of a person who was drowned in a river owing to a defective guard-rail, the Court will, as between the co-defendants, condemn the company to pay the entire amount so found to the corporation, plaintiff in warranty, when it is established that the municipality has for years been protesting that the company failed to take proper precautionary measures to ensure the safety of the highway and of banks of the river, and where the power company was under a legal duty in that regard the neglect of which was the cause of the death.

Village of Richelieu v. Montreal and St. Lawrence Light and Power Co., 3 D.L.R. 145.

IV. Assessment; double or treble damages.

(§ IV—370) — Assessment; double or treble damages.

The maker of a lien note cannot recover treble the amount taken by the holder of the note for costs and expenses of a seizure of the chattels for which the note was given, as provided by R.S.S. (1909), ch. 51, where the note provided that the maker

would pay "all reasonable costs of collection, including Court costs and bailiff's fees"; such agreement is a waiver of the benefit of the statute. [Union Bank v. McHugh, 14 Can. S.C.R. 473, applied.]

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

V. Division of damage.

(No cases.)

DANGEROUS AGENCIES.

Master's liability for servant's use of, see Master and Servant.

Negligence as to, generally, see Negligence.

Question for jury as to what constitutes, see Trial.

Electricity, neglect in control of, see Electricity.

DEATH.

I. In general.

II. Right of action for causing.

A. In general.

B. Who may maintain and for whom.

III. Who liable for causing.

IV. Defences.

V. Authority to compromise claim for.

VI. Effect of.

Abatement of cause of action by, see Abatement and Revival, I.

Presumption of, see Evidence.

Admissibility of declarations of deceased person, see Evidence.

Of insured; cause of, see Insurance, VI.

Actionable negligence causing death, generally, see Negligence.

Proximate cause of, see Proximate Cause.

Hotel keeper causing, see Intoxicating Liquors, IV. B.

I. In general.

(No cases.)

II. Right of action for causing.

A. In general.

(§ II A—6)—Death resulting from employment work (Workmen's Compensation).

The death of a servant is due to the negligence of the master where, for the purpose of lumbering operations, the servant is furnished with a pole and a fellow-servant with an inch board for the purpose of supporting a derrick which the servants were engaged in raising, during the construction of a "log jammer," of which the derrick was a part, and which, in the course of the operation, it was necessary to support for a time by placing the pole and the board under it upon frozen ground, snow and ice, if the superintendent in charge of the work should have known that the board and pole were insufficient supports without proper spikes to prevent slipping, and by reason of their insufficiency the derrick fell when it came on the supports and fatally injured the servant while holding the pole.

Delyea v. White Pine Lumber Co., 2 D.L.R. 863, 3 O.W.N. 823, 21 O.W.R. 665.

Where a workman received an injury in the course of his employment which resulted in hernia and he underwent an operation therefor and at the same time he was operated on for an old hernia on the opposite side from the new one, which had nothing to do with the injury complained of or with the operation necessitated thereby, and after the operations had been apparently successfully performed blood poisoning was found in both wounds and caused death a few days later and there was nothing to shew where the infection originated, the operating surgeon being of the opinion that it began in both at the same time, a finding of the trial Judge under a Workmen's Compensation statute, that the death resulted from the injury received in the "course of employment," will not be disturbed. [Dunham v. Clare, [1902] 2 K.B. 292, and Ystradowen v. Griffiths, [1909] 2 K.B. 533, followed.]

Re Eddles and School District No. 1 of Winnipeg, 2 D.L.R. 696, 21 W.L.R. 214, 22 Man. L.R. 240.

B. Who may maintain and for whom.

(§ II B—11)—Non-resident aliens.

An alien non-resident dependent of a workman who lost his life as the result of an accident arising out of and in the course of his employment while resident in the province, is entitled to compensation under the B.C. Workmen's Compensation Act, 1902, 2 Edw. VII. (B.C.) ch. 74, now R.S.B.C. 1911, ch. 244.

Krzus v. Crow's Nest Pass Coal Company, 8 D.L.R. 264, [1912] A.C. 590, 28 Times L.R. 488.

(§ II B—13)—Parents.

The right of action given to the mother of a minor, killed by accident, by art. 1056 C.C. is personal to her and does not come from the deceased nor from the succession.

Richard v. Canadian Pacific Ry. Co., 13 Que. P.R. 268 (Sup. Ct.).

Where the death of a child is alleged to have been caused by the wrongful act, neglect, or default of the defendant, and where compensation in damages for negligence causing death is given by statute to certain relatives for their financial loss but with a provision that the action for same shall be brought by the executor or administrator of the deceased child suing in a representative capacity, and where the action is limited by the Act to a certain period after the death, and an action was brought before the expiry of the limitation period, by the parent as such, a motion on his behalf after the limitation period had

expired, to amend by suing in the alternative as the personal representative of the deceased child will not be granted, as its allowance would operate to defeat the statute. [N.W.T. Ordinances, 1911 (Alta.) ch. 48, sec. 3, referred to.]

McKerral v. The City of Edmonton, 7 D.L.R. 661.

Where the parent of a deceased child, whose death was alleged to have been caused by certain wrongful acts (which would not be grounds for an action at common law) is given a certain right of action therefor by statute, and where the statutory provision requires any such action to be brought by and in the name of the executor or administrator of the deceased child; an action of that class instituted by the parent as such, instead of as such executor or administrator, cannot be maintained. [Monaghan v. Horn, 7 Can. S.C.R. 409, followed; Lord Campbell's Act, 9 & 10 Vict. ch. 93; N.W.T. Ordinances 1911 (Alta.), ch. 48, sec. 3; Osborn v. Gillett (1873), L.R. 8 Ex. 88, referred to.]

McKerral v. The City of Edmonton, 7 D.L.R. 661.

The mother has a pecuniary interest in the life of a son who is killed giving her the right to sue in damages those responsible for his death even though at the time of such death her own husband be quite able to support her.

Dube v. City of Montreal, 7 D.L.R. 87.

(§ II B—17)—Personal representative.

Two actions brought on account of death of same person—Order staying one—Actions by mother and widow as administratrix.

Scarlett v. Canadian Pacific R. Co., 2 D.L.R. 891, 3 O.W.N. 1006.

III. Who liable for causing.

(§ III—20)—Who liable for causing.

An employer is liable for the death of an employee, caused by the negligence of another employee, where it appears that it being the duty of an electrical expert engineer in the employ of an electric company to make a test of an electric generator, which had been just set up by the workmen of the company's mechanical department, and he, before making the test, informed the foreman of the mechanical department that he did not think the generator was properly secured to the floor, and such foreman ordered two of the men in his department to be present at the time the test was made for the purpose of doing all necessary mechanical work to the machine, and the workmen were of the same opinion as the expert as to the insecurity of the generator and suggested to him that they would tighten up certain bolts, fastening the machine to the floor, to which he assented and they proceeded to do so without any further orders from him, and shortly after the electrical expert saw one of the servants standing up near the machine as if through with the work he had undertaken to do, and, taking it for granted that all was clear, turned on the power, causing the death of the other servant who was still working at the bolts.

Darke v. Canadian General Electric Co., 4 D.L.R. 259, 3 O.W.N. 817, 21 O.W.R. 583.

A railway company is not liable at common law for the death of the fireman of a locomotive that was propelling a snowplough, as the result of a collision with another train, due to the negligence of the engineer in charge of the engine in continuing to run it without attempting to learn the cause of the failure of the signalman on the plough to give crossing and station signals, where no negligence on the part of the signalman was shewn, as the engineer whose negligence caused the accident was the deceased's fellow-servant.

Jones v. Canadian Pacific R. Co., 5 D.L.R. 332, 3 O.W.N. 1404, 22 O.W.R. 439.

Where a pole erected by a telephone company upon a street of a municipality has decayed to some extent, but would nevertheless have stood for some time without falling by its own weight, and was still fit to be used for the purpose for which it was erected, and one passing along the street, in a frolic, jumps up and catches a guy wire attached to the pole, and pulls the pole down upon his companion and injures him, neither the telephone company nor the municipality is responsible for such injuries. [Nordheimer v. Alexander, 19 Can. S.C.R. 248; and Englehart v. Farrant, [1897] 1 Q.B. 240, discussed and distinguished.]

Johnson v. City of Montreal and The Merchants' Telephone Co., 7 D.L.R. 233, 42 Que. S.C. 450.

Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company. ["The Bernina," 13 A.C. 1, and Burrows v. The March Gas and Coke Co., L.R. 5 Ex. 67, followed.]

Pettit v. Canadian Northern R. Co., 7 D.L.R. 645, 22 W.L.R. 265.

A navigation company is not liable in an action under the Ontario Fatal Accidents Act brought by the plaintiff on behalf of herself and her infant children, to recover damages for the death of her husband, whose body was found in the hold of one of the defendant's vessels which was laid up alongside of a wharf, for the winter, where, from the evidence, it is clear that the deceased had met his death by falling through an open hatch but was not upon the boat in which his remains were found by reason of any business which concerned the defendants nor upon any invitation ex-

press or implied of the defendants but merely out of curiosity or interest he had by reason of having formerly been employed upon the vessel and of his anticipation of being employed there at a later date, where the defendants were not guilty of any act of active negligence and had not deceived the deceased by means of a trap, whether the deceased was to be considered as a bare licensee or as a trespasser upon the boat. [King v. Northern Navigation Co., 24 O.L.R. 643, affirmed on appeal; Perdue v. Canadian Pacific R. Co., 1 O.W.N. 665, specially referred to; see annotation to this case.]

King v. Northern Navigation Co., 6 D.L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

In an action under the Fatal Accidents Act (Ont.) setting up that deceased was an employee, an invitee, or a licensee, it is quite immaterial (in so far as the law of master and servant is concerned) to determine whether or not the contract of employment of deceased was still in effect covering the time of the accident if the master had directed a suspension of the work covering the date in question, and if the employee had been directed not to report for service until a future date. (Per Garrow, J.A.).

King v. Northern Navigation Co., 6 D.L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

IV. Defences.

(§ IV—26)—Contributory negligence of deceased.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom.

Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, 21 O.W.R. 808.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom. [Deyo v. Kingston and Pembroke R. Co., 8 O.L.R. 588, and Barnes v. Nunnery Colliery Co., [1912] A.C. 44, specially referred to; Moore v. Moore, 4 O.L.R. 167, distinguished; Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, affirmed on appeal.]

Mercantile Trust Co. v. Canada Steel Co. (No. 2), 5 D.L.R. 55, 3 O.W.N. 1467, 22 O.W.R. 568.

(§ IV—29)—Workmen's Compensation Act (Alta.)

An award of $1,000 as damages for the death of a workman, cannot be based by an arbitrator under the Workman's Compensation Act of Alberta, 1908, upon the facts that the manager of the company informed the claimant that her claim would be settled, and that the solicitors for the company wrote the solicitors for the claimant that they thought the matter should be settled, and that an assurance company, which was liable to indemnify the company in respect of such claim, sent a letter to the claimant making her an offer of one thousand dollars, in settlement of her claim, which did not appear to have been authorized by the company with whom the workman had been employed and against which the award was made.

Re Reid and The Leitch Collieries, Ltd., 5 D.L.R. 50, 21 W.L.R. 689.

V. Authority to compromise claim for.

(No cases.)

VI. Effect.

(No cases.)

DEBTOR AND CREDITOR.

Arrest for debt, see Arrest.

Insolvency of debtor, see Assignment for Creditors; Banks, IV.; Companies, VI.; Insolvency; Partnership.

As to remedies of creditor, see Attachment; Fraudulent Conveyances, VII.; Garnishment.

Compromise and settlement between, see Compromise and Settlement.

Creditors of decedent, see Executors and Administrators.

As to exemptions, see Exemptions; Homestead.

Conveyances fraudulent as to creditors, see Fraudulent Conveyances.

Situs of debt for purpose of garnishment, see Garnishment, I.

Rights of husband's creditors as affected by marital relations of debtor, see Husband and Wife, II.

Joint creditors and debtors, see Joint Creditors and Debtors.

Lien of creditor, see Liens; Mechanics' Liens.

Protection of creditors under recording acts, see Records, III.

Rights of creditors in trust fund, see Trusts, III.

Decedent, see Descent and Distribution.

DECEIT.

See Fraud and Deceit.

DECLARATIONS.

Admissibility in evidence, see Evidence, X.

In pleading, see Pleading, II.

DECREE.

See Judgment.

DEDICATION.

I. Mode and effect.
- A. In general.
- B. By map or plat.
- C. Who may dedicate.

II. Acceptance.

III. Revocation; abandonment; reverter.

I. Mode and effect.

A. In general.

(§ I—3)—Shewn by use; intention.

A dedication of land to public purposes must be made with the intention to dedicate, and the mere acting so as to lead persons into the supposition that a way was dedicated to the public does not of itself amount to dedication. [Simpson v. Attorney-General, [1904] A.C. 476, at p. 493, followed.]

Canadian Northern R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

B. By map or plat.

(§ I B—10)—By map or plan.

The registration with a deed of land of a sketch of the land attached to the deed, without the formalities required by the Registry Act in the registration of a plan, does not constitute a dedication as public highways of those parts of the land which are shewn in the sketch as streets or roads. [Sinclair v. Peters, 3 D.L.R. 664, affirmed.]

Sinclair v. Peters, 8 D.L.R. 575, 4 O.W.N. 338, 23 O.W.R. 441.

(§ II—23)—What constitutes acceptance of.

Where a strip of land used as a street but privately owned was treated by the assessor of the municipality as a street and was not assessed for nine years, but there was no direct assertion by the municipality of any claim to dedication of the land, nor were any municipal improvements made thereon, such facts do not establish a dedication thereof as a highway. [Sinclair v. Peters, 3 D.L.R. 664, affirmed.]

Sinclair v. Peters, 8 D.L.R. 575, 4 O.W.N. 338, 23 O.W.R. 441.

III. Revocation; abandonment; reverter.

(No cases.)

DEEDS.

I. Form and requisites.
- A. In general; execution.
- B. Delivery.
- E. Estate or interest created.
- F. Revocation; destruction, etc.
- G. Failure of consideration.

II. Construction; effect; validity.
- A. In general; construction.
- B. Description of parties.
- C. Description of property conveyed.
- D. What property passes.

Of trusts, see Assignment for Creditors; Mortgage.

Boundaries under provisions of, see Boundaries, II.

As to covenants or conditions in, see Covenants and Conditions.

Made under threat of prosecution, see Duress.

Parol evidence as to, see Evidence.

Sufficiency of evidence to impeach, see Evidence.

Fraud in securing signature to, see Fraud and Deceit.

To wife, see Husband and Wife.

Record of, see Records and Recording Laws, III.

Tax deeds, see Taxes, III.

Creation of trust by, see Trusts.

I. Form and requisites.

A. In general; execution.

(§ I A—1)—In general; execution.

A deed of land made by the grantor to a daughter and son-in-law in consideration of an agreement on their part to support the grantor during his lifetime will not be set aside on the grounds of improvidence, mental incapacity, etc., where it appears that the grantor although of a peculiar and excitable disposition had sufficient mental capacity to understand what he was doing, and that no undue influence was exercised and that there was sufficient consideration.

Maddern v. McNeil et al., 45 N.S.R. 407.

(§ I A—2)—Witnesses.

The rule of law that in establishing a gift during a decedent's lifetime to the recipient, the gift must be established by separate and independent evidence without taking into account the evidence of the recipient himself, is satisfied, where in an action by an administrator to set aside a conveyance as invalid it appears that the deceased donor and recipient were mother and daughter, respectively, that the mother had lived with the daughter some years before the deed in question was made, that the mother had sent for a solicitor to draw up the conveyance which was done without the recipient being present and without the recipient taking part therein, that the instructions were given to the solicitor by the mother herself, and it is obvious from the evidence that the mother intended to compensate the daughter for her trouble and care and the amount which the daughter received was no more than a reasonable compensation. [Walker v. Smith, 29 Beav. 396, distinguished.]

Taylor v. Yeandle, 8 D.L.R. 733, 4 O.W.N. 531.

B. Delivery.

(§ I B I—6)—Necessity; death of grantor.

The mere fact of the grantor retaining possession of the deed does not render the grant inoperative, particularly where the grant contained a reservation of a life estate to the grantor. [Xenos v. Wickham, L.R. 2 H.L. 296, referred to.]

O'Callaghan v. Coady, 8 D.L.R. 316, 11 East. L.R. 63.

(§ I B I—7)—What constitutes.

The efficacy of a deed depends on its being sealed and delivered, and delivery may be inferred of a deed of gift notwithstanding the retention of possession of the document by the grantor, if it appears that it was executed in the presence of the grantor's legal adviser as an attesting witness with a full knowledge of its contents after the whole deed including the attestation clause had been read over to the grantor and that the deed was drawn at the grantor's request in furtherance of a previously expressed intention to make the gift evidenced by it. [Zwicker v. Zwicker, 29 Can. S.C.R. 527, applied.]

O'Callaghan v. Coady, 8 D.L.R. 316, 11 East. L.R. 63.

II. Construction; effect; validity.

A. In general; construction.

(§ II A—16)—Deed or bill of sale.

A so-called deed of lease made for a period of six years whereby the so-called lessee binds himself to pay to the so-called lessor $100 a year, with interest on a named capital sum, containing a stipulation that the lessee may at any time purchase the property for a fixed sum (e.g., $610) or the balance of such sum, credit being given for the instalments of $100 paid in, is a deed of sale and not a contract of lease, and failure to pay one or more of the annual instalments does not give the creditor the right to take an action in cancellation of contract before the expiry of the term (e.g., six years), and in no case may such action be accompanied by a saisie-gagerie to seize the furniture or the crops.

Carey v. Carey, 8 D.L.R. 854, 42 Que. S.C. 471.

(§ II A—19)—Construction generally.

Where a deed contains words which, though in the form of a condition, are sufficient to create a covenant, and also covenants in the usual form, the maxim "expressio unius est exclusio alterius" has no application, and effect must be given to all parts of the deed.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

A provision in a deed of gift that the donee municipality was to "maintain" a city hall on the site does not mean "maintain for all time."

Powell v. City of Vancouver, 8 D.L.R. 24.

In arriving at the construction which is to be placed on the words of a deed relied upon as creating a trust the same rule of interpretation applies upon the question of intention to be gathered from the deed and the circumstances surrounding the making of such deed, as would apply in the case of a will. (Per Ritchie, J.). [Pratt v. Balcom, 45 N.S.R. 123; Nyssen v. Gretton, 2 Y. & C. 222, specially referred to.]

Wolfe v. Croft, 6 D.L.R. 61.

Where there is no rent mentioned but only a fixed and determinate price, the sale will be held to be that of the immoveable property, especially if there be no restriction as to time and duration.

Houle v. Quebec Bank and Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

All the terms of a deed of sale must be examined in order to arrive at the true import thereof, and such words as "from now on and forever" will not be held to be mere surplusage.

Houle v. Quebec Bank and Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

Where a penal clause in a deed of sale is ambiguous, such clause will be interpreted restrictively and against the creditor of the obligation.

Ledoux v. Hill, 8 D.L.R. 894.

B. Description of parties.

(§ II B—27) — Deeds to "children," "issue," or "heirs."

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons, who might be members of the settler's family, as he should by will appoint, prima facie means "children." [Pigg v. Clarke, 3 Ch. D. 672, referred to.]

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W. R. 562.

C. Description of property conveyed.

(§ II C—30) — Description of property conveyed.

Where a deed by way of lease from the Crown in its operative clause demises and leases to the defendant a specific tract as a water-power location, and in the same clause expressly grants to him the right to overflow a larger area (including the smaller tract) of Crown lands, and where a later clause of the same instrument assumes to limit the overflow privilege to the smaller tract; upon a construction of the entire instrument, it will be read as leasing for the purpose of overflowing the larger area, in order to give effect to every clause and to avoid a repugnancy. [Bucknall v. British Canadian Power Co. (No. 1), 5 D.L.R. 574, reversed on appeal.]

Bucknall v. British Canadian Power Co. (No. 2), 7 D.L.R. 62, 4 O.W.N. 164, 23 O.W.R. 155.

(§ II C—33)—Ambiguity and vagueness.

Where a deed of conveyance is made of

the "west half" of a lot on a registered plan without further description thereof and the plan shews that the whole lot has a uniform width for a part only of its depth from the street on which it fronts and that the west boundary line of the lot is much longer than the east boundary and that the northerly boundary thereof runs diagonally in a south-easterly direction, the conveyance of the "west half" carries with it only one half of the superficial area of the whole lot; the rectangular area is to be first divided equally from a point in the centre of the frontage and the triangular portion in rear is to be divided by a straight line running diagonally from the termination of the division line of the rectangular portion so as to give an equal area thereof to each. [Skull v. Glenister, 16 C.B.N.S. 81, and Herrick v. Sixby, L.R. 1 P.C. 436, applied.]

Hooey v. Tripp, 2 D.L.R. 136, 3 O.W.N. 738, 21 O.W.R. 493, 25 O.L.R. 578.

Where a lot of irregular shape has its principal frontage on the north side of a street, and a conveyance is made of the "west half" thereof without further description, the grantee is entitled to the west half of the frontage on that street upon which the lot fronts but not necessarily to one half of another frontage which it has upon another street shewn on the registered plan (in this case at the north-easterly side of the lot).

Hooey v. Tripp, 2 D.L.R. 136, 3 O.W.N. 738, 21 O.W.R. 493, 25 O.L.R. 578.

Ambiguity and vagueness of description—Surplus frontage—Apportionment.

Re Liesmer and Philp, 2 D.L.R. 881, 3 O.W.N. 878.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect. [Cowen v. Truefitt, [1899] 2 Ch. 309, followed.]

Sinclair v. Peters, 3 D.L.R. 664, 3 O.W.N. 1045, affirmed 8 D.L.R. 575, 4 O.W.N. 338, 23 O.W.R. 441.

D. What property passes.

(§ II D 2—41)—OF MINERAL.

In the case of reprise d'instance by the heir of the deceased plaintiff his incapacity, due to non-payment of succession duties under par. 6 of art. 1380, R.S.Q. 1909, should be set up in answer to his demand for reprise and the defendant cannot proceed to a hearing on the merits. The service of an action brought by the assignee of a debt against the debtor takes the place of signification of the transfer provided for by art. 1571 C.C. When the vendor of an immovable reserves the right to make excavations in prospecting for mines on condition of paying the damages thereby caused a clause in the deed in these words, "such damage to be fixed by experts in case of disagreement" is an arbitration clause and, therefore, void.

Robertson Asbestos Mining Co. v. Houle, Q.R. 21 K.B. 176.

(§ II D 2—42)—OF RIGHT TO BUILD DAM OR FLOOD LANDS.

Natural gas is not within the exception of a deed reserving to the grantor all mines and quarries of metals and minerals, as well as all springs of oil discovered, or undiscovered, on the land conveyed, together with the right to search for, work, win, and carry the same away, where such deed was executed at a time when natural gas was regarded as a dangerous nuisance and long before it became a commercial product, since it was the clear intent of the parties to reserve only the products expressly mentioned in the deed. [Farquharson v. Barnard, etc., Co., 25 O.L.R. 93, affirmed on appeal.]

Barnard-Argue-Roth Stearns Oil and Gas Co., Ltd., The Alexandra Oil and Development Co., Ltd., and the Canada Co. v. Farquharson, 5 D.L.R. 297, 23 O.W.R. 90, 28 Times L.R. 590, 32 C.L.T. 843.

F. Revocation; destruction, etc.

(§ II F—65) — REVOCATION; DESTRUCTION, ETC.

Action to set aside—Parent and child.

Cumming v. Cumming, 5 D.L.R. 884, 4 O.W.N. 91, 23 O.W.R. 47.

G. Failure of consideration.

(§ II G—70)—FAILURE OF CONSIDERATION.

Where a conveyance of land is made in part consideration of the support and maintenance for life of the grantor by the grantee of the latter's place of residence, and the grantee by denial of common necessaries and other wrongful acts makes it impracticable for the parties to live in the same house, the Court may fix the annual value of the maintenance and charge the amount as a lien upon the land in addition to an award of personal judgment against the wrongdoer. See also Power v. Power, 43 N.S.R. 412, 2 Can. Ten Year Digest, 3542.

Zdan v. Hruden, 1 D.L.R. 210, 19 W.L.R. 883.

DE FACTO.

Justification of acts done under authority of statute, apart from its validity, see Sunday.

Corporation, see Corporations and Companies.

Officers, see Officers.

DEFECTS.

In highways, see Highways, IV.

DEFENDANTS.

Parties defendant, see Parties, II.

Pleading by, see Pleading, III.

DEFENCES.

In action on account stated, see Accounts.
To action, generally, see Action, I.
To charge of assault, see Assault and Battery, II.
To action on negotiable paper, see Bills and Notes, III.; Bills and Notes, VI.
In proceeding for contempt, see Contempt.
To liability on contract, generally, see Contracts, VI.
In action for breach of covenant, see Covenant.
Against liability as stockholder, see Company.
In action to recover for death, see Death, II.
In suit for alimony, see Divorce and Separation, III.
In ejectment, see Ejectment, II.
Burden of proving, see Evidence, II.
In action for false imprisonment, see False Imprisonment, III.
To prosecution for false pretences, see False Pretences.

DEFINITIONS.

I. In general.

(§ I—1)—Meaning of "verdict."

The word "verdict" in sec. 1021 of the Criminal Code is confined to the findings of a jury.

Rex v. Murray and Fairbairn, 8 D.L.R. 208, 4 O.W.N. 368, 23 O.W.R. 492.

(§ I—2)—Meaning of word "scab."

The term "scab" as applied to one who takes the place of a striking workman, is one of opprobrium, meaning a very mean, low man, or one to be despised.

The King v. Elderman, 19 Can. Cr. Cas. 445.

For a sympathizer with a body of striking workmen, while on a public street during the progress of a strike wherein it had been necessary to call troops to maintain peace and order, to call one who takes the place of a striker a "scab" or "a born scab" is a violation of a municipal by-law imposing a fine upon one who shall, while on a public street, use abusive, insulting and provoking language to any person thereon, since such language tended to incite disorder and public disturbance.

The King v. Elderman, 19 Can. Cr. Cas. 445.

(§ I—7)—Meaning of word "family."

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons who might be members of the settlor's family, as he should by will appoint, is elastic enough and the context broad enough to include grandchildren who, at the death of the beneficiary, resided with and were a part of the settlor's recognized family.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ I—10) — Meaning of "unpatented lands."

The term "unpatented lands" in sec. 31 of the Municipal Assessment Act, is used in the special sense of lands vested in the Crown, in which a purchaser takes merely such interest as the Crown or its officers may be willing to recognize in the particular case.

The Rural Municipality of Minto v. Morrice, 4 D.L.R. 435, 21 W.L.R. 255 and 617, 22 Man. L.R. 391.

(§ I—11)—Meaning of "necessaries."

"Necessaries" for failing to provide which for his wife or children, a husband is liable under sec. 242 of the Criminal Code, are such things as are essential to preserve life, since such word is not used in its ordinary legal sense, and what will constitute necessaries must be determined in view of the circumstances of each particular case. [R. v. Brooks, 5 Can. Cr. Cas. 372, approved.]

The King v. Sidney, 5 D.L.R. 256, 21 W.L.R. 853.

DELIVERY.

Indorsement of note before, see Bills and Notes, III.
By carrier, see Carriers, III.
Of deed, see Deeds, I.
In escrow, see Escrow.
Of gift, see Gifts, III.
Of pledge, see Pledge and Collateral Security.
Of personalty sold, see Sale, I.

DEPORTATION.

See Aliens.

DEPOSITIONS.

I. In general.
II. Taking and returning.
III. Objections.
IV. Use on trial.
V. Examination of transferees.

As to discovery and inspection, see Discovery and Inspection.
Use in evidence, see Evidence.

I. In general.

(§ I—1)—In general.

Involved issues of fact will not ordinarily be determined by affidavit evidence.

McGreevy v. Murray, 1 D.L.R. 285, 19 W.L.R. 947, 22 Man. L.R. 78.

(§ I—2)—Right to take; preliminaries.

On a reference to determine who is entitled to the property of a deceased intestate, a claimant may have a commission issued to take evidence abroad, unless it be perfectly plain that the alleged evidence

will not be available, or, if it be available, will be wholly useless, and unless the rights of some other party would suffer, but he will be required to pay into Court a sum sufficient to cover the costs of the commission in case he fails to prove his claim. [Re Corr, 3 D.L.R. 367, 3 O.W.N. 1177, varied on appeal.]

Re Corr, 5 D.L.R. 367, 3 O.W.N. 1442, 22 O.W.R. 539.

A person is entitled as a matter of absolute right to the appointment of a commissioner to take depositions of witnesses in another country for use in Canada in a summary proceeding under Part XV., Crim. Code 1906.

Barsky v. Serling, 5 D.L.R. 638, 19 Can. Cr. Cas. 468.

Security cannot be required of an applicant for a commission to take depositions of witnesses in another country for use in Canada in a summary proceeding, in the absence of a formal text of law authorizing it, under Part XV., Crim. Code 1906.

Barsky v. Serling, 5 D.L.R. 638, 19 Can. Cr. Cas. 468.

Motion for commission—Suggested term —Premature application.

MacMahon v. Railway Passengers Assurance Co. (No. 1), 2 D.L.R. 912, 3 O.W.N. 1238.

Foreign Commission — Admission — Order refusing commission affirmed upon terms.

MacDonald v. Sovereign Bank of Canada, 2 D.L.R. 892, 3 O.W.N. 1006.

The same particularity is not required as to the proof to be adduced on an application for a foreign commission in a criminal case under Cr. Code (1906), sec. 716, which authorizes the making of the order in aid of a preliminary inquiry to take the deposition of a witness out of Canada who is "stated to be" able to give material information relating to the offence as would be required upon an application under Cr. Code, sec. 997, to take evidence for use at the trial, in which case it must be "made to appear" that the evidence of the absent witness is material.

The King v. Murray, 2 D.L.R. 113, 3 O.W.N. 734, 21 O.W.R. 544.

(§ I—4b) — PRELIMINARY EXAMINATION OF PARTY; OF OFFICER OF A CORPORATION.

It is not competent for the plaintiff in an action against a railway company for personal injuries to use the examination for discovery of an officer of the company for the purpose of contradicting an affidavit filed by such officer in his examination on a motion to require the production of certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who had investigated the same, which affidavit was to the effect that such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. Grand Trunk R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

(§ I—4c)—OF PARTY RESIDING ABROAD.

The principles governing the granting of an order to take the evidence of a plaintiff when he resides out of the jurisdiction do not apply when the application is by a defendant to take his own evidence abroad, and prima facie a defendant residing abroad, who is sued here, is entitled to an order to take his evidence where he lives.

Lawton v. Wilcox, 7 Terr. L.R. 213.

While it may be necessary in some cases to shew that it is impossible to obtain the attendance of the witnesses at trial, it is not, as a rule, necessary to do so to procure an order to take their evidence abroad. A party is not entitled ex debito justitiæ to an order to examine a witness abroad, but he is, prima facie, so entitled on shewing the residence abroad, and that the evidence sought to be obtained is material.

Burke v. The North-West Colonization Co., 7 Terr. L.R. 219.

II. Taking and returning.

(§ II—6)—TIME TO TAKE; FOREIGN COMMISSION.

To obtain a commission to take the depositions of foreign witnesses to be used as evidence, it is not necessary to set out explicitly the nature of the evidence nor the facts intended to be proved by the witnesses sought to be examined, if the Court is satisfied that the application is bona fide and that the evidence is material and cannot be obtained within the jurisdiction.

Smith v. Murray, 1 D.L.R. 303, 20 W.L.R. 9.

Foreign commission—Terms—Prior examination of officers of defendant bank.

Campbell v. Sovereign Bank of Canada, 2 D.L.R. 913, 3 O.W.N. 1285.

Foreign commission—Application for—Information and belief—Rule 518—Unnecessary testimony—Admission.

Macdonald v. Sovereign Bank of Canada, 1 D.L.R. 924, 3 O.W.N. 849, 21 O.W.R. 702.

Where the Court is not satisfied that a foreign commission is necessary, the applicant may be ordered to elect between giving security for the costs of the commission, and a refusal of the commission with liberty to obtain a commission at the trial if it appears necessary to the trial Judge, the party opposing the commission to be bound in that event to consent to a postponement of the trial for that purpose. [Macdonald v. Sovereign Bank of Canada, 3 O.W.N. 1006, followed.]

Hawes, Gibson and Co. v. Hawes, 3 D.L.R. 396, 3 O.W.N. 1229, 22 O.W.R. 46.

(§ II—8)—INTERROGATORIES.

An order may be made under Ontario Consolidated Rule 472 to withhold the right of discovery upon oath from the opposite

party in respect of matters which relate only to consequential relief to be given in the event of the plaintiff succeeding on the main issue if the enforcement of discovery before the trial of that issue would be of an oppressive character.

Patterson v. Neill, 1 D.L.R. 22, 3 O.W.N. 516, 20 O.W.R. 887.

An open commission under art. 385a, Civil Procedure, Quebec, will issue to take the depositions of witnesses in a foreign country for use in a summary proceeding under Part XV., Crim. Code, 1906, where the parties to the application agreed there should be but one commissioner appointed, but did not agree in the first instance that they would not furnish interrogatories and cross-interrogatories, and it was alleged that the petitioner had caused the departure of the witnesses from Canada in order to prevent their testifying.

Barsky v. Serling, 5 D.L.R. 638, 19 Can. Cr. Cas. 468.

III. Objections.

(§ III—10)—OBJECTIONS.

The right of examination for discovery extends not only to the knowledge and recollection of the adverse party, but also to his information and belief. [Vanhorn v. Verral, 3 O.W.N. 337, 439, followed.]

Lindsey v. Le Sueur, 1 D.L.R. 61, 3 O.W.N. 486, 20 O.W.R. 851.

(§ III—11)—SUFFICIENCY.

Affidavit on production—Claim of privilege—Reports for information of solicitor—Absence of special direction—Reports made to board of railway commissioners—Examination of servants of company.

Shapter v. Grand Trunk R. Co., 3 D.L.R. 877, 3 O.W.N. 1334, 22 O.W.R. 252.

(§ III—14)—UNSWORN STENOGRAPHER.

The petitioner's affidavit in support of an application for habeas corpus that the stenographer who transcribed the evidence at the preliminary enquiry had not been sworn will not be credited as against the certificate of oath signed by the magistrate and filed in the record.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

It is a good ground for quashing a summary conviction that the stenographer who took down the depositions was not sworn as required by Crim. Code, sec. 683. [The King v. L'Heureux, 14 Can. Cr. Cas. 100, followed.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203.

IV. Use on trial.

(§ IV—17)—AUTHENTICATION; CERTIFICATE.

A deposition taken before a magistrate on a summary trial for keeping a bawdy-house is admissible on the hearing of an appeal from the conviction taken under Crim. Code sec. 797 only in case the personal presence of the witness cannot be obtained by any reasonable efforts, and in case the deposition is certified by the magistrate; the magistrate cannot be called as a witness to give viva voce proof of the regularity of the deposition in lieu of the certificate.

The King v. Hornstein, 19 Can. Cr. Cas. 127.

Where, upon a charge of an indictable offence, the evidence in the preliminary inquiry before the Justice was taken down in shorthand, and it appeared that at the close of the taking of the evidence the accused party consented that the reading of the depositions should be dispensed with, that the accused was thereupon committed for trial and an indictment was afterwards returned against him by the grand jury for the offence recited in the commitment, but it did not appear that the transcript of evidence transmitted to the clerk of the trial Court was accompanied by an affidavit of the stenographer to the effect that it was a true report of the evidence:—Held, that the defendant was not entitled to have the indictment quashed on the ground that the charge therein was not founded on facts disclosed in any depositions regularly taken before the Justice.

The King v. Montminy, 18 Rev. de Jur. 309.

V. Examination of Transferees.

(§ V—25)—EXAMINATION OF TRANSFEREES.

Under the summary power conferred by Ont. Consolidated Rule 903 for discovery in aid of execution, an examination under oath may be ordered of a person to whom the judgment debtor has made a transfer of his property or effects "exigible under execution" but the rule is not to be interpreted as extending to an examination of the transferee as to a conveyance made by the debtor to him of lands situate in another province although such lands may be exigible under execution in that province.

Crucible Steel Co. v. Ffolkes, 1 D.L.R. 381, 3 O.W.N. 750, 21 O.W.R. 302.

DEPOSITS.

In banks, see Banks.

DEPOT.

Condition of, see Carriers.

Establishment of, see Carriers.

Liability for failure to maintain, see Railways.

DESCENT AND DISTRIBUTION.

I. RIGHT TO INHERIT.

- A. Who entitled generally.
- B. Effect of alienage.
- C. Effect of Illegitimacy or slavery.
- D. Effect of adoption.
- E. Rights of husband and wife.

II. Property subject to descent and distribution.

III. Nature and incidents of estate.

As to dower rights of wife, see Dower.

Tax on right to take property by, see Taxes, V.

As to devise or bequest of property, see Wills, III.

I. Right to inherit.

A. Who entitled generally.

(§ I A—1)—Right to inherit; who entitled generally.

The real estate in Ontario of an infant who died in the year 1882, leaving no brother or sister, devolves in accordance with the statute then in force in regard to real property (R.S.O. 1877, ch. 105, sec. 22), and goes altogether to the father surviving to the exclusion of the mother.

Re Brennan and Waldman, 7 D.L.R. 295, 4 O.W.N. 161.

K. died intestate, leaving no widow, one son, three daughters, and one grand-daughter, daughter of a deceased daughter. Held, the word "children" in the clause beginning "and if there be no widow," in sec. 2 of the Intestates' Estates Act, C.S. 1903, ch. 161, includes grand-children, and that K.'s grand-daughter was entitled to the share of the personal estate which her mother would have received if living.

In the matter of the estate of David Kennedy, 40 N.B.R. 437.

Plaintiff claimed to be entitled to a double share of the estate of deceased on the ground that she was what is known as a double cousin, her father being a brother and her mother a sister of deceased. Held, that plaintiff was not so entitled. Also, that a release of actions, etc., given by plaintiff to defendant had the effect of an absolute release notwithstanding it contained words limiting the release to the interest claimed by plaintiff in respect to one relationship only. The computation of relationship is made under the rules of the civil law by going back to the common ancestor, in this case the grandfather, and by adding together the degrees of kinship between the parties and the common ancestor, instead of under the canon law, by which the degree of kinship of the parties is that of the one furthest removed from the common ancestor. For this reason plaintiff and other cousins of the deceased stood in the same degree of consanguinity. The qualification as to persons taking by representation is only a device to change the general rule by which it may be varied, and is restricted to the case of brothers' and sisters' children. Such children would be one degree further removed from the deceased than brothers and sisters, but would take by representation the shares that would have been taken by their deceased parents if living, but where there are no children of deceased brothers and sisters the rule has no application.

Troop v. Robinson, 45 N.S.R. 145, 8 E.L.R. 366.

C. Effect of illegitimacy or slavery.

(§ I C—10)—Effect of illegitimacy or slavery.

Relationship in the direct line exists between a father and his natural children even if they are the fruits of adultery. Hence, if he bequeaths to them his succession it will only be subject to the taxes imposable under par. 1 of art. 1375 R.S.Q. 1909.

McLaren v. Fortier, 41 Que. S.C. 315 (Ct. Rev.).

E. Rights of husband and wife.

(§ I E—22a)—Tenancy by curtesy.

Where a wife dies intestate leaving her surviving husband and children, the husband is not entitled to tenancy by the curtesy in the wife's real estate where the circumstances are such that section 5, subsection 5, of British Columbia statutes 1898, ch. 40, can be applied, although the effect of its application may be to cut down the husband's interest from a life estate in the whole of his deceased wife's lands as tenant by the curtesy to a life estate in one third thereof. [Romang v. Tamourni, 17 W.L.R. 133, affirmed on appeal.]

Romang v. Tamourni, 2 D.L.R. 295, 20 W.L.R. 825.

II. Property subject to descent and distribution.

(§ II—25)—Property subject to descent and distribution.

Notwithstanding the provisions of sec. 3 of the "Land Title Act" (Sask.) that the land of a deceased owner goes to his personal representatives, the title to such land will, pending the grant of letters of administration, devolve upon his heirs.

Junic's Case, 7 Terr. L.R. 269.

III. Nature and incident of estate.

(§ III—31)—Proceedings to prove heirship.

Where a reference is ordered to inquire and report who is or are the next of kin of a deceased intestate, it is the duty of the officer conducting the reference to allow any claimants to present their respective claims as best they can, and at their own risk as to costs, and, if no claims be established, the estate goes to the Crown. An inquiry at the expense of the estate for the purpose of discovering the next of kin will not be allowed.

Re Corr, 3 D.L.R. 367, 3 O.W.N. 1177, 21 O.W.R. 798.

(§ III—32)—Debts of decedent.

Payment of debts—Resort to undisposed of personalty.

Re Piper (No. 2), 3 D.L.R. 882, 3 O.W.N. 1377.

DESCRIPTION.

Of land; sufficiency to satisfy Statute of Frauds, see Contracts.
Of parties to deed, see Deeds, II.
Of property conveyed, see Deeds, II.; Specific Performance.
Of property to mortgage, see Mortgage.
Of parties in pleading, see Pleading, II.
Of beneficiary in will, see Wills, III.
Of property devised; mistake in, see Wills, 86.

DESERTION OF WIFE.

See Husband and Wife, IV.
As ground for alimony, see Divorce and Separation, V.
Of minor from navy, see Habeas Corpus, 30.

DESTRUCTION OF PROPERTY.

I. In general.

Of deeds, see Deeds.
Of property, see Nuisance; Health.

(§ I—5)—Under statutory authority.

No order for destruction of property under the Public Utilities Act is valid unless the interested party has been notified of the application and has been afforded an opportunity of making a defence.

La Compagnie Electrique De Grand'mere v. Public Utilities Commission, 6 D.L.R. 92.

DETAINER.

See Forcible Entry and Detainer.

DEVISE.

See Wills, III.

DISABILITIES.

Of married woman, see Husband and Wife, I.
Of incompetent person, see Incompetent Persons.
Of infants, see Infants, I.
Effect of, on running of limitations, see Limitation of Actions, II.

DISCHARGE.

Of indorser, see Bills and Notes, III.
Of chattel mortgage, see Chattel Mortgage.
Of guarantor, see Guaranty, II.
On habeas corpus, see Habeas Corpus, I.
Of servant, see Master and Servant, I.
Of mortgage, see Mortgage, V.
Of surety, see Principal and Surety, I.
Of trusts, see Trusts, I.

DISCONTINUANCE.

Of action, see Dismissal and Discontinuance.
Of highway, see Highways, V.; Street Railways, I.

DISCOVERY AND INSPECTION.

I. In general; of documents.
II. Physical examination.
III. Submitting person to x-ray.
IV. By interrogatories or depositions.

I. In general; of documents.

(§ I—1)—In general; of documents.

Where a party, having asked for and obtained particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the Judge at Chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused:—Held, that the Judge was right.

Turner v. Municipality of Surrey, 16 B.C.R. 349 (C.A.).

Where the pleadings shew that there is no defence to the principal action except by way of counterclaim, the defendant is not entitled to be relieved from making discovery pending the disposal of the counterclaim.

Patterson v. Neill, 1 D.L.R. 22, 3 O.W.N. 516, 20 O.W.R. 887.

(§ I—2)—Production or inspection of documents.

Under the Con. Rules 1897 (Ont.), it is the duty of a person under examination for discovery to produce, if called upon, all books, papers and documents which he would be bound to produce at the trial. (Dictum per Riddell, J.) [Con. Rules 448 et seq. 490, 491, 492, referred to.]

Re Baynes Carriage Co. (No. 2), 8 D.L.R. 309, 4 O.W.N. 118.

When an affidavit on production of documents has been filed but the correctness of the schedule of documents produced is impeached by the opposite party, an order will be made for a further and better affidavit only when from the first affidavit itself or from the documents therein referred to or from an admission in the pleadings of the party from whom discovery is sought, the Court is of opinion that the first affidavit is insufficient. [Jones v. Monte Video Gas Co. (1880), 5 Q.B.D. 556, followed; and see Ross on Discovery, 1912, Can. ed., p. 164.]

Irwin v. Jung, 1 D.L.R. 153, 19 W.L.R. 901, 17 B.C.R. 69.

In an action to restrain the author of a biography not yet published from making use of certain literary material, on the ground that the author obtained it from plaintiff by misrepresenting that the views he would propound in the book would not be in adverse criticism of the subject of the biography and on the ground that the work had been so adverse that it had been rejected by the publisher at whose instance it was written, the defendant may be ordered on discovery to deposit in Court all

extracts and copies of material supplied to him by the plaintiff and to answer interrogatories in regard thereto. [See Ross on Discovery, 1912 ed., pp. 152, 176.]

Lindsey v. LeSueur, 1 D.L.R. 61, 3 O.W.N. 486, 20 O.W.R. 851.

Further production and examination—Not relevant to issue.

Davison v. Thompson, 4 O.W.N. 396, 23 O.W.R. 888.

A company examined on discovery by a plaintiff injured in a railway accident will be compelled to produce and file a report of such accident prepared by the company's employees (e.g., motorman or conductor) at the time of the accident when such report is required from them in the ordinary course of their duties; such report being a "document" within the meaning of the Code of Civil Procedure (Que.) (C.P. 289). [Southwark v. Quick, 9 Ruling Cases 587, approved.]

Feigleman v. Montreal Street Railway Co., 3 D.L.R. 125, 13 Que. P.R. 353.

Production or inspection of documents—Claim of Privilege—Confidential documents—Preparation for purposes of obtaining solicitor's advice.

Imrie v. Wilson (No. 2), 2 D.L.R. 886, 21 O.W.R. 513, 3 O.W.N. 929.

Production or inspection of documents—Action on life insurance policy—Issue as to age of assured—Production of marriage certificate—Relevancy—Affidavit on production.

MacMahon v. Railway Passengers' Assurance Co. (No. 2), 2 D.L.R. 912, 3 O.W.N. 1239.

Production or inspection of documents—Action on judgment—Inquiry as to property of judgment debtors—Company—Production of minute books and accounts.

Carry v. Toronto Belt Line R. Co., 1 D.L.R. 908, 21 O.W.R. 348, 3 O.W.N. 751.

Production or inspection of documents—Examination of officer of defendant—Scope of examination—Production of books—Evidence—Admissibility.

Canadian Knowles Co. v. Lovell-McConnell, 1 D.L.R. 906.

Information which would otherwise be compellable on an examination for discovery does not become privileged because an affidavit on production has been made, and the information sought would contradict the affidavit, or form a basis for a motion for a better affidavit.

MacMahon v. Railway Passengers' Assurance Co. (No. 2), 5 D.L.R. 423, 3 O.W.N. 1301, 22 O.W.R. 196, 26 O.L.R. 430.

In an examination of an officer of a railway company for discovery in an action against the company for personal injuries where a motion was made by the plaintiff to require the production by such officer of certain reports to the company as to the happening of the accident which gave rise to the action, made by its officials who investigated the same, an affidavit as to the privilege of the reports filed by the officer being examined, must clearly and specifically state that they were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of such accident and in the absence of such clear and specific statement a further and better affidavit will be directed to be filed.

Swaisland v. Grand Trunk R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

A document or statement of facts prepared by the employees of a company (e.g., conductors and motormen) at the request of the company and ostensibly for the use of the solicitors of the company in case of litigation is a privileged communication of which the adverse party cannot compel the production at an examination on discovery, notwithstanding that such report was made at a time when no litigation was contemplated and that it was only communicated to the solicitors of the company ten months after the accident. [Feigleman v. Montreal Street R. Co., 3 D.L.R. 125, reversed.]

Montreal Street Railway v. Feigleman, 7 D.L.R. 6, 14 Que. P.R. 108, 19 Rev. Leg. 45.

A statement of facts prepared by the employees of a company at the request of the company is privileged although it were only a subterfuge on the part of the company to avoid disclosure of the facts of the action when it appears that the persons making the report prepared it under the impression that it was to be treated as confidential. [Southwark and Vauxhall Water Co. v. Quick, L.R. 3 Q.B.D. 315; Anderson v. Bank of British Columbia, L.R. 2 Ch.D. 644; Bondy v. Valois, 15 Rev. Leg. 63; Hunter v. G.T.R., 16 Ont. P.R. 385, referred to; Collins v. London General Omnibus Co., 68 L.T. 831, followed; see also Swaisland v. G.T.R., 5 D.L.R. 750.]

Montreal Street Railway v. Feigleman, 7 D.L.R. 6, 14 Que. P.R. 108, 19 Rev. Leg. 45.

An affidavit on production is conclusive, and must be accepted as true by the opposite party, not only as regards the documents that are or have been in the possession of the party making production, and their relevancy, but also as to the grounds stated in support of any claim for privilege from production, subject, however, to the provisions of a rule of Court whereby the Court is authorized to judicially determine the question of privilege upon inspection of the document. [Stapley v. C.P.R. (No. 1), 6 D.L.R. 97, varied on appeal.]

Stapley v. The Canadian Pacific R. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85.

The object of the provision in the Alberta Supreme Court Rules, permitting the Court to inspect any document, for which privilege is claimed upon an application for an order for inspection, is to get rid of the

fetters imposed by the old practice, and to give power to determine at once whether the objection sought to be raised is well founded. [Ehrmann v. Ehrmann (No. 2), [1896] 2 Ch. 826, referred to.]

Stapley v. The Canadian Pacific R. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85.

Where, on an application in Alberta for an order for inspection of documents, privilege is claimed for any document, the Judge applied to should not order the inspection of such document without first exercising his power under the Supreme Court Rules to inspect it himself, in order to see whether the claim for privilege is well founded.

Stapley v. The Canadian Pacific R. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85 .

II. Physical examination.

(§ II—7)—GROUNDS FOR REFUSING.

Postponement of trial—Action for damages for personal injuries.

Barber v. Sandwich, Windsor and Amherstburg R. Co., 1 D.L.R. 919.

III. Submitting person to X-ray.

(No cases.)

IV. By interrogatories or depositions.

(§ IV—20)—BY INTERROGATORIES OR DEPOSITIONS.

Where the issue raised is whether, as charged by the plaintiff, a purchase contract for land had been assigned by way of loan to enable the assignee to pledge the same to a third party, such assignee concurrently transferring to the assignor of the land contract certain company shares as security for the return of the purchase contract, or whether, as claimed by defendant, the transfer of the latter was made absolutely in exchange for the shares, but no concealment, misrepresentation or fraud is charged against the defendant, the value of the shares as known to the parties at the time of the transaction may be relevant so as to form a subject of examination of defendant for discovery, but the fact of whether or not the shares were fully paid up and whether the defendant had paid anything on the shares is not relevant and the defendant will not be compelled to answer on discovery in regard to the latter points, although his pleading described the shares as "fully paid up."

Morrison v. Rutledge, 8 D.L.R. 325, 22 W.L.R. 364.

On examination for discovery under the Manitoba King's Bench Rules of 1902, rules 387, 395, the plaintiff may question the defendant under oath not only as to facts which would go to prove the plaintiff's case, but by way of cross-examination to obtain statements or admissions from the defendant which would tend to displace the defence pleaded. [Hopper v. Dunsmuir (No. 2), 10 B.C.R. 23, and Kennedy v. Dodson, [1895] 1 Ch. 334, referred to.]

Morrison v. Rutledge, 8 D.L.R. 325, 22 W.L.R. 364.

The opposite party may, upon an examination for discovery, be asked as to what relevant documents are in his custody or power, notwithstanding that his affidavit of documents already filed contains no reference to the documents forming the object of the examination. [MacMahon v. Railway Passenger Ins. Co. (No. 3), 5 D.L.R. 423, approved.]

Stapley v. Canadian Pacific R. Co., 6 D.L.R. 97, 22 W.L.R. 1.

By interrogatories or depositions—Persons for whose immediate benefit action prosecuted—Con. Rule 440—Affidavit—Insufficiency.

Aikins v. McGuire, 6 D.L.R. 864, 4 O.W.N. 132, 23 O.W.R. 98.

On the trial of an action, where plaintiff has put in evidence certain questions and answers from the defendant's examination for discovery, and defendant's counsel asks to read and does read certain other questions and answers which he says are explanatory, these questions can only become evidence if they are explanatory of what has already been put in.

Washburn v. Robertson, 8 D.L.R. 183.

Where, on the trial of an action, defendant's counsel read certain questions and answers from defendant's examination for discovery, in order to explain certain questions and answers from the same examination for discovery which were put in by plaintiff, if the trial Judge, finding that they are not explanatory, does not direct that they be read in evidence, they are not before the Court on appeal and cannot be looked at.

Washburn v. Robertson, 8 D.L.R. 183.

By interrogatories or depositions—Relevancy of questions—Scope of examination—Production of document.

Stewart v. Henderson, 6 D.L.R. 862, 4 O.W.N. 166, 23 O.W.R. 135.

By interrogatories or depositions—Default—Failure to justify—Con. Rule 454—Order for plaintiff to attend at his own expense.

Rogers v. National Portland Cement Co., 6 D.L.R. 858, 4 O.W.N. 217, 23 O.W.R. 218.

By interrogatories or depositions—Default—Failure to justify—Con. Rule 454—Order for plaintiff to attend at his own expense.

Rogers v. National Portland Cement Co., 6 D.L.R. 909, 4 O.W.N. 299.

By interrogatories or depositions—Examination of foreign defendant on commission—Con. Rule 477—Payment of conduct-money to bring defendant to Ontario.

Allen v. Grand Valley R. Co., 1 D.L.R. 903.

By interrogatories or depositions—Examination of defendant—Libel—Questions as to similar statements—Privilege.

Meyer v. Clarke, 1 D.L.R. 927.

Commission to examine plaintiff—Necessary and material witness—Materiality of evidence—Terms on which order will be made—Security for costs.

Stewart v. Henderson, 4 O.W.N. 355, 23 O.W.R. 414.

Discovery—Further affidavit on production—Insufficient material—Inspection of car.

Ramsay v. Toronto Railway Co., 4 O.W.N. 420, 23 O.W.R. 513.

In an action upon an accident insurance policy upon the life of the plaintiff's mother, where one of the defences is misrepresentation as to the age of the deceased, the plaintiff, on his examination for discovery, must answer questions as to the marriage certificate of his parents, which may be material in determining the age of the deceased, notwithstanding the fact that no mention of any marriage certificate has been made in his affidavit on production. [Standard Trading Co. v. Seybold, 1 O.W.R. 650, discussed, and dictum of Meredith, C.J., therein dissented from; Dryden v. Smith, 17 P.R. 500, distinguished.]

MacMahon v. Railway Passengers' Assurance Co. (No. 2), 5 D.L.R. 423, 3 O.W.N. 1301, 22 O.W.R. 196, 26 O.L.R. 430.

Discovery is in aid of the case as pleaded, and the examining party has no right to interrogate for the purpose of finding out something of which he knows nothing now, and which may enable him to present a case of which he has no knowledge, and which he has not set up in his pleadings. [Hennessey v. Wright (No. 2), 24 Q.B.D. 445 (n), and Yorkshire v. Gilbert, [1895] 2 Q.B. 148, referred to.]

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

By interrogatories or depositions—Objection to be sworn—Presence of opposite party.

Loper v. Cairns, 7 D.L.R. 913.

By interrogatories or depositions—Sale of wheat—Destruction by fire—Loss, by whom borne—Property passing—Scope of examination—Relevancy of questions—Former dealings between parties.

Inglis v. Richardson, 5 D.L.R. 880, 4 O.W.N. 23, 22 O.W.R. 977.

One, who, subject to the approval of a company, solicits orders and sells machinery for it, and receives a commission on all sales effected by him, is an "officer" of the company, within the meaning of Sask. Rule 201, which permits the examination of the officers of a company for discovery, since the word "officer" must receive a wide interpretation. [Powell v. Edmonton, Y. & P. R. Co., 2 Alta. L.R. 339, followed.]

Nichols and Shepard Co. v. Skedanuk, 4 D.L.R. 450, 21 W.L.R. 401.

Where relevant information for discovery to the opposite party in a damage action is specially within the knowledge of the plaintiff company's former agent and not of their present manager, the Court may direct that the plaintiffs shall either produce the former agent for discovery or, in the alternative, that the plaintiff company's manager attend for further examination for discovery after having applied to the former agent for the information and thereupon disclose the information so obtained. [Bolckow v. Fisher, 10 Q.B.D. 161, distinguished.]

Ont. and Western Co-operative Fruit Co. v. Hamilton, G. & B. R. Co., 1 D.L.R. 485, 21 O.W.R. 82.

Under the Saskatchewan Rules 278 and 279 (S.R. 1911), a person who is or has been an officer of a company may be examined for discovery in an action against that company, but a former foreman or employee not being an officer cannot be examined after the employment has terminated.

Toronto General Trusts v. Municipal Construction Co., 1 D.L.R. 552.

By interrogatories or depositions—Order for further examination—Stay of proceedings until plaintiff's return from abroad.

MacMahon v. Railway Passengers' Assurance Co., 3 D.L.R. 892, 3 O.W.N. 1514.

By interrogatories or depositions—Action for price of goods—Counterclaim—Inferior quality of goods—Particulars of sales and return of goods by customers.

Canadian Oil Co. v. Clarkson, 3 D.L.R. 873, 3 O.W.N. 1331, 22 O.W.R. 230.

By interrogatories or depositions—Place for examination—Residence of defendant—Con. Rules 447, 477.

Denneen v. Wallbert, 3 D.L.R. 891, 3 O.W.N. 1511.

Upon a motion to compel answers upon an examination for discovery the pleadings and particulars are to be treated as the basis of the inquiry to be made as to whether the questions asked are relevant to the issues, and if objection is to be taken to the particulars or pleadings it must be done by substantive motion.

Brown v. Orde, 2 D.L.R. 562, 3 O.W.N. 1230.

The defendant had answered interrogatories sur faits et articles. He refused to sign his answers and wished to substitute a document prepared by his attorney. This was rejected and he appeared again to answer. Some of his replies contradicted those he had formally given:—Held, that this was not a sufficient reason to allow the plaintiff's attorney to put supplementary questions.

Riordan v. McLeod. 13 Que. P.R. 266 (Sup. Ct.).

A party summoned to answer interrogatories sur faits et articles may make use of written answers which he prepared beforehand.

Phelan v. Coutlee, 13 Que. P.R. 239 (Sup. Ct.).

In an action for slander upon a member of the governing body of a municipality in respect of his fitness for such membership, questions upon the examination of the plaintiff for discovery touching his general character, competence, capacity and ability are relevant and must be answered.

Brown v. Orde, 2 D.L.R. 562, 3 O.W.N. 1230.

(§ IV—31)—Officer of corporation.

Mining case—Discovery—Further examination of engineer—Production of time sheets.

Curry v. Wettlaufer Mining Co., 4 O.W.N. 500, 23 O.W.R. 623.

Whether or not a person is an "officer" of a corporation for the purpose of being examined for discovery depends upon the circumstances of each particular case, and apart from any official designation given to him, may include an employee in a position of authority and responsibility to whom reports would be made by his assistants in the course of their duties. (Per Irving, J.A.)

King Lumber Mills, Ltd. v. Canadian Pacific R. Co., 2 D.L.R. 345, 17 B.C.R. 26, 19 W.L.R. 950.

A member of a firm, a part only of the business of which is to effect sales of the wares of an incorporated company on commission, who has no authority to close such sales or to bind the company by contract, and has no other connection with the company, cannot be examined for discovery as an officer of the company under the Alberta Supreme Court Rules. [Morrison v. Grand Trunk R. Co., 5 O.L.R. 38, discussed and followed; Nichols v. Skedanuk (No. 1), 4 D.L.R. 450, reversed on appeal.]

Nichols and Shepard & Co. v. Skedanuk (No. 2), 6 D.L.R. 115, 22 W.L.R. 114.

One who is examined for discovery as an officer of a corporation under the Alberta Supreme Court Rules must not only answer as to his individual knowledge, but must also obtain such further information from other officers, servants and agents of the corporation as will enable him to answer all proper questions, or must shew sufficient reason for not doing so. [Southwark Water Co. v. Quick, 3 Q.B.D. 315; and Berkeley v. Standard Discount Co., 13 Ch.D. 97, followed; see also Bray on Discovery, pp. 138 et seq.]

Nichols and Shepard & Co. v. Skedanuk (No. 2), 6 D.L.R. 115, 22 W.L.R. 114.

In an examination of an officer of a railway company for the purpose of discovery in an action against the company for personal injuries, a motion to require the company to produce reports of its employees as to the accident which gave rise to the action, is answered by an affidavit made by another officer that such reports stated on their face that they were made only for the information of the company's solicitor and his advice thereon, and such affidavit is conclusive on the question of privilege as far as the motion proceedings are concerned, unless it can be shewn from the documents produced or from the admissions in the pleadings or by the party himself that the affidavit is either untrue or has been made under a misapprehension of the legal position. [Savage v. Canadian Pacific R. Co., 16 Man. L.R. 376, specially referred to.]

Swaisland v. Grand Trunk R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

Where the plaintiff in an action against a railway company for personal injuries moved, in the examination of an officer of the company for discovery, to have produced certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who investigated the same, there is no right under the practice established in discovery proceedings to cross-examine upon an affidavit filed by the officer being examined if such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. Grand Trunk R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

Examination of officers of plaintiff company—Con. Rule 439 (a)—Production of documents—Better affidavit.

Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 866, 3 O.W.N. 1284, 22 O.W.R. 129.

A person in the employ of a railway company as a fire warden having superintendence over subordinates who patroled a large territory to protect railway property from forest fires is an officer of the railway company for the purposes of discovery and not merely a servant.

King Lumber Mills, Ltd. v. Canadian Pacific R. Co., 2 D.L.R. 345, 17 B.C.R. 26, 19 W.L.R. 950.

(§ IV—33)—Of witnesses.

On a motion for particulars of the statement of defence, a witness cannot be examined by the plaintiff as to matters not relevant to the motion but which will be in issue at the trial, where it is plain that the ulterior purpose of the questions is to obtain discovery of the evidence which the defendant will produce at the trial.

D. v. W., 3 D.L.R. 293, 3 O.W.N. 993, 21 O.W.R. 853.

Where it was alleged that a Canadian trade union adopted a label, to distinguish goods made by its members, that infringed the label of another trade union, on a motion for an interim injunction in an action wherein certain members of the latter union were plaintiffs and the defendant a manufacturer, who employed members of the Canadian union, and who affixed their alleged infringing label to his goods, the production of the books and records of the latter union cannot be required, nor can witnesses be examined as to the organiza-

tion and conduct of such union, where it abundantly appeared from the evidence of the plaintiffs that their design was to embark, under colour of such motion, on a preliminary cross-examination of persons who might be hostile witnesses at the trial, or upon an enquiry to obtain discovery greater than that permitted, which testimony might afterwards be used in a contest not only with the defendant in the action, but with the Canadian trade union as well.

Rickart v. Britton Mfg. Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

(§ IV—34)—PRIVILEGE.

In an action for damages in a railway accident, reports made by officials of defendant railway company relative to the accident admitted by a district superintendent of the company upon his examination for discovery to be in its custody or power, such reports being made in regular routine as in all such accidents and not for the purpose of the defence of the action at bar nor with reference to any particular action, though perhaps in anticipation of possible future actions, must be produced for inspection upon an examination for discovery, under Alberta rules 207, 212 and 215, and Eng. O. 31, rule 19a (2) of 1893 in force in Alberta. [Cook v. North Metropolitan Tramway Co., 6 Times L.R. 22, followed; R. v. Greenaway, 7 Q.B. 126; Phipson on Evidence, 4th ed., p. 413, referred to.]

Stapley v. Canadian Pacific R. Co., 6 D.L.R. 97, 22 W.L.R. 1.

Motions for further examination of parties—Information and belief—Solicitor and client.

Phillips v. Lawson, 4 O.W.N. 390, 23 O.W.R. 646.

(§ IV—35)—DIVORCE PROCEEDINGS.

Harsh and oppressive interrogatories.

M—— v. M——, Anonymous Case, 8 D.L.R. 1040, 17 B.C.R. 336.

DISCRETION.

Review of, on appeal, see Appeal, VII.

As to granting liquor license, see Intoxicating Liquors, II.

Mandamus to compel exercise of discretionary power, see Mandamus.

In refusing specific performance, see Specific Performance.

As to awarding costs, see Costs, I.

DISMISSAL AND DISCONTINUANCE.

Of appeal, see Appeal, VI.

Of pleading, see Pleading, I.

(§ I—1)—VOLUNTARY.

It should be only where there is absolutely no doubt, that a party litigant, invoking the aid of the Court to get rid of a conviction, should, after going a certain length, and being likely to fail, be permitted to stop short and deny the right of the Court to go further.

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.L.R. 381.

Con. Rule 430—Proceedings taken after delivery of statement of defence—Order to produce and appointment for examination of defendant.

Christie, Brown & Co., Ltd., v. Woodhouse, 5 D.L.R. 886, 4 O.W.N. 93, 23 O.W.R. 55.

If the plaintiff pays to the defendant's attorney the costs of an action which he discontinues the latter cannot set up litem pendens to a second action even though no formal abandonment of the first is on record. In such case the defendant may withdraw the deposit which he made in the first action and tender anew in pleading to the merits of the second.

Maccarone v. Zanga, 14 Que. P.R. 59 (Sup. Ct.).

A notice of discontinuance that is merely filed but not served is a nullity. A defendant before appearance has no locus standi to make any motion to the Court except the motions specified in rule 87 of the Judicature Ordinance, C.O. 1898, ch. 21.

Robertson v. Eastman, 7 Terr. L.R. 210.

The demand by a plaintiff that his action be discontinued "without costs" cannot be granted.

Legaré et al. v. Verret et al. and Bedard, 13 Que. P.R. 298 (Sup. Ct.).

(§ I—2)—INVOLUNTARY.

The Court cannot of its own motion supply the defence resulting from prescription under C.C. 1040, and when such defence is not raised the Court cannot, therefore, base its reason for dismissal on such prescription.

Banque Nationale v. Godbout et al., 8 D.L.R. 668.

An action must not be dismissed on account of plaintiff's default to produce some documents, if the motion of defendant merely asked that he be relieved from pleading during plaintiff's default to file said documents.

Legaré et al. v. Verret et al. and Bedard, 13 Que. P.R. 298 (Sup. Ct.).

Irregularity in inscription for judgment ex parte is not a reason for the dismissal of the action.

Serling v. Levine, 7 D.L.R. 266.

The Court refused a motion for judgment quasi nonsuit upon a first default, where the plaintiff produced an affidavit shewing absence of a material witness—although the affidavit did not state the residence of the witness or what had been done to procure his attendance upon an undertaking by the plaintiff to go down to trial at the next Circuit and upon payment by him of costs of the day and costs of the motion.

Rourke v. Tompkins, 40 N.B.R. 288.

Want of prosecution—Delay—Counterclaim—Terms—Costs.

McNaughton v. Mulloy, 2 D.L.R. 888, 3 O.W.N. 970.

Statement of claim—Sufficiency of information already given—Delay in moving.

Stuart v. Bank of Montreal, 6 D.L.R. 870, 4 O.W.N. 218, 23 O.W.R. 205.

(§ I—3)—Of party.

Where one of two defendants has appeared and pleaded, but the other defendant has not been served within the time limited for service, the appearing defendant is not entitled to treat the action as having been abandoned as against his co-defendant and to himself serve notice of trial; he should first inquire of the plaintiff as to the intention to proceed against the unserved defendant, and if it appears that the action is being informally abandoned as to the unserved defendant without service of a discontinuance, the appearing defendant may make an interlocutory application to strike out the name of his co-defendant. [Foley v. Lee, 12 P.R. (Ont.) 371, applied; Vandusen v. Johnson, 3 C.L.T. 505. distinguished.]

Sellick v. Town of Selkirk, 1 D.L.R. 607, 22 Man. L.R. 323.

A motion by a plaintiff that a co-plaintiff be eliminated from the proceedings cannot be granted unless the motion be served on that co-plaintiff.

Legaré et al. v. Verret et al. and Bedard, 13 Que. P.R. 298 (Sup. Ct.).

(§ I—4)—Reinstatement.

A judgment dismissing the action for a foreign plaintiff because the power of attorney was not filed within the delays, although security for costs had been given, will be set aside on a requête civile, if it is proven that the delays were due to consular correspondence, equivalent to a case of force majeure. (2) The joinder and trial on a petition in revocation of judgment and on the dilatory exception for the production of a power of attorney must take place summarily; written pleadings and examination of witnesses can only be allowed on permission of the Judge and the allegations in support of the petition can be proven by affidavits.

Malcolm v. Galloro, 13 Que. P.R. 314 (Sup. Ct.).

The Court will hesitate to dismiss an action for want of prosecution although the plaintiff is in default in not proceeding with the cause within the time limited by rules of Court, if the action is not a frivolous one and the plaintiff evinces a desire to proceed to trial.

Evans v. Evans, 5 D.L.R. 546, 21 W. L.R. 925.

(§ I—5)—Statutory defence.

Change of solicitors—New plaintiff.

Land Owners, Ltd., v. Boland (No. 2), 6 D.L.R. 903, 4 O.W.N. 305.

DISORDERLY HOUSES.

(§ I—1)—What are.

In a prosecution for keeping a disorderly house where there was no evidence of disorderly conduct except on one single occasion but there was evidence of the bad reputation of the house, there was evidence upon which the magistrate could convict and as he was the judge of the weight to be attached to it, his conviction will not be disturbed. [R. v. St. Clair, 3 Can. Crim. Cas. 551, 27 O.A.R. 308, at p. 310, followed.]

Rex v. Marcinko, 4 D.L.R. 687, 19 Can. Cr. Cas. 388, 3 O.W.N. 1626, 22 O.W.R. 846.

(§ I—10)—Excessive penalty; reducing.

A conviction upon summary trial before a police magistrate for keeping a disorderly house may be amended in certiorari proceedings, if the Court is satisfied as to the proof, by reducing the illegal fine of $100 and costs to the limit provided by Criminal Code sec. 781 of $100 including costs; the amount of the costs in such case remaining in the amended conviction but the $100 penalty being reduced by the amount of the costs so that the total shall not exceed $100. [R. v. Shing, 17 Can. Cr. Cas. 463, disapproved.]

Rex v. Crawford, 6 D.L.R. 380, 22 W. L.R. 107, 20 Can. Cr. Cas. 49.

DISORDERLY PERSONS.

(§ I—5)—Keeper of bawdy house.

The offence, under Criminal Code, sec. 228, of keeping a bawdy house, being punishable, upon indictment, there is no limitation of time for commencement of a prosecution for it by indictment, although the keeper is also declared by the Criminal Code, sec. 239, to be a loose, idle or disorderly person or vagrant, punishable in this character upon summary conviction, subject to the six months' limitation of Criminal Code sec. 1142. (Per Magee, J.)

Rex v. Sovereen, 4 D.L.R. 356, 3 O.W.N. 779, 21 O.W.R. 618, 26 O.L.R. 16, 20 Can. Cr. Cas. 103.

DISQUALIFICATION.

Of candidates for election, see Elections.

Of public officer, see Officers, I A.

As to summary conviction, see Summary Convictions.

DISTRESS.

For rent, see Landlord and Tenant, III.

DISTRIBUTION.

Of decedent's estate, see Executors and Administrators, IV.

As to distribution of decedent's estate generally, see Descent and Distribution, I.

As to distribution under Wills, see Wills.

As to duties of executors and administrators, see Executors and Administrators.

As to filing claims against decedent's estate, see Executors and Administrators.

DIVORCE AND SEPARATION.

I. In general.
II. Suit for annulment and jurisdiction thereof.
III. Grounds.
A. Cruelty; ill-treatment.
B. Desertion.
C. Drunkenness; use of morphine.
D. Imprisonment; miscellaneous.
E. Adultery.
IV. Defences; connivance; recrimination.
V. Alimony.
A. In general.
B. Temporary alimony; suit money.
C. Permanent allowance.
D. Subsequent change.
VI. Other property rights.
VII. Custody and support of children.
VIII. Agreements for support and maintenance.
A. In general.
B. Validity of.

Action for enticing wife away from her husband, see Criminal Conversation; Husband and Wife, III A.

Presumption as to foreign law in regard to, see Evidence.

Annulment of, see Marriage.

I. In general.

(No cases.)

II. Suit and jurisdiction for annulment thereof.

(§ II—5)—The suit and jurisdiction thereof.

There is no provision, under the divorce law in force in British Columbia, for granting a decree nisi in the first place.

Purdy v. Purdy, 16 B.C.R. 493.

(§ II—6)—Residence of plaintiff for jurisdictional purposes.

A decree of divorce granted in a foreign country at the suit of the husband will not absolve him in Canada from criminal responsibility under sec. 242 of the Criminal Code (1906), for neglect to provide necessaries for the wife whom he had deserted in Canada, if the husband had not in fact changed his domicile from Canada to the foreign country but had gone there merely for the purpose of living there long enough to enable him to obtain the divorce and of then returning to Canada.

The King v. Wood, 19 Can. Cr. Cas. 15, 20 O.W.R. 576.

(§ II—7)—Residence of defendant for purpose of jurisdiction.

In an action for separation from bed and board, or for separation of property only, the defendant must be summoned either before the Court of the domicile of the husband, or, if he has left his domicile, before that of the last common domicile of the consorts; and an action for separation from bed and board, instituted before a Court other than that so prescribed will be dismissed even though the husband as defendant has not entered any appearance, the provisions of article 96 C.P. being jurisdictional.

Bonin v. Bergeron, 18 Rev. de Jur. 355.

(§ II—9)—Particulars.

Acts of cruelty alleged in support of a petition for divorce should be specifically set out in the petition so that the respondent may know what charges he has to meet. [Suggate v. Suggate, 28 L.J. M.C. 7; Timms v. Timms, 15 B.C.R. 39, referred to.]

Edmonds v. Edmonds, 1 D.L.R. 550, 20 W.L.R. 541, 17 B.C.R. 28.

III. Grounds.

A. Cruelty; ill treatment.

(§ III A—15)—Cruelty; ill-treatment.

The cruelty charged in a suit for divorce in British Columbia must be such as would cause danger to life, limb, or health, or a reasonable apprehension of it. [Russell v. Russell, [1895] P. 315, and Tomkins v. Tomkins (1858), 1 Sw. & Tr. 168, followed.]

Edmonds v. Edmonds, 1 D.L.R. 550, 20 W.L.R. 541, 17 B.C.R. 28.

E. Adultery.

(§ III E—38)—Adultery.

In a suit for divorce on the ground of adultery, corroboration of the fact will be required in addition to proof of an admission of adultery made by the defendant unless the admission is entirely free from suspicion.

Edmonds v. Edmonds, 1 D.L.R. 550, 20 W.L.R. 541, 17 B.C.R. 28.

IV. Defenses; connivance; recrimination.

(§ IV—40)—Defences.

The husband, defendant in an action en séparation de corps, can set up, in answer to an allegation of ill-treatment, provocation induced by the misconduct and disobedience of his wife.

O'Callaghan v. Ahern, 21 Que. K.B. 83.

V. Alimony.

A. In general.

(§ V A—45)—Alimony.

The conduct of the husband in removing and taking up his residence with some of his own relatives with whom his wife is not on good terms and cannot reasonably be expected to reside, amounts to desertion on his part sufficient to found

an independent action for alimony if he fails to provide for her maintenance. [See also Eversley on Domestic Relations, 3rd ed., p. 466.]

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

The wife séparie de corps by judicial decree, even for adultery on her part, preserves the right to alimony from her husband.

Duval v. Joubert, 42 Que. S.C. 208 (Sup. Ct.).

The payment of alimony due under a decree for divorce may be enforced in the Court for Divorce and Matrimonial Causes by writ of execution issued out of such Court. Semble: That imprisonment in default of payment of money due under decree of the said Court is not abolished by the Nova Scotia Judgment Debtor's Act.

Halliday v. Halliday, 10 E.L.R. 293.

In case the wife is living apart from her husband without a judicial separation, she is not entitled to an allowance or provision from her husband unless she be able to prove such a condition of things as would constitute the husband the guilty consort and would justify a judicial separation being granted to her.

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

(§ V A—46)—INDEPENDENT SUIT FOR.

On an application by a wife to enforce the statutory charge for arrears due on a judgment for alimony, an order will not be made for a sale of the lands free from her dower, nor to provide for payment to her of a lump sum in lieu of this right. [Forrester v. Forrester (unreported), distinguished.]

Abbott v. Abbott, 1 D.L.R. 697, 3 O. W.N. 683, 21 O.W.R. 281.

Judgment—Enforcement by sale—Executions.

Cowie v. Cowie, 3 D.L.R. 887, 3 O.W.N. 1510.

(§ V A—49)—COHABITATION AFTER ACTION.

Alimony—Cohabitation after action—Costs.

Ruttle v. Ruttle, 4 O.W.N. 457, 23 O.W. R. 575.

B. Temporary alimony; suit money.

(§ V B—50)—INTERIM ALIMONY.

An allegation in a husband's affidavit and defence to a wife's claim for alimony on the ground of desertion, that he is ready and willing to support and maintain his children is insufficient to defeat the wife's aplication for interim alimony in which she charges cruelty on his part.

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

The fact that the wife has left the husband and refuses to return to him although he is willing to take her back to live with him, is no answer, in an alimony action, to her application for an order directing the husband to pay her interim alimony until the trial. [Wilson v. Wilson, 6 P.R. (Ont.) 129, approved.]

Moon v. Moon, 6 D.L.R. 46, 22 W.L.R. 179.

A prima facie case is made out for an order directing payment of interim alimony in an alimony action, by proving the marriage. [Karch v. Karch, 3 D.L.R. 658, applied.]

Moon v. Moon, 6 D.L.R. 46, 22 W.L.R. 179.

Interim alimony will not be ordered if it appears that the defendant has no ability to pay. Pherrill v. Pherrill, 6 O. L.R. 642, applied.]

Standall v. Standall, 7 D.L.R. 671.

Upon an application by plaintiff for interim alimony, the Court will consider the following questions: (a) dilatory course of plaintiff in going to trial; (b) her own earning capacity; (c) her sources of income from her adult children; but on the other hand will take into consideration the expense to which the applicant is put in supporting the five dependent children. [Karch v. Karch, 3 D.L.R. 658, 21 O.W.R. 883, referred to.]

Standall v. Standall, 7 D.L.R. 671.

Upon a motion for interim alimony resisted by the defendant upon the ground that he had offered to resume cohabitation with the plaintiff, such an offer where cruelty and desertion were set up in the statement of claim is not a bar to the application, although, in the absence of the allegation of cruelty, it would be otherwise. [Snider v. Snider, 11 P.R. 140; Theakstone v. Theakstone, 10 O.L.R. 386, referred to; see also Karch v. Karch (No. 1), 3 D.L.R. 658.]

Standall v. Standall, 7 D.L.R. 671.

Where an application for interim alimony was not made in an alimony action until long after the delivery of plaintiff's statement of claim the Court may refuse to order interim alimony computed from the delivery of the statement of claim and direct payment to be made only from the date of the order until the trial. [Peterson v. Peterson, 6 P.R. (Ont.) 150; Howe v. Howe, 3 Ch. Ch. R. 494; Thompson v. Thompson, 9 P.R. 526, referred to.]

Parish v. Parish, 6 D.L.R. 494, 4 O.W.N. 105. 23 O.W.R. 79.

An order for interim alimony will not be refused nor its operation stayed upon the ground that the plaintiff should first return to the defendant the child and certain chattels alleged to have been wrongfully taken away by her where the matter of the objection should properly be determined at the trial. [Karch v. Karch, 3 D.L.R. 658, 3 O.W.N. 1032, followed.]

Parish v. Parish, 6 D.L.R. 494, 4 O.W.N. 105. 23 O.W.R. 79.

Where a wife without any means and

unable to earn anything on account of the state of her health is entitled to interim alimony, an allowance of eight dollars per week as such is reasonable, notwithstanding that her husband asserts on oath that he is not the owner of any property within the Province.

Secrest v. Secrest, 5 D.L.R. 833, 22 W. L.R. 51.

Interim alimony will be granted, although desertion only is charged by a wife, where the husband does not shew by his defence or affidavit that he is willing to resume co-habitation with her.

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

Where desertion only is charged by a wife who is residing in her husband's house, interim alimony will not be granted where the husband, by his defence and affidavit, offers to resume co-habitation with her. [Snider v. Snider (1885), 11 P.R. 140, specially referred to.]

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

Interim alimony—Refusal—Order for payment of disbursements.

White v. White, 2 D.L.R. 885, 21 O. W.R. 515, 3 O.W.N. 929.

(§ V B—52)—COUNSEL FEES.

Upon an application for interim alimony counsel fees will not be included unless it is affirmatively shewn that the employment of counsel was necessary. [Cowie v. Cowie, 17 O.L.R. 44; K.B. Practice Rule 942 (Man.), referred to.]

Standall v. Standall, 7 D.L.R. 671.

(§ V B—53)—WHEN REFUSED; INDEPENDENT MEANS OF SUPPORT.

An application for interim alimony may be refused in an alimony action if the defendant satisfies the Court or Judge that the plaintiff has ample means of support without any allowance by way of interim alimony or that he, the defendant husband, has neither property nor earning power wherewith to provide interim alimony. [Pherrill v. Pherrill, 6 O. L.R. 642; Smith v. Smith, 6 P.R. (Ont.) 51; and Cunningham v. Cunningham, 5 W.L.R. 514, specially referred to.]

Moon v. Moon, 6 D.L.R. 46, 22 W.L.R. 179.

C. Permanent allowance.

(§ V C—55)—PERMANENT ALLOWANCE.

The general rule in fixing permanent alimony in an alimony action is that the wife is entitled to one-third of the husband's income subject to deduction in respect of any independent separate income the wife may have apart from her own earnings.

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

Cruelty—Desertion—Quantum of allowance.

Tanner v. Tanner, 2 D.L.R. 907, 3 O. W.N. 1157.

(§ V C—56)—EFFECT OF PREVIOUS AGREEMENT AS TO.

An agreement for the settlement of an action for alimony, providing for the transfer to the wife of an undivided half interest in certain lands and chattels, but containing no provision for her maintenance by means thereof, nor any other arrangement to maintain her beyond a covenant by the husband to do so, is not a bar to a subsequent action for alimony, though regard will be had thereto in fixing the amount of alimony to be awarded. [Gandy v. Gandy, 7 P.D. 168, and Atwood v. Atwood, 15 P.R. (Ont.) 425, distinguished.]

Morgan v. Morgan, 3 D.L.R. 802, 22 O. W.R. 25, 3 O.W.N. 1220.

(§ V C—58)—INSTANCES OF AMOUNT; PROPORTION OF HUSBAND'S INCOME.

Where the husband is incapacitated by illness from earning anything, the wife's right of action for alimony is not to be based upon his former increased income which included earnings during health, but upon his present income from any source; nor can the corpus of his estate be charged with the deficiency required for the wife's maintenance.

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

A wife will be granted some alimony notwithstanding her husband, who had properly provided for her, had suffered from her neglect of her household duties, and had finally left her because of her neglect of him and her continued nagging and scolding, as her conduct was not such as to disentitle her to alimony upon the defendant refusing to live with her. [Nelligan v. Nelligan, 26 O.R. 8, and Forster v. Forster, 1 O.W.N. 93, 419, specially referred to.]

Karch v. Karch (No. 2), 4 D.L.R. 250, 3 O.W.N. 1446, 22 O.W.R. 534.

Alimony—Custody.

Karch v. Karch (No. 3), 6 D.L.R. 856, 4 O.W.N. 65, 23 O.W.R. 188.

Five dollars per week alimony was granted a wife whose husband had left her because of her neglect of him and her household duties, as well as on account of her continued nagging and scolding, where he earned fifty dollars per month, and had an income of three hundred dollars per year from other property, as well as owning a home.

Karch v. Karch (No. 2), 4 D.L.R. 250, 3 O.W.N. 1446, 22 O.W.R. 534.

The rule often followed in England of allotting to the wife as alimony one-third of the joint income will not usually be satisfactory in Ontario, but the Court will look to what is just and reasonable, having regard to the amount and yearly value of the property of both husband and wife.

Morgan v. Morgan, 3 D.L.R. 802, 22 O. W.R. 25, 3 O.W.N. 1220.

(§ V C—59a)—ALIMONY ACTION.
Enforcement of decree.
Cowie v. Cowie, 6 D.L.R. 886, 4 O.W.N. 224, 23 O.W.R. 237.

VI. Other property rights.

(No cases.)

VII. Custody and support of children.

(No cases.)

VIII. Agreements for support and maintenance.

A. In general.

(§ VIII A—80)—AGREEMENTS FOR SUPPORT AND MAINTENANCE.
Upon a separation of husband and wife, the wife is competent to make her own terms and her agreement to accept a stipulated allowance for her maintenance will be deemed valid in the absence of any shewing that fraud or duress was practised upon her.
Frémont v. Frémont, 6 D.L.R. 465, 3 O.W.N. 789, 21 O.W.R. 644, 26 O.L.R. 6.

(§ VIII A—81)—ENFORCEMENT OF.
Where an alimony action has been settled and the husband and wife resumed cohabitation under an agreement stipulating that in the event of his wife being at any time "compelled for good cause to leave and live separate and apart from him" certain monetary benefits should be charged on his landed property in her favour, the charge will be enforced as upon a breach of the condition if the husband leaves the wife under circumstances which justify her in refusing to go where he is living and in refusing to cohabit with him further.
Nargang v. Nargang, 1 D.L.R. 323, 20 W.L.R. 206.

DOCUMENTS.

Order for production of, see Discovery and Inspection.
Admission in evidence, see Evidence, IV.

DOGS.

Liability for killing of or injury to, see Animals.
Liability for injuries by, see Animals, II.

DONATIO MORTIS CAUSA.

See Gift, II.

DONATION.

See Gift, I.

DOWER.

I. RIGHT TO.
A. Nature and extent.
B. In what property.
C. How barred.
II. RIGHTS AND REMEDIES OF WIDOW.

Election to take under will, see Will, III.

I. Right to.

A. Nature and extent.

(§ I A—5)—NATURE AND EXTENT.
A widow who is a devisee of the freehold in lands cannot have dower in the same lands.
Re Allen, 7 D.L.R. 494.

B. In what property.

(§ I B—11)—IN MORTGAGE LANDS.
The wife of a purchaser of land, who has joined, to bar her dower, in a mortgage to secure unpaid purchase-money, is not entitled to dower in the whole value of the land, but only in the value of the land after deducting the amount of the mortgage debt. [Campbell v. Royal Canadian Bank, 19 Gr. 334, followed; Lindsay v. Lindsay, 23 Gr. 210; and Robertson v. Robertson, 25 Gr. 486, distinguished; Re Croskery, 16 O.R. 207; and Re Williams, 7 O.L.R. 156, referred to; Re Auger, 3 O.W.N. 377, reversed on appeal.]
Re Auger, 5 D.L.R. 680, 3 O.W.N. 1264, 26 O.L.R. 402, 22 O.W.R. 118.

A wife who has joined, to bar her dower, in a mortgage by her husband which was not given to secure unpaid purchase-money, is entitled, subject to the rights of the mortgagee, to dower in the whole value of the mortgaged land. (Per Meredith, C.J., and Teetzel, J.) [Doan v. Davis, 23 Gr. 207, and Lindsay v. Lindsay, 23 Gr. 210, referred to.]
Re Auger, 5 D.L.R. 680, 3 O.W.N. 1264, 26 O.L.R. 402, 22 O.W.R. 118.

C. How barred.

(§ I C—27)—BY ADULTERY OR DIVORCE.
R.S.O. 1897, ch. 164, sec. 12.
Re S., 3 D.L.R. 896, 3 O.W.N. 1573.

II. Rights and remedies of widow.

(No cases.)

DRAINS AND SEWERS.

I. IN GENERAL; ESTABLISHMENT; REPAIRS; STATUTES.
II. PROCEDURE.
III. ASSESSMENTS.

I. In general; establishment; repairs; statutes.

(No cases.)

II. Procedure.

(§ II—12)—PETITION; NECESSITY OF.
Where what is proposed is not the construction of a new drainage work, but merely the repair and improvement of an existing system, which experience has proved is defective in that it provides no adequate outlet, the work falls within sec. 77 of the Municipal Drainage Act, 10 Edw. VII.

(Ont.) ch. 90, and can be performed without a petition. [Township of Orford v. Township of Howard, 27 A.R. 223, followed; Sutherland-Innes Co. v. Township of Romney, 30 Can. S.C.R. 495, discussed and distinguished.]

Re Township of Orford and Township of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

III. Assessments.

(§ III—16)—RULE FOR MAKING ASSESSMENT.

The test in determining outlet liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.), ch. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of the land proposed to be assessed, and where lands can be more effectively drained after the construction of the drainage work than before, because they will then have an outlet which they did not have before, or where they are effectively drained, but their waters are not taken to a sufficient outlet, so that, legally speaking, they have no outlet at all, and the drainage work will give them a sufficient outlet, they are assessable for outlet liability. (Per Henderson, Drainage Referee.)

Re Township of Orford and Township of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

DRUNKENNESS.

As effecting criminal responsibility, see Criminal Law, Homicide.

Validity of bills and notes given by intoxicated person, see Bills and Notes.

Duty to intoxicated person, see Carriers, Jails.

Evidence of in defence to action, see Evidence.

DUPLICITY.

In indictment or information, see Indictment, Information and Complaint.

In pleading, see Pleading.

DURESS.

(§ I—1)—IN GENERAL.

Deed of land—Action to set aside—Duress and undue influence—Want of parties—Refusal of costs.

Pidgen v. Pidgen, 4 O.W.N. 391, 23 O.W.R. 694.

(§ I—14)—WAIVER AND REPUDIATION OF.

The voluntary acting under an agreement for five months after knowledge of facts afterwards set up to prove that the agreement was obtained by fraud, duress, undue influence or extortion, is such an unequivocal affirmation of the contract as to amount to a waiver of the complainant's right to rescind the contract upon these grounds even if proved.

Brandon Electric Light Co. v. City of Brandon, 1 D.L.R. 793, 20 W.L.R. 658.

DUTIES.

Succession duties, see Taxes.

(§ I—1)—CUSTOMS DUTIES.

Under the customs tariff (Can.), 1907, the lumber of wood sawn, split or cut and dressed on one side only, but not "further manufactured," is entitled to free entry into Canada and this applies where the lumber is in the first place sawn on four sides in the sawmill and is subsequently sized on one side by a saw in a planing mill where it was in the same process also dressed on one side; the sizing effected by the second sawing does not constitute a "further manufacture" within the meaning of the provision. [Item 504, schedule A, customs tariff, 1907, 6-7 Edw. VII. (Can.) ch. 11, referred to.]

Foss Lumber Co. v. The King; and The British Columbia Lumber, etc., Co., Ltd., 8 D.L.R. 437, 47 Can. S.C.R. 130.

EARLY CLOSING.

See Municipal Corporations.

EASEMENTS.

I. WHAT CONSTITUTES; NATURE; KIND.

II. CREATION; HOW ACQUIRED.
- A. In general; by express terms.
- B. By prescription.
- C. As appurtenant; by necessity.

III. EXTENT OF RIGHTS.

IV. HOW LOST.

In party wall, see Party Walls.

Effect upon where property sold by judicial sale in partition proceedings, see Judicial Sale, II.

Reservation of, in deed, see Deeds.

Condemnation of land, see Eminent Domain.

In waters generally, see Waters.

As distinguished from license, see License.

I. What constitutes; nature; kind.

(No cases.)

II. Creation; how acquired.

A. In general; by express terms.

(§ II A—7)—BY LOST GRANT.

Where an action is brought by a mill-owner against the owner of a mill higher up on the stream, claiming to have the stream flow to and through his lands, without obstruction, and without the same being polluted by the throwing in of sawdust and mill refuse, which prevented his mill from running, the material damage dating from a period when, from the introduction of additional machinery in the

mill, the sawdust and refuse had greatly increased in volume, and, in consequence, the owner of the mill higher up the stream had for several years up to the time of the installation of a burner in connection with his mill operation, by which the sawdust and mill refuse was destroyed, paid to the owner of the mill lower down the stream an annual sum, as damages, an implied grant so to pollute the stream cannot be presumed, even where the original grant from the Crown was made on the understanding that the grantee should build a saw-mill thereon. [Angus v. Dalton, 3 Q.B.D. 85, 4 Q.B.D. 162; Dalton v. Angus, 6 App. Cas. 740; Birmingham, Dudley & District Banking Co. v. Ross, 38 Ch.D. 295, referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

B. By prescription.

(§ II B—14)—As to way of necessity.

A unity of possession of a dominant and servient estate, which will prevent the assertion of a right to a prescriptive way over it, is not created by a lease of the dominant estate to the owner of the servient estate where the dominant owner reserved to himself the use and enjoyment of the way.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O.W.N. 995.

In 1885, the predecessor in title of the plaintiffs conveyed to a railway company, the predecessors of the defendants, a certain strip of land, running across a farm, for the right of way of the railway. The conveyance was in fee, the consideration was $40, and there was no reference in the deed to a crossing. The defendants' predecessors, however, constructed an undergrade crossing, which was necessary for the working of the farm, and this was maintained and kept in repair by the defendants or their predecessors, and was used by the plaintiffs or their predecessors until 1906, when the defendants closed it up:—Held, having regard to the surrounding circumstances and the evidence, that it was a part of the agreement and arrangement, made at the time of the purchase of the right of way, that the plaintiffs' predecessor should have an under-pass for the passing of wagons and cattle from one part of the farm to the other—the granting of the pass was a part of the consideration for the right of way; and the plaintiffs were entitled to have it maintained. McKenzie v. Grand Trunk R.W. Co., Dickie v. Grand Trunk R.W. Co. (1907), 14 O.L.R. 671, followed. Oatman v. Grand Trunk R.W. Co. (1910), 2 O.W.N. 21, distinguished. Held, also, upon the evidence, that the pass was used in connection with and for the purposes of the farm for over twenty years; and the plaintiffs had established an easement by continuous user as of right for that period. Canadian Pacific R.W. Co. v. Guthrie (1901), 31 S.C.R. 155, and Grand Trunk R.W. Co. v. Valliear (1904), 7 O. L.R. 364, distinguished. Semble, also, that the doctrine of presumption of a lost grant could be applied. It being conceded by the defendants that the plaintiffs were entitled to a level crossing, and the plaintiffs being willing to accept such a crossing, with damages, in lieu of the under-pass, damages arising from the depreciation of the land by the change from an under-pass to a level crossing, and damages on account of the under-pass having been closed since 1906, were assessed.

Leslie v. Pere Marquette R.W. Co., 13 Can. Ry. Cas. 219.

A prescriptive right of way is not lost by the occupancy of the dominant estate by another person where, during such occupancy, there was no suspension of the use and enjoyment of the way by the dominant owner.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O.W.N. 995.

(§ II B—19)—As to waters.

A prescriptive right, claimed pursuant to the Limitations Act, 1910, 10 Edw. VII. (Ont.) ch. 34, sec. 35, to deposit sawdust and other mill refuse in a stream is an inchoate right until action is brought, and the user to support the same must be continuous and of right. [Halsbury's Laws of England, vol. II., p. 272, sec. 542, specially referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

A prescriptive right to dispose of sawdust and mill refuse by throwing the same into a stream does not arise from the mere fact that this had been done for more than the statutory period of prescription, where it is shewn that the user was contentious and objected to, and was recognized as such by the payment of damage claims and the erection of a burner to destroy the refuse. [Burrows v. Lang, [1901] 2 Ch. 502, 510, and Goddard's Law of Easements, 7th ed., p. 258, specially referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

The prescriptive right to pollute a stream by depositing the sawdust and mill refuse, arising from the operation of a one saw saw-mill, does not justify the pollution thereof by the additional sawdust and refuse consequent on the operation of many saws in the mill, as well as shingle and lath mills, an edger and other modern appliances, notwithstanding that this evolution was gradual and that the rights of the mill-owner lower down on the stream were not materially affected to his prejudice until forty years after the erection of the original mill.

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

C. As appurtenant; by necessity.

(§ II C—26)—SUPPORT OF BUILDING.

Where the defendant, while owner of two lots of land, extended the footings of a building into one of the lots so that they were concealed from view, one who subsequently purchased the latter lot without knowledge of the existence of the footings therein, under a certificate of title free from reservation, by reason whereof the defendant could not acquire an easement to maintain them in such a lot, except by a writing duly recorded under sec. 3 of ch. 50 of the Sask. Land Titles Act of 1909, cannot require their removal, as by his purchase he became the owner of the footings. [Corbett v. Hill, L.R. 9 Eq. 671; Laybourn v. Gridley, [1892] 2 Ch. 53, referred to.]

The National Trust Co., Ltd., v. The Western Trust Co., 4 D.L.R. 455, 21 W. L.R. 571.

(§ II C—27)—IN ALLEY.

Where the vendor upon the sale of a portion of his land agrees to give the purchaser a right-of-way across the remainder of his property from a certain road to the parcel sold and to make a grant of such right-of-way "as soon as the same is surveyed" it is the duty of the vendor to define the way by selecting its precise location and having a survey made. [Deacon v. South-Eastern R. Co. (1889), 61 L.T.R. 377; Metropolitan R. Co. v. Great Western R. Co. (1900), 82 L.T.R. 451, referred to.]

Burney v. Moore, 7 D.L.R. 357, 4 O. W.N. 173, 23 O.W.R. 161.

(§ II C—29)—WAY OF NECESSITY.

The right to use a prescriptive way over demised premises is included within a reservation in a lease of the right to cut and remove timber therefrom, as, of necessity, it implied the reservation of the usual means of ingress to and egress from the demised premises. [2 Halsbury's Laws of England, 272, referred to.]

Thomson v. Maxwell, 3 D.L.R. 661, 3 O. W.N. 995.

III. Extent of rights.

(§ III—31)—LIGHT AND AIR.

The owner of the servient land must not erect any building or structure to interfere, within the distances specified in arts. 536 and 537 C.C., with a right of light, air, and view incident to the right to the use of windows created by a partition deed as a servitude over adjoining land.

Rosenbloom v. Sutherland, 4 D.L.R. 712, 41 Que. S.C. 481.

The right to use windows in the rear wall of a house, being a servitude over the adjoining property created by a deed of partition, includes the right of view and the right to receive air, and is not limited to the right to receive light. (Arts. 534 and 535 C.C.)

Rosenbloom v. Sutherland, 4 D.L.R. 712, 41 Que. S.C. 481.

IV. How lost.

(§ IV—46)—BY NON-USER.

The owner of land in the rear of which a third party has acquired the right to cover over a passage at a specified height from the ground is liberated from the burden on his property (whether regarded as a surface right or a servitude) by the extinctive prescription of thirty years, or by that of ten years with title, when the beneficiary of the right allows either of these periods to elapse without making use of it.

Goldstein v. Allard, 42 Que. S.C. 255 (Sup. Ct.)

The owner of the servient tenement of a servitude of passage liberates it by the extinctive prescription resulting from his possession for thirty years with no use of their right by the owners of the dominant tenement. The owner of the dominant tenement can exercise the right of passage only in the precise place established by the constituting title; to do otherwise would be a violation of the rule "No servitude without title." The right of passage being a servitude non-continuous and non-apparent it is without registration, without effect against third persons acquiring it and subsequent creditors whose rights are registered.

Hamelin v. Pepin, 42 Que. S.C. 276 (Sup. Ct.)

(§ IV—46a)—BY INTERRUPTION OF USER.

Where a mill-owner operating a mill higher up on the stream on which another mill is located, permitted sawdust and mill refuse to pass into the stream, in much larger quantities than formerly, and for the damages so occasioned paid to the lower mill owner a certain sum of money annually for a number of years, until the erection of a burner in connection with his mill for the destruction of the sawdust and refuse made it no longer necessary to deposit it into the stream, this payment operates as an interruption to the prescriptive right. [Gardner v. Hodgson's Kingston Brewery Co., [1903] A.C. 229, referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

(§ IV—49)—UNITY OF POSSESSION.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render sec. 36 of the Limitations Act, 10 Edw. VII. ch. 34 (Ont.) applicable to an action by the dominant owner to establish his right to use a prescriptive right of way, the use of which he reserved in such lease.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O.W.N. 995.

When the ownership of the dominant and servient tenements is united the servitude is extinct by confusion unless the relation of common servitude between the two parcels is maintained by the owner through a written instrument declaring his intention therefor.

Rosaire v. Grand Trunk Railway Co., 42 Que. S.C. 517 (Sup. Ct.).

EJECTMENT.

I. When proper remedy.
II. Title and defences.
  A. Sufficiency of plaintiff's title.
  B. Defences.
III. Verdict; judgment; relief generally.
  A. Verdict; judgment, obtaining possession.
  B. Mesne profits; improvements; emblements.
IV. Statutory new trial.

I. When proper remedy.

(No cases.)

II. Title and defenses.

A. Sufficiency of plaintiff's title.

(§ II A—15)—Possessory titles.

On the trial of an action of ejectment in respect of a parcel of land claimed by two adjoining owners, if neither of them has any paper title to the disputed land, the action will be dismissed, notwithstanding proof that plaintiff had placed a tent on the land and was ousted by the defendant, if it appears that such was the only act of possession by the plaintiff and that the lands were not enclosed and that the defendant had at intervals exercised acts of possession equally adverse as to the plaintiff. [Mann v. Fitzgerald, 1 D.L.R. 26, 3 O.W.N. 488, affirmed on appeal; see also the Annotation, 1 D.L.R. 28-31.]

Mann v. Fitzgerald (No. 2). 4 D.L.R. 274, 3 O.W.N. 1529, 22 O.W.R. 690.

III. Verdict; judgment; relief generally.

(§ III B—40)—Mesne profits; improvements; emblements.

Action to recover land—Lien for improvements—Mistake of title under statute—At common law—Increased selling value—Exception to general rule as to lien—Estoppel—Statement of intention to give land—Evidence.

McBride v. McNeil, 4 O.W.N. 475, 23 O.W.R. 558.

IV. Statutory new trial.

(No cases.)

ELECTION FRAUD.

See Elections, II D.

ELECTION OF REMEDIES.

I. Choice.
II. Effect; pursuing two remedies.

I. Choice.

(§ I—4)—Tort or contract.

Two or more distinct causes of action for separate torts cannot properly be joined in one action; if joined the plaintiff must elect with which he will proceed. [Edinger v. McDougall, 2 A.L.R. 345; Nyblett v. Williams, 6 Terr. L.R. 200; Saddler v. Great West Railway, [1896] A.C. 450; Thompson v. London County Council, [1899] 1 Q.B. 840; Hinds v. Town of Barrie, 6 O.L.R. 656, followed; see also Underhill on Torts, 9th ed., 49, 50a.]

Pringle v. Dwyer, 6 D.L.R. 446, 22 W. L.R. 158.

(§ I—7)—Recovery of land or account from guardian.

An action against a guardian and other defendants. both to set aside a sale of property of his ward made by the former to his co-defendants, at an undervaluation, in breach of his trust, the latter being aware of such breach, and also to obtain an account of all the guardian's dealings with the estate of his ward, involves two distinct and separate causes of action against different parties, and therefore the plaintiff must elect which he will pursue. [Edinger v. McDougall, 2 A.L.R. 345; and Thompson v. London County Council, [1899] 1 Q.B. 840, specially referred to.]

Thomas v. Day, 4 D.L.R. 238, 21 W. L.R. 244.

(§ I—8)—On trial.

A party cannot with full knowledge of all relevant facts and with a choice of two courses open to him, elect to adopt one of such courses and then invoke the aid of Nova Scotia Order 34, rule 24, to avoid the consequences of a mistake in his election, as that rule does not apply to a case where a party present at a trial elects for one reason or another not to take part in it, but is intended to cover cases of inadvertence, neglect or accident, etc.

Carruthers v. The Nova Motor Co. (No. 2), 8 D.L.R. 690.

II. Effect; pursuing two remedies.

(No cases.)

ELECTIONS.

I. Voters.
  A. Right to vote; residence.
  B. Registration.

scrutiny of the ballots cast, under the provisions of secs. 369, 271 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, since the Court's power in such proceeding is not limited to a mere recount or examination of the paper ballots themselves. [In re Local Option By-law of Township of Saltfleet (1908), 16 O.L.R. 293, specially referred to; Re West Lorne Scrutiny, 25 O.L.R. 267, 277, reversed on appeal.]

Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 3 O.W.N. 1163, 21 O.W.R. 813.

Section 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, applies to a scrutiny of a municipal election held under the Ontario Consolidated Municipal Act as well as to one held under the Ontario Election Act. (Per Moss, C.J.O.)

Re West Lorne Scrutiny, 4 D.L.R. 870, 3 O.W.N. 1163, 21 O.W.R. 813, 26 O.L.R. 339.

Votes illegally cast at an election on a local option by-law, upon a scrutiny thereof under secs. 369 and 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, will be deducted from the total vote cast in favour of the by-law, where the official declaration that the by-law had carried is under attack, since there is no way of ascertaining legally in which way they were actually cast.

Re West Lorne Scrutiny, 4 D.L.R. 870, 3 O.W.N. 1163, 21 O.W.R. 813, 26 O.L.R. 339.

Upon a scrutiny under secs. 369, 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, a ballot cast at a local option by-law election by a tenant whose name appeared upon the certified voters' list, may, under sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 19, sec. 24, be declared void by the County Judge if it appears that such tenant was not a resident of the municipality when his name was placed on the list, or that he had subsequently ceased to be one. [Re Orangeville Local Option By-law (1910), 476, distinguished.]

Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 3 O.W.N. 1163, 21 O.W.R. 813. Appeal taken to the Supreme Court of Canada.

A person who, without right, votes at a local option by-law election cannot be required upon a scrutiny of the vote under secs. 369 and 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, to disclose how he voted, since sec. 200 of such prohibits such disclosure. [Re West Lorne Scrutiny, 23 O.L.R. 598, 25 O. L.R. 267, 277, and 20 O.W.R. 738, specially considered.]

Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 3 O.W.N. 1163, 21 O.W.R. 813. Appeal taken to the Supreme Court of Canada.

D. Election frauds; crimes.

(§ II D—76)—MUNICIPAL ELECTIONS.

The Nova Scotia Franchise Act (R.S. (1900) ch. 4), is prima facie the list to be used (R.S. (1900) ch. 71, sec. 71 as amended by N.S. Acts of 1907, ch. 56, sec. 1) in the holding of town elections for mayor and councillors and is to be corrected by striking out therefrom "by scoring with red ink" the names of person who are in arrears for taxes. The only evidence as to whether a person is so in arrears or not is the rate book and where the town clerk finds there the name of a person who has not paid his taxes it is his duty to strike it off from the list of voters to be delivered to the presiding officer for the purposes of the election. It is a wrong view of the statute to strike from such list the names of persons whose names are not to be found on the rate or poll books of the town. Where the result of an election is attacked it is not necessary for the person attacking it to shew that the persons whose names were struck off attempted to poll their votes and were not prevented from doing so. Persons whose names are so struck off are not within the provision (sec. 131 (2)) providing for application to the town clerk for the insertion of names inadvertently left off. Where on the trial of a controverted town election the trial Judge rejected evidence which would have shewn how many of the persons struck off by the clerk were delinquents with respect to the payment of their taxes. Held, that the case must go back to enable the petitioner to shew that the persons whose names were so struck off were not delinquents. (Per Russell, J.:—The election having been run on lists which were shewn to have been made up upon a wrong principle should be declared void.)

Demock v. Graham et al., 45 N.S.R. 166, 9 E.L.R. 417.

III. Nominations (primaries); political committees.

(§ III 80)—NOMINATIONS; POLITICAL COMMITTEES.

The appointment of election president by resolution of a municipal council (art. 296 M.C.) is not essential to the validity of the election. A unanimous appointment by a meeting of electors is valid. The gratuitous holder of a municipal office becomes, on resigning it, eligible for election as councillor whether his resignation has or has not been accepted. The mere presence of electors at the polling booth at four o'clock in the afternoon of the first day of polling is not a reason for postponing it to the following day if they have had time to vote but shewed no intention of doing so. The closing of the poll in such case at four o'clock is legal.

Daoust v. Valois, 42 Que. S.C. 318 (Cir. Ct.).

(§ III—83)—NOMINATION BY PETITION.

Papers proposing the nomination of a candidate for election as a member of the House of Commons, under the Dominion Elections Act, which do not mention the residence and addition or description of the candidate proposed in such a manner as sufficiently to identify him do not constitute a nomination in the form that is specified as essential by sec. 94 of the Act. This being, in the present case, a patent and substantial defect, it became the duty of the returning officer to give effect to the objection, taken by an opposing candidate and to reject such proposed nomination on the ground that the essential requirements of the statute had not been complied with, and such rejection could properly be made after the expiration of the time limited for the nomination of candidates by sec. 100 of the Act. [Fauteux v. Ethier, 42 Que. S.C. 235, affirmed on appeal.]

Two Mountains Dominion Election, Fauteux v. Ethier, 7 D.L.R. 126.

(§ III—85)—IRREGULARITIES.

Technical or formal objections to nomination papers filed with the returning officer under the provisions of the Dominion Elections Act, R.S.C. 1906, should not be permitted to defeat the manifest purpose and intention of the statute.

Two Mountains Dominion Election, Fauteux v. Ethier, 7 D.L.R. 126.

IV. Contests.

(§ IV—90)—CONTEST.

Under the Alberta Elections Act, 1909, ch. 3, the clerk of the executive council is the proper custodian of the voters' lists for the various divisions, and a document produced from his custody, and purporting to be a voters' list, will be deemed to be such list until the contrary is shewn.

Carstairs v. Cross (No. 2), 7 D.L.R. 192.

While the petitioner is to bear the costs of the publication by the returning officer in a newspaper notice of the election petition, neither the Dominion Controverted Elections Act nor the rules of Court thereunder in force in Manitoba, make prepayment by the petitioner a preliminary to the insertion of the notice by the returning officer and the officer's neglect or delay should not prejudice the petitioner, particularly where the non-payment of the money was not the cause of the delay.

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 20 W.L.R. 11, 48 C.L.J. 155, 22 Man. L.R. 16.

It is not an objection to an election petition that notice of the petition was not forthwith published as required by sec. 16 of the Dominion Controverted Elections Act. [Rogers on Elections, vol. II. (18th ed.), 678, and McPherson's Election Law, p. 1065, referred to.]

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 20 W.L.R. 11, 48 C.L.J. 155, 22 Man. L.R. 16.

The power given to the Court under sec. 87 of the Controverted Elections Act, to extend the period limited for proceedings "on the application of any of the parties to a petition" applies only to interlocutory proceedings after a petition has been regularly filed upon which the Court has acquired jurisdiction and before the petition itself has lapsed. [Re Glengarry Election, 14 Can. S.C.R. 453, and the Assiniboia Election Case, Davin v. McDougall, 27 Can. S.C.R. 215, distinguished; Re Bothwell Election, 9 Ont. P.R. 485, followed.]

Re Provencher Election; Barkwill v. Molloy (No. 1), 1 D.L.R. 84, 19 W.L.R. 794, 22 Man. L.R. 6, 48 C.L.J. 111.

The fiftieth rule of practice relating to controverted elections for the House of Commons, which declares that no proceeding shall be rejected for defects of form applies to every technical and formal defect which can be remedied by the Judge without prejudice to the opposite party.

Morgan v. Cardin, 13 Que. P.R. 208 (El. Ct.).

Where an election petition under the Dominion Controverted Elections Act is presented by two petitioners and each makes an affidavit of belief in the charges laid, in the form required by the statute, the petition which would have been valid with one petitioner only will not be set aside on the ground that one of the petitioners on cross-examination admitted that he knew nothing of several of the charges, or that while he had information as to certain charges, his knowledge and understanding of the contents of the petition generally were very defective. [Lunenburg Election Case (1897), 27 Can. S.C.R. 226, applied.]

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 20 W.L.R. 11, 48 C.L.J. 155, 22 Man. L.R. 16.

Under sec. 3 of the Controverted Elections Act (ch. 2, Alberta, 1907), providing for the bringing of a petition to set aside an election by "any duly qualified elector of the electoral district in which the election was held," the fact that the evidence of the qualification of the petitioner offered before the Court was directed to his qualification existing at the time of the election instead of the date of the filing of the petition, is no objection, since there is nothing in the section which directly specifies the exact time at which the qualification of the petitioning elector must exist and it is therefore open to the Court to put such an interpretation upon the section as is most consonant with the spirit and general intention of the Act. (Per Stuart, J.) [Carstairs v. Cross, Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

Where, at the time of his nomination and election as mayor of Sherbrooke, a candidate for said office had the property qualification required by the charter of said city, but a day or two subsequent to his election encumbered his property to such an extent as to bring it below the amount required as a qualification to take or hold said office, his right or title to said office cannot be attacked in a proceeding to set aside his election on a petition by one elector alleging lack of property qualification at the times mentioned. [Art. 3 of the Cities and Towns Act, 3 Edw. VII. ch. 38, referred to.]

Demers v. Hebert, 8 D.L.R. 632, 42 Que. S.C. 314.

Under sec. 5 of the Controverted Elections Act (ch. 2 of Alberta, 1907) providing that the person bringing a petition to set aside an election shall at the time of filing such petition deposit with the clerk the sum of $500, a deposit of the money by his solicitor is sufficient. (Per Stuart, J.) [Carstairs v. Cross; Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

On an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of the objections provided by the Controverted Elections Act, sec. 10 (ch. 2, of Alberta, 1907), is that the petitioner was guilty of corrupt practices under the Act, there is a presumption of innocence in favour of the petitioner. (Per Stuart, J.) [Carstairs v. Cross; Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal decision.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

Under sec. 103 of the Elections Act (Alberta), providing that "every voter shall be entitled to vote whose name is on the voters' list and has not been erased therefrom in accordance with the foregoing provisions of secs. 88 to 104, both inclusive, of this Act," when once it is established that a person's name is on the list and has not been erased therefrom, his qualification to vote is at least primâ facie established and the burden of proof is on the person contending that he is not duly qualified to establish that contention. (Per Stuart, J.) [Carstairs v. Cross; Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

On an application under sec. 10, of the Controverted Elections Act (ch. 2 of Alberta, 1907) to set aside a petition against the applicant's election, on preliminary objections, the burden of proving the disqualification of the petitioner is upon the applicant. (Per Stuart, J.) [Carstairs v. Cross; Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

There is a presumption of sanity in the petitioner's favour, on an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of objection provided by sec. 10 of the Controverted Elections Act (ch. 2 of Alberta, 1907) is that the petitioner is an inmate of an insane asylum, and the petitioner is not called upon to prove that he was not suffering from such a disability. (Per Stuart, J.) [Carstairs v. Cross; Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

On an application on behalf of the respondent to set aside a petition against his election as a member of the House of Commons, on preliminary objections, it is not improper to dispose of a demurrer to part of the petition. [Re Lisgar Election Petition, 16 Man. L.R. 249, followed.]

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

Under the Controverted Elections Act, sec. 18, ch. 7, R.S.C. 1906, the service by the petitioner of a duplicate original of the petition against a person's election as a member of the House of Commons is not necessary, but the statute is sufficiently complied with by the service of a copy.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

A copy of the affidavit prescribed by the Controverted Elections Act, sec. 6, ch. 7, R.S.C. 1906, need not be served by the petitioner on the respondent in order to maintain a petition against the respondent's election as a member of the House of Commons.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

Apart from statute, freedom of election is at common law essential to the validity of an election, irrespective of any question of the connection of the candidate whose election is sought to be set aside with the intimidation complained of. [The North Louth Case, 6 O'M. & H. 137, 172, specially referred to.]

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

The fact that the given name of one of the petitioners was transposed in the printed voters' list, is not a valid objection, on an application to set aside on preliminary objections a petition against the applicant's election as a member of the House of Commons, where there appears

to be no doubt as to the identity of the petitioner, who appeared and gave evidence, with the person intended to be named in the voters' list.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

A petition to set aside an election of a member of the House of Commons is not invalidated by the fact that the affidavit verifying the petition and which is required to be filed therewith was sworn four days before the date of filing the petition.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

(§ IV—91)—ELECTION FRAUD OR CRIME AS GROUND.

Where objection, supported by affidavits, is made to a petition to submit a municipal by-law that some of the signers' names were procured by fraud, such names will be disregarded by the Court hearing a mandamus application in which the regularity of the proceedings is questioned, when it finds such charge established, but there should be corroborating evidence besides that in the affidavits, especially when such affidavits are not made by the voters affected by the charge. [Re North Renfrew, 8 O.L.R. 359, referred to.]

Rex ex rel. Sovereen v. Edwards, 8 D.L.R. 450, 22 W.L.R. 723.

. An election, held under such circumstances that, owing to threats, undue influence and menaces, the canvassers and workers on one side are effectually excluded from taking part in the election, while, at the same time, the electoral district is overrun with workers, agents and orators of the other side, is not free and fair, and is void at common law if such threats and undue influence can be reasonably held to have affected the result. (Dictum per Cameron, J.A.)

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

(§ IV—91a)—JURISDICTION.

In order to establish the status of the petitioner on a preliminary objection to set aside a petition against a person's election as a member of the House of Commons, it is not necessary to produce a certified copy of the voters' list actually used at the polls in the polling subdivision in which the petitioner was entitled to vote, as was the former practice, but all that is now required under the Dominion Elections Act, secs. 14 and 18 of ch. 6, R.S.C. 1906, is the production of a copy of the original list of voters with the imprint of the King's printer. [Re Richelieu, 21 Can. S.C.R. 168; Re Provencher, 13 Man. L.R. 444; Re Provencher (No. 2), 1 D.L.R. 265, 22 Man. L.R. 16, referred to.]

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

A returning officer, whose conduct is complained of and who is made a party to an election petition, is to be deeme for most purposes of the Dominion Controverted Election Act, a respondent and the petitioners who have deposited the statutory sum ($1,000) as security have sufficiently complied with the statute, such deposit standing as security for the payment of the costs of both the member whose election is protested and the returning officer whose official action is attacked.

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 20 W.L.R. 11, 48 C.L.J. 155, 22 Man. L.R. 16.

(§ IV—92)—TIME; EXTENSION OF.

The Court having jurisdiction over contested election cases under the Dominion Controverted Elections Act, has power to extend the time for filing preliminary objections to a petition filed against the return of a member of parliament although the five days limited therefor by statute had expired. [See Macpherson's Election Law of Canada, pages 634, 660.]

Re Provencher Election; Barkwill v. Molloy (No. 1), 1 D.L.R. 84, 19 W.L.R. 794, 22 Man. L.R. 6, 48 C.L.J. 111.

The right given to any elector to intervene and be substituted at any stage of the proceedings in an election petition is prescribed by the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, sec. 38, subsec. 3, for the purpose of providing against any possible collusion or fraudulent arrangement between the original petitioner and the candidate whose election is being contested; and it is, therefore, essential to advise all electors, in strict compliance with the statute and practice rules passed thereunder, of the time, status and place of the proceedings under the petition.

Bergeron v. Fortier, 8 D.L.R. 459, 42 Que. S.C. 286.

Election petitions and hearings thereof, under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, are matters of public order (i.e., matters connected with the conduct of good government), and statutory regulations as to the time limitation of the proceedings are to be construed under the rules applicable to statutes of public order.

Bergeron v. Fortier, 8 D.L.R. 459, 42 Que. S.C. 286.

When notice of the time and place fixed for the trial of an election petition is not given as required by R.S.C. 1906, ch. 7, sec. 38 (3), the order for the trial becomes null and void, and the Court has no jurisdiction to proceed therewith, the statute and the rules thereunder being construed strictly.

Bergeron v. Fortier, 8 D.L.R. 459, 42 Que. S.C. 286.

(§ IV—93)—PLEADINGS; STATEMENT.

In an application to set aside an election petition under the Controverted Elections Act (Alberta) upon the ground, among others, that the petitioner was not qualified to file a petition, and where, up-

on the hearing it does not appear that the petitioner was, at the date of the filing, neither a defeated candidate nor a duly qualified elector, the objection on this ground will be sustained. [Carstairs v. Cross, re Edmonton Election (No. 1), 6 D.L.R. 59; Carstairs v. Cross, re Edmonton Election (No. 2), 7 D.L.R. 192; Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, referred to.]

McVaught v. McKenzie (re Claresholm Provincial Election), 8 D.L.R. 58.

The fact that the precise words of complaint specified in sec. 11 of ch. 7 of the Controverted Elections Act have not been used by the petitioners is not a valid objection on an application to set aside, on preliminary objections, the petition against the applicant's election as a member of the House of Commons.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 22 W.L.R. 755.

ELECTRICITY.

I. Municipal regulation of.
II. Conflicting rights of different companies.
III. Injuries resulting from.
A. Negligence of party producing.
B. Contributory negligence of person
IV. Sale of electric light and power.

Poles and wires as additional servitude, see Eminent Domain.

Right to maintain poles and wires in highway, see Highways.

Powers of municipalities as to electric lighting, see Municipal Corporations.

Liability of municipalities for negligence of employees in electric light work, see Municipal Corporations.

I. Municipal regulation of.

(§ I—2)—Restrictions as to importation.

A company empowered to operate a street railway and to supply electricity for light, heat and power, over poles and wires erected in the streets and public places of a city, may, without first obtaining the consent of the city, transmit thereon electricity generated and developed beyond the city limits.

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

After an electric street railway has, to the knowledge of a city and its officers, and with their active co-operation, erected beyond the city limits, at a cost of millions of dollars, a plant for the generation of electricity, located its sub-power houses and erected poles and wires in the city, and after the city has received about $100,000 in taxes from the company, and has adopted by-laws and resolutions requiring a company that the street railway had absorbed by amalgamation, to lay double tracks on certain streets, and to establish a schedule for operating its cars, the city cannot deprive the street railway company of the right to introduce into the city, electricity generated beyond the city limits, on the ground that its charter forbade such importation of electricity, or that permits were void which the city had granted for the erection of poles. [Winnipeg v. Winnipeg Electric R. Co., 20 Man. L.R. 337, 16 W. L.R. 62, reversed.]

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

A restriction in the charter of a street railway company that prevented it from importing electricity from without the city limits, is not binding upon a company formed by the amalgamation of such street railway company with other companies, none of which were so restricted.

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

II. Conflicting rights of different companies.

(No cases.)

III. Injuries resulting from.

A. Negligence of party producing.

(§ III A—16)—Negligence as to wires generally.

Where a pile-driver was ignorantly and crudely constructed and the contractor in whose control it was, continued, after notice of its dangerous proximity to high voltage electric wires, to maintain it there without utilizing the protective measures pointed out to him by the electric company which he had thereupon agreed to introduce, and where an employee was killed by the electric current coming in contact with the pile-driver, the contractor is liable in damages.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

Where an electric company with notice that their wires are in dangerous proximity to a crudely constructed pile-driver in operation over a river does not itself proceed to abate the danger but relies upon the promise of the operator of the pile-driver to do so, the electric company is not necessarily liable for resultant injuries, by reason of its being in control of a dangerous electric current; the electric company's undertaking being authorized by law there is no liability unless negligence can be affirmatively found. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished; Dumphy v. Montreal Light, Heat and Power Co., [1907] A.C. 454, applied.]

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

IV. Sale of electric light and power.

(§ IV—40)—Sale of electric light and power.

The extra price provided for in an agree-

ment between the Queen Victoria Falls Park Commissioners and a power company licensing the company to operate an electric power plant in the park and in the water of the Niagara river, for which the Park Commissioners, a public body, was to be paid "for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse power," includes power used by the power company for its own purposes as well as that sold to others.

Attorney-General for Ontario v. Canadian Niagara Power Company, 2 D.L.R. 425, 20 O.W.R. 941, 3 O.W.N. 545.

Under an agreement between the Queen Victoria Niagara Falls Park Commissioners and a power company licensing the latter to exercise certain rights in the park and in the water of the Niagara river for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park and requiring payment therefor at a specified annual rental and "in addition thereto, payment at the rate of the sum of one dollar per annum for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse power" the extra payments are to be made as the electricity is generated at a rate greater than 10,000 horse power as shewn by the meters, and do not continue when the generation falls below such rate.

Attorney-General for Ontario v. Canadian Niagara Power Company, 2 D.L.R. 425, 20 O.W.R. 941, 3 O.W.N. 545.

ELECTRIC RAILWAYS.

See Railways.

As carriers, see Carriers.

Uses and dangers of electricity, see Electricity.

As to street railways, see Street Railways.

EMBEZZLEMENT.

(§ I—7)—By bank officer.

It is no objection to a warrant for the extradition to a foreign state of a bank officer on a charge of embezzlement of money from the bank, who caused a note endorsed by him to be marked "paid" and to be surrendered upon a part payment of the amount due thereon charging the balance to the bank's interest and discount account, which act was undoubtedly embezzlement under the law of the state of which extradition was demanded, that by sub-sec. (b) of sec. 359 Crim. Code, 1906, such method of getting a note from a bank was theft and not embezzlement. [Rex v. Stone (1911), 17 Can. Crim. Cas. 377, applied.]

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

EMINENT DOMAIN.

I. Right to take property.
- A. In general.
- B. Who may exercise.
- C. What may be taken.
- D. For what purpose.
- E. Right acquired.

II. Procedure.
- A. In general.
- B. Petition.
- C. Trial; judgment.
- D. Appeal; new trial.

III. Rights and remedies of owners.
- A. In general.
- B. What constitutes a taking of, or injury to, property.
- C. Right to compensation.
- D. Payment or security; taking possession of property.
- E. Consequential injuries.

IV. Additional servitude.
- A. In general; on railroad way.
- B. On highway.

I. Right to take property.

A. In general.

(§ I A—4)—Right of municipality.

Articles 421 and 423 (a) of the Montreal charter as to expropriation for improvements do not apply to the acquisition of real estate for the administrative purposes of the city corporation.

Birchenough v. City of Montreal, 3 D. L.R. 299, 21 Que. K.B. 467.

C. What may be taken.

(§ I C—21)—Tidelands; land covered with water.

Land covered with water may be expropriated by a city for a water-works system under the provisions of the Sask. City Act, where the land was granted by the Crown, without reservation except the right of navigation and fisheries, before the passage of the North-West Irrigation Act, 1898.

Ex parte Young, 5 D.L.R. 83, 21 W.L.R. 860.

(§ I C 2—32)—For crossing of other railway.

An order was made by the board authorizing a railway company, for the purpose of completing a projected spur authorized by a former order of the board, to take a portion of land acquired by another railway company after the making of the former order referred to. It was also ordered that the expense of the crossings on the land in question should be borne jointly by the two companies.

Qu'Appelle Long Lake and Saskatchewan R. and S.S. Co. v. Canadian Pacific R. Co., 21 W.L.R. 628.

D. For what purpose.

(§ I D—52)—Electric light.

The Municipal Act of 1903, 3 Edw. VII.

ch. 19, as amended, does not confer power upon a town to acquire "in invitum" by arbitration and expropriation proceedings a plant owned by a company organized for the manufacture of gas and electricity.

Sarnia Gas and Electric Light Co. v. Sarnia, 4 D.L.R. 19, 3 O.W.N. 1455, 22 O. W.R. 558.

(§ I D 2—55)—RAILROADS.

Application under sec. 178 of the Railway Act, to take additional lands about two miles in length by some 2.5 or 2,700 feet in width for railway terminals, shops, storage yards and other railway purposes. Held, 1. That the right of eminent domain is given to railway companies not for their own benefit but in the public interest and to enable reasonable facilities to be given to the public. 2. That upon a strict compliance with the provisions of sec. 178 of the Railway Act, the company has the right to acquire the lands covered by its application unless it is established that the application is not bona fide and that the company does not require the lands for public purposes, or that it is acquiring them for some ulterior purpose. 3. That this application should be granted subject to the following conditions:—(a) That the applicant (if required within ten days after making the award) must purchase from the land owners, portions of whose lands are authorized to be taken, the remainder of their lands, at the same rate as may be fixed by the award for the portions taken, but should the amount awarded for the portions taken include compensation for damages to the remaining lands, then such amount shall be deducted from the purchase price of the remainder of said lands. (b) The operation of the order should be stayed as to the lands covered by options until the pending litigation is terminated, when, if expropriation takes place, the compensation to be awarded shall be based upon the value of such lands at the time the applicant actually acquires title thereto pursuant to 8 and 9 Edw. VII. ch. 32, sec. 3. (c) The applicant shall provide the Pitt River Lumber Company with suitable railway facilities for the mill proposed to be erected on its lands adjoining those authorized to be taken and if the extra expense of the new railway facilities over the cost of the present railway facilities is not taken into consideration in the compensation awarded for the portion taken, the question of such additional expense shall be reserved for further consideration.

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(§ I D 3—66)—RESERVOIR; WATERWORK SYSTEM.

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E. Right acquired.

(§ I E—78) — BY RAILWAY COMPANY AGAINST OWNER OF FEE.

The title to land expropriated for a right of way by a railway company that received a subsidy under 27 Vict. (N.B.), ch. 3, 1864, and 28 Vict. (N.B.), ch. 12, 1865, is, by the provisions of such Acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

Carr v. Canadian Pacific R. Co., 5 D.L. R. 208.

II. Procedure.

A. In general.

(§ II A—80)—PROCEDURE; IN GENERAL.

Land covered with water, which was granted by the Crown after the passage of the Irrigation Act, 1898, can be expropriated by a city for waterworks purposes, only under the provisions of such Act.

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C. Trial; judgment.

(§ II C 1—92)—INSTRUCTIONS.

Warrants for possession—Sums to be paid into Court.

Re Campbellford, Lake Ontario and Western R. Co., 3 D.L.R. 889, 3 O.W.N. 1513.

(§ II C—93a)—ADJOURNMENT.

The consent of the parties to an arbitration under the Railway Act (R.S.C. [1906] ch. 37) to an adjournment as provided by sec. 204 can be given verbally and the statement of it in the minutes of a subsequent sitting of the arbitrators is valid.

Canadian Northern R. Co. v. Nault, Q. R. 42 S.C. 121 (Sup. Ct.).

(§ II C 1—94a)—AMENDMENT OF AWARD.

The powers of the expropriation commissioners of the City of Montreal do not cease until their final report is filed and published, and until such publication they may revise their awards, decrease or increase the indemnities to be allowed to expropriated parties, and reconsider their decisions, and a mandamus will not lie to compel them to make a return on a resolution which they had reconsidered before the publication of their report.

Hampson v. Dupuis and City of Montreal, 8 D.L.R. 500.

D. Appeal; new trial.

(§ II D—101)—APPEAL.

An application to the Superior Court in the Province of Quebec under sec. 209 of the Railway Act. R.S.C. 1906, ch. 37, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the

compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior Court, and that the Court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that Court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

Rolland v. Grand Trunk R. Co., 7 D.L.R. 441.

III. Right and remedies of owners.

B. What constitutes a taking of, or injury to, property.

(§ III B 2—116)—RAILWAY IN STREET.

The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

City of Hamilton v. Grand Trunk R. Co., 5 D.L.R. 60.

Power of Board of Railway Commissioners—Construction and location of railway—Condition as to compensating abutting owners ultra vires—Rescission of order of board.

Grand Trunk Pacific R. Co. v. Landowners, etc., Fort William, [1912] A.C. 224, 1911 C.A.D., col. 389.

(§ III B 3—126)—DRAINAGE.

The test in determining injuring liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.). ch. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of lower land suffering injury from water brought from upper land by artificial means, and, where the drainage work will carry this water to a sufficient outlet, the lands from which the water causing the damage is artificially brought are assessable for injuring liability. (Per Henderson, Drainage Referee.)

Re Township of Orford and Township of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

C. Right to compensation.

(§ III C—135)—RIGHT TO COMPENSATION.

Where it is not alleged that the financial limit of a municipality may be overrun, a landowner is entitled to judgment, on motion, for the amount of an award rendered by arbitrators under ch. 20 of British Columbia Statutes of 1873 and ch. 64 of the British Columbia Statutes of 1892, where the parties could not agree as to compensation for land taken possession of by a municipal corporation for waterworks purposes, notwithstanding the city, which did not pay the award within the time limited by the statute, proposed to abandon the arbitration and take a smaller amount of land, as, where land has been once expropriated and possession taken by a municipal corporation it cannot withdraw therefrom. [Reg. v. Commissioners of H. M. Woods, etc. (1850), 19 L.J.Q.B. 497, distinguished.]

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The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

Marson v. G. T. P. R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

(§ III C 1—143)—TAKING RIGHTS OF ABUTTING OWNER.

"Due compensation" under sec. 437 of the Consolidated Municipal Act (Ont.), 1903, providing for "due compensation" being made to owners of land taken for the purpose of widening streets, simply means a full indemnity in respect of all pecuniary loss suffered, and the only subjects of such pecuniary loss are (1) the lands actually taken, and (2) the injury to the leasing or selling value of what is left. [Wadham v. North Eastern R. Co. (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227; The Queen v. Moss (1895), 5 Ex. C.R. (Can.) 30, specially referred to.]

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Where a city corporation under a by-law took for the purpose of widening a street ten feet from the front of a building lot, and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, the fact that a street railway is to be placed on the widened street is not an element of damage to be considered, under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" in a case of that sort.

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The powers of the expropriation commissioners of the City of Montreal do not cease until their final report is filed and published, and until such publication they may revise their awards, decrease or increase the indemnities to be allowed to expropriated parties, and reconsider their decisions, and a mandamus will not lie to compel them to make a return on a resolution which they had reconsidered before the publication of their report.

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D. Appeal; new trial.

(§ II D—101)—APPEAL.

An application to the Superior Court in the Province of Quebec under sec. 209 of the Railway Act. R.S.C. 1906, ch. 37, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the

compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior Court, and that the Court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that Court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

Rolland v. Grand Trunk R. Co., 7 D.L.R. 441.

III. Right and remedies of owners.

B. What constitutes a taking of, or injury to, property.

(§ III B 2—116)—RAILWAY IN STREET.

The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

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Power of Board of Railway Commissioners—Construction and location of railway—Condition as to compensating abutting owners ultra vires—Rescission of order of board.

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(§ III B 3—126)—DRAINAGE.

The test in determining injuring liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.). ch. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of lower land suffering injury from water brought from upper land by artificial means, and, where the drainage work will carry this water to a sufficient outlet, the lands from which the water causing the damage is artificially brought are assessable for injuring liability. (Per Henderson, Drainage Referee.)

Re Township of Orford and Township of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

C. Right to compensation.

(§ III C—135)—RIGHT TO COMPENSATION.

Where it is not alleged that the financial limit of a municipality may be overrun, a landowner is entitled to judgment, on motion, for the amount of an award rendered by arbitrators under ch. 20 of British Columbia Statutes of 1873 and ch. 64 of the British Columbia Statutes of 1892, where the parties could not agree as to compensation for land taken possession of by a municipal corporation for waterworks purposes, notwithstanding the city, which did not pay the award within the time limited by the statute, proposed to abandon the arbitration and take a smaller amount of land, as, where land has been once expropriated and possession taken by a municipal corporation it cannot withdraw therefrom. [Reg. v. Commissioners of H. M. Woods, etc. (1850), 19 L.J.Q.B. 497, distinguished.]

Davie v. City of Victoria, 2 D.L.R. 287, 20 W.L.R. 544.

(§ III C 1—142)—FOR INJURY TO BUSINESS.

The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

Marson v. G. T. P. R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

(§ III C 1—143)—TAKING RIGHTS OF ABUTTING OWNER.

"Due compensation" under sec. 437 of the Consolidated Municipal Act (Ont.), 1903, providing for "due compensation" being made to owners of land taken for the purpose of widening streets, simply means a full indemnity in respect of all pecuniary loss suffered, and the only subjects of such pecuniary loss are (1) the lands actually taken, and (2) the injury to the leasing or selling value of what is left. [Wadham v. North Eastern R. Co. (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227; The Queen v. Moss (1895), 5 Ex. C.R. (Can.) 30, specially referred to.]

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Where a city corporation under a by-law took for the purpose of widening a street ten feet from the front of a building lot, and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, the fact that a street railway is to be placed on the widened street is not an element of damage to be considered, under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" in a case of that sort.

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Under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" being made on the taking of land for the purpose of widening streets, where an award is made by arbitrators for land taken from a building lot upon which there was a dwelling, for the purpose of widening the street, compen-

ch. 19, as amended, does not confer power upon a town to acquire "in invitum" by arbitration and expropriation proceedings a plant owned by a company organized for the manufacture of gas and electricity.

Sarnia Gas and Electric Light Co. v. Sarnia, 4 D.L.R. 19, 3 O.W.N. 1455, 22 O. W.R. 558.

(§ I D 2—55)—RAILROADS.

Application under sec. 178 of the Railway Act, to take additional lands about two miles in length by some 2.5 or 2,700 feet in width for railway terminals, shops, storage yards and other railway purposes. Held, 1. That the right of eminent domain is given to railway companies not for their own benefit but in the public interest and to enable reasonable facilities to be given to the public. 2. That upon a strict compliance with the provisions of sec. 178 of the Railway Act, the company has the right to acquire the lands covered by its application unless it is established that the application is not bona fide and that the company does not require the lands for public purposes, or that it is acquiring them for some ulterior purpose. 3. That this application should be granted subject to the following conditions:—(a) That the applicant (if required within ten days after making the award) must purchase from the land owners, portions of whose lands are authorized to be taken, the remainder of their lands, at the same rate as may be fixed by the award for the portions taken, but should the amount awarded for the portions taken include compensation for damages to the remaining lands, then such amount shall be deducted from the purchase price of the remainder of said lands. (b) The operation of the order should be stayed as to the lands covered by options until the pending litigation is terminated, when, if expropriation takes place, the compensation to be awarded shall be based upon the value of such lands at the time the applicant actually acquires title thereto pursuant to 8 and 9 Edw. VII. ch. 32, sec. 3. (c) The applicant shall provide the Pitt River Lumber Company with suitable railway facilities for the mill proposed to be erected on its lands adjoining those authorized to be taken and if the extra expense of the new railway facilities over the cost of the present railway facilities is not taken into consideration in the compensation awarded for the portion taken, the question of such additional expense shall be reserved for further consideration.

Canadian Pacific Ry. Co. v. Coquitlam Landowners, 13 Can. Ry. Cas. 25, 20 W.L. R. 632.

(§ I D 3—66)—RESERVOIR; WATERWORK SYSTEM.

Expropriation proceedings to acquire land for a city waterworks system must be based upon the Sask. City Act.

Ex parte Young, 5 D.L.R. 83, 21 W.L.R. 860.

E. Right acquired.

(§ I E—78) — BY RAILWAY COMPANY AGAINST OWNER OF FEE.

The title to land expropriated for a right of way by a railway company that received a subsidy under 27 Vict. (N.B.), ch. 3, 1864, and 28 Vict. (N.B.), ch. 12, 1865, is, by the provisions of such Acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

Carr v. Canadian Pacific R. Co., 5 D.L. R. 208.

II. Procedure.

A. In general.

(§ II A—80)—PROCEDURE; IN GENERAL.

Land covered with water, which was granted by the Crown after the passage of the Irrigation Act, 1898, can be expropriated by a city for waterworks purposes, only under the provisions of such Act.

Ex parte Young, 5 D.L.R. 83, 21 W.L.R. 860.

C. Trial; judgment.

(§ II C 1—92)—INSTRUCTIONS.

Warrants for possession—Sums to be paid into Court.

Re Campbellford, Lake Ontario and Western R. Co., 3 D.L.R. 889, 3 O.W.N. 1513.

(§ II C—93a)—ADJOURNMENT.

The consent of the parties to an arbitration under the Railway Act (R.S.C. [1906] ch. 37) to an adjournment as provided by sec. 204 can be given verbally and the statement of it in the minutes of a subsequent sitting of the arbitrators is valid.

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Under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" being made on the taking of land for the purpose of widening streets, where an award is made by arbitrators for land taken from a building lot upon which there was a dwelling, for the purpose of widening the street, compen-

sating the owner for the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street nearer to the house, the fact that the claimant would be assessed for a portion of the cost of widening the street under a local improvement plan by which the city and the adjacent owners share the cost, does not constitute an element of damage to be considered by the arbitrators. [Re Pryce and City of Toronto, 20 A.R. 16, distinguished.]

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Where a city corporation under a by-law took for the purpose of widening a street ten feet from the front of a building lot and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, an item for injuries for "depreciation caused by the change of the general character of the street" need not be considered by the arbitrators, under sec. 437 of the Consolidated Municipal Act, 1903, providing for "due compensation" in cases of that sort.

Re MacDonald and City of Toronto, 8 D.L.R. 303, 4 O.W.N. 54, 27 O.L.R. 179.

(§ III C 2—157)—TENANTS.

Certain property, chiefly consisting of mud-flats, was held under a lease which contained a covenant whereby the lessors had agreed to pay the appraised value of any "buildings or erections for manufacturing purposes" erected by the lessees during the currency of the lease. Upon expropriation proceedings being taken by the City of St. John, the lessor, it was decided by the Supreme Court (Sleeth v. City of St. John, 38 N.B.R. 542, 39 N.B. R. 56) that the words "buildings or erections for manufacturing purposes" in the covenant included all piling and capping placed on the land by the lessees in use, or capable of being used as a foundation for buildings for manufacturing purposes even if there were no buildings actually thereon at the time the land was expropriated, and also all filling done by the lessees with the intention and effect of strengthening such foundations. An appraisement under the lease having been subsequently made in which the arbitrators excluded from their consideration the value of such filling as had been done by the lessees. Upon proceedings in equity to set aside the appraisement a decree was made setting the same aside, but declaring that the words "erections" and "buildings" in the lease did not include "any piling, capping or woodwork on the said demised lots, or the filling in of the same, except where such piling, capping or woodwork" was on the date of expropriation "in actual use as a foundation for a building for manufacturing purposes." Held (on appeal by the lessees) that the decree should be amended so as to make it clear that the lessees were entitled to compensation for all piling, capping, woodwork or filling in which on the day of expropriation was in actual use or intended for actual use as a foundation for a building erected or intended to be erected for the same.

Gordon v. City of St. John, Quinlan and Gordon v. City of St. John, 10 E.L.R. 437.

E. Consequential injuries.

(§ III E 1—165)—CONSEQUENTIAL INJURIES.

Where the owner of riparian land upon whose land the Crown erects an ice pier becomes entitled to damages under the Expropriation Act, R.S.C. 1906, ch. 143, for injurious affection to the remainder of his property, he cannot claim as one of the items damages sustained by reason of a collision of one of his vessels with the pier in question while the vessel was being launched, where it appears from the evidence that due care was not exercised in the launching.

Pickels v. The King, 7 D.L.R. 698.

(§ III E 2—174)—SPUR OR SWITCH.

The Railway Commission will usually follow the principle that a railway company desiring to take land of a private individual should be given the right, provided the individual can be properly compensated for his land and for damages to adjoining land, but it is a ground for refusing to give the railway company that privilege that the proposed railway line is a cut-off for freight only which if permitted would run through a valuable suburban subdivision for the development of which the land proprietor had dedicated large sections for the construction of driveways and parks, which might be expected to benefit both the suburban locality and the adjoining city and so be considered as in the nature of a public undertaking.

Canadian Pacific R. Co. v. Smith, 5 D. L.R. 391.

(§ III E 3—176a)—OBSTRUCTING ACCESS TO WATER.

Where arbitrators dealing with an objection to the admissibility of evidence of increased value to set off against damage in eminent domain proceedings under the Railway Act (Can.) stated that they would take the evidence, but would specify separately in their award the increased value and the gross amount of damages against which it was set-off, and thereby enable the objecting party to have reviewed by the Courts the application of the "set-off" provisions of the Railway Act, but no two of the three arbitrators could agree on the amounts on the basis of excluding the benefits, but concurred in awarding one dollar damages for lands

injuriously affected but not expropriated, but without specifying how the amount was arrived at, the arbitrators' statement as to separate findings will be held to be equivalent to a promise to exercise their discretionary power to state a case for the opinion of the Court, a reliance upon which may have prejudiced the objecting party in the conduct of his case, and the arbitrators' non-fulfilment, although unintentional, of the promise given is such misconduct on their part as will justify setting aside the award. [Re False Creek Flats Arbitration (No. 1), 1 D.L.R. 363, affirmed on an equal division.]

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 21 W.L.R. 761.

IV. Additional servitude.

B. On highway.

(§ IV B—195)—On highways.

Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many years previously by the municipal corporation of permission to carry the railway line along such street, the Railway Board of Canada will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions.

City of Hamilton v. Grand Trunk R. Co., 5 D.L.R. 60.

Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard.

City of Hamilton v. Grand Trunk R. Co., 5 D.L.R. 60.

EMPLOYEES.

Bonds for fidelity of, see Bonds, II.

Rights, duties, and liabilities of, generally, see Master and Servant.

EMPLOYER'S LIABILITY.

Statute as to, see Master and Servant.

Insurance against, see Insurance.

ENACTMENT.

Of by-law, see Municipal Corporations, II.

Of statute, see Statutes, I.

ENCROACHMENT.

As to boundaries generally, see Boundaries.

(§ I—1)—Trespass.

Land—Boundary—Overlapping building—Suit to establish title.

McIntyre v. White, 10 E.L.R. 88 (N.B.).

The owner of an immovable sued by his neighbour for encroaching on the latter's land by a building in course of construction, may by dilatory exception have the proceedings stayed to enable him to summon in warranty the architect entrusted with the work.

Duberuil v. Labelle, 12 Que. P.R. 177 (Sup. Ct.).

(§ I—10)—Buildings.

Vendor and purchaser—Buildings encroaching 2¼ in. in rear—Innocent purchaser.

Re Maton and Clavir, 6 D.L.R. 882, 4 O.W.N. 263.

On an action for encroachment in constructing the wall of a building partly over the boundary line upon adjoining lands, the Court has a discretion under Ontario Statute 1 Geo. V. ch. 25, sec. 33, to award a money compensation for the encroachment if made under the belief that the land encroached upon was within his own boundaries, and in such case the judgment should decree that upon paying the compensation awarded the portion of the land which it represents should be vested in the encroaching party.

Ward v. Sanderson, 1 D.L.R. 356, 3 O. W.N. 802, 21 O.W.R. 254.

If the land upon which lasting improvements have been made under mistake of title such as the wall of a building encroaching upon neighbouring land, is subject to a mortgage, the compensation money awarded on vesting the land in the trespasser under Ontario Statute 1 Geo. V. ch. 25, sec. 33, must be paid to the mortgagee and not to the owner of the equity of redemption unless the consent of the mortgagee to the adoption of the latter course is filed.

Ward v. Sanderson, 1 D.L.R. 356, 3 O. W.N. 802, 21 O.W.R. 254.

Buildings—Injury to adjacent property—Water from roof—Injunction—Damages—Destruction of line fence—Costs.

Huckell v. Pommerville. 1 D.L.R. 921.

Vendor and purchaser—Description of land—Encroachment—Possession.

Re Butler and Henderson, 4 O.W.N. 498, 23 O.W.R. 576.

ENFORCEMENT.

Of chattel mortgage, see Chattel Mortges, V.

Of contracts, see Contracts, VI.

Of judgment, see Judgment, VI.

EQUITABLE ASSIGNMENT.

See Assignment, II.

EQUITY.

I. JURISDICTION.
A. In general.
B. Remedy at law.
C. Relief against judgment, orders or awards.
D. Cases of fraud; mistake; conspiracy; trusts; wills.
E. To prevent irreparable damage.
F. To cancel instruments.
G. To avoid multiplicity of suits.
H. Retaining jurisdiction.
II. TRANSFERS BETWEEN LAW AND EQUITY.
III. EQUITY PRINCIPLES.
A. In general.
B. Coming into equity with clean hands.

Review of discretion, see Appeal and Error.

Relief against forfeiture in, see Forfeiture.

Allegations for equitable relief, see Pleading.

Subrogation in, see Subrogation.

Power to control discretion of trustee, see Trusts.

I. Jurisdiction.

A. In general.

(§ I A—2a)—TITLES AND PROPERTY IN GENERAL.

An agreement by a shipbuilding company to build a vessel for a navigation company for a certain price, payments to be made every two months to the extent of 80 per cent. of the work done and material supplied, and the balance on completion. which provides that, as the work goes on after the first payment, the property in the vessel so far as constructed and in all machinery and materials purchased therefor shall become vested in and be the absolute property of the navigation company, and that the shipbuilding company will, at the request of the navigation company, execute and deliver to it such bill of sale as may be necessary so as to vest the vessel, machinery and materials in the navigation company, operates in equity, without the execution of a bill of sale, as a transfer of ownership to the navigation company, from the time of the first payment, of all the vessel, machinery and materials. [Holroyd v. Matshall, 10 H.L.C. 191, discussed and applied. See also Re Thirkell, Perrin v. Wood. 21 Gr. 492; Mason v. MacDonald, 25 C.P. 435, at p. 439; Coyne v. Lee, 14 A.R. (Ont.) 503; Horsfall v. Boisseau, 21 A.R. (Ont.) 663.]

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 3 O.W.N. 1476, 22 O.W.R. 585, 26 O. L.R. 564.

(§ I A—12)—MISCELLANEOUS.

In matters where the Chancery and Probate Courts have concurrent jurisdiction, the Chancery Court will not act, when the question involved can be more conveniently and inexpensively disposed of in the Probate Court, unless some special reason be shewn why the Probate Court should not act.

Kennedy, administrator v. Slater, administrator, 4 N.B. Eq. 339.

F. To cancel instruments.

(§ I F—35)—TO CANCEL INSTRUMENTS.

In equity, it is not necessary to the validity of the rescission of a sealed document, that such rescission be effected by an instrument under seal, but rescission may result from the abandonment of the contract by one party and the other accepting the abandonment, and this may be implied from their acts, although there is no writing whatever.

Handel v. O'Kelly, 8 D.L.R. 44, 22 W. L.R. 407.

II. Transfers between law and equity.

(§ II—50)—TRANSFERS BETWEEN LAW AND EQUITY.

Where there is a bona fide dispute as to plaintiff's title in a partition suit brought in a Court of equity, that Court will not, under cover of a suit for partition, adjudicate upon a purely legal title but will leave the plaintiff to his remedy at law.

Durant v. Huestis, 1 D.L.R. 786, 10 E. L.R. 423.

III. Equity principles.

(No cases.)

ESCROW.

(§ I—1)—DEEDS.

Where a transfer of property was delivered to a company on the condition that it should be held in escrow until the consideration money was paid, and it agreed to hold it unregistered so that the rights of the parties would not be prejudiced by such transfer of possession, a reconveyance will be required where, without the consideration money being paid, and without the knowledge or consent of the depositor, the company caused the transfer to be registered and transferred the property in trust to one of its officers.

Wiley v. Trusts and Guarantee Co. (No. 1), 3 D.L.R. 295, 3 O.W.N. 997, 22 O.W.R. 625.

Where upon the formation of a mining syndicate to take over the plaintiff's mining claim, a trust company was appointed trustee to hold a transfer of the property but, so as not to affect the rights inter se of the parties thereto, undertook not to register the transfer, a registration thereof in violation of such agreement will be vacated where no intervening rights are in question; but a re-conveyance of

the land will not be ordered merely because of such breach of agreement where the trust company held the title to the property for valuable consideration as against the plaintiff and upon trusts in favour of the members of the syndicate who had become such members and paid for their syndicate shares upon the faith of the title being "vested" in the trust company. [Wiley v. Trusts and Guarantee Co. (No. 1), 3 D.L.R. 295, reversed on the facts; McKim v. Bixel, 19 O.L.R. 81, specially referred to.]

Wiley v. Trusts and Guarantee Co. (No. 2). 5 D.L.R. 409, 3 O.W.N. 1494, 22 O.W.R. 625.

ESTATES.

In real property, generally, see Deeds, II; Wills, III.

Of dower, see Dower.

ESTOPPEL.

I. Of municipality or of Crown.
A. Of municipality.
B. Of Crown.
II. By deed or record.
A. By deed.
B. By bond or mortgage.
C. By record.
III. Equitable estoppel or estoppel in pais.
A. In general; effect.
B. Of married women.
C. As to corporate existence of powers.
D. By contracts or agreements generally; ratification.
E. By conduct, request or admissions generally.
F. By assent.
G. By laches, silence or acquiescence.
H. By representations.
I. By negligence or fraud.
J. By inconsistency in acts, claims, etc.
K. By receiving benefits.
L. By character or relation of parties.
M. Who affected.
N. Who may set up.

To raise question on appeal, see Appeal.

I. Of municipality or Crown.

A. Of municipality.

(§ I A—9)—By inconsistency in acts or claims.

The rule of law that where one party to a contract refuses to perform his part, the other party is freed from the obligation to perform any conditions precedent before he can maintain an action for the breach thereof, does not apply to wrongs independent of contracts, so as to waive the necessity for performing conditions precedent required in order to obtain a permit issuable by a public authority (ex. gr. a building permit), although the permit was refused upon other grounds.

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

II. By deed or record.

A. By deed.

(§ II A—20)—By deed.

One, who delivered a transfer of property to a trustee as paid for, is estopped, by permitting the latter to represent himself in advertisements made for the public to act upon, as being vested with such property, from claiming a vendor's lien, as against persons who, on the strength of such advertisements, became members of a syndicate formed to deal with such property and for the benefit of whom the trust was created.

Wiley v. Trusts and Guarantee Co. (No. 2), 5 D.L.R. 409, 3 O.W.N. 1494, 22 O.W.R. 625.

C. By record.

(§ II C—36)—By judgment.

Where a municipal corporation accepted the promissory notes of a taxpayer for his tax arrears and by reason thereof had the taxes marked paid in the collector's tax roll and thereafter upon default in payment of some of the notes, took judgment thereon, the municipality is thereby estopped from afterwards seeking any other remedy for the taxes than what is available upon or incident to the notes and the judgment obtained. (Dictum per Kelly, J.)

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

III. Equitable estoppel or estoppel in pais.

A. In general; effect.

(§ III A—40)—By conduct.

A defendant who appears as a witness to answer interrogatories on articuled facts and who objects to the relevancy of questions put to him, and who objects to questions put to other witnesses, by such proceeding acquiesces in his being summoned as a defendant and cannot raise later the question of his incapacity.

Serling v. Levine, 7 D.L.R. 266.

To constitute an estoppel in pais, there must be a representation made with the intention that it should be acted upon, which representation is acted upon by the party to whom it is made, in the belief that it is true and by which he is prejudiced. The jury found that the plaintiff made a contract with one F., as agent of the defendant, and also made the following finding:—"Did defendant knowingly permit F. to so deal with the public as to lead the plaintiff to infer that he (F.) had authority to make contracts binding on the defendant?" "Yes." Held, insufficient to constitute an estoppel.

Giberson v. The Toronto Construction Co., Ltd., 40 N.B.R. 309.

(§ III A—41)—KNOWLEDGE OR RELIANCE OF OTHER PARTY.

A party may, without pleading it, take advantage of the estoppel derived from the rule that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. [Freeman v. Cooke, 18 L.J. Ex. 11 Ruling Cases 82, followed.]

Nixon v. Dowdle (No. 2), 2 D.L.R. 397, 20 W.L.R. 749.

Where a defendant, being sued by his lessor, in order to avoid all risk of cancellation of the lease, pays an alleged surcharge under protest, reserving to himself the right to proceed by way of action for the recovery of such surcharge; the defendant is, notwithstanding the protest, estopped of his right to recover back the amount of the surcharge so paid, provided he made such payment in the absence of mistake and so made it with full knowledge of the cause, although he could otherwise have resisted the surcharge on the very same grounds which he now invokes in his claim for payment back.

Girard v. Brunet, 18 Rev. de Jur. 503.

(§ III A—45)—FAILURE TO RAISE OBJECTION IN PLEADING.

Where the defendant's counsel failing to take any objection on the trial to the fact that the Statute of Frauds was not pleaded to the counterclaim though he treated it as if it had been properly raised, his objection first taken thereto after trial on an argument directed by the Court upon a new question suggested at the close of the trial, will be overruled and the plaintiff's pleadings will be deemed amended so as to raise such defence.

Frith v. Alliance Investment Co., 5 D. L.R. 491, 20 W.L.R. 551.

B. Of married women.

(§ III B—53)—SEPARATION AGREEMENT.

Where it is provided by a separation agreement that the husband shall obtain a religious separation in another country and if not procured within three months by reason of any default or neglect on the part of the wife the allowance for separate maintenance shall cease, it becomes the duty of the wife to facilitate the obtaining of such religious separation, and if she declines to go to the foreign country which she knew when making the agreement would be necessary to the obtaining of the religious separation and thereby prevents her husband from fulfilling that condition of the agreement, and thereafter makes no claim thereon for many years, she will be estopped from claiming that her husband was in default in respect of maintenance payable by the terms of the agreement "until the separation is procured." [Levi v. Levi (No. 1), 1 D.L.R. 776, 20 W.L.R. 598, affirmed on appeal.]

Levi v. Levi (No. 2), 3 D.L.R. 535, 21 W.L.R. 593.

(§ III B—54)—TO DENY VALIDITY OF INSTRUMENT, STOOD BY.

Where a husband, who had been in the habit of conducting his wife's business, executes an "oil lease" of lands belonging to her, in which lease she does not join, but stands by at the execution thereof, reads the instrument, knows its contents and expresses her approval, and the husband accepts rent under the lease, and later the wife herself actually subscribes her name to the instrument in order to confirm it, she is estopped as against assignees of the lease from claiming that there was no valid execution of the lease. [Cairncross v. Lorimer (1860), 3 Macq. H.L. 827, referred to.]

Maple City Oil and Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

D. By contracts or agreements generally; ratification.

(§ III D—63)—AS TO AGENCY.

Estoppel does not arise to prevent a denial of agency in respect of a purchase made by one in the name of another from whom in fact he had no authority, where the latter is first notified of the transaction after the pretended agency has been acted upon and after the consequent loss had been sustained, although, instead of directly repudiating any liability, the pretended principal answers a demand for settlement in terms which imported a doubt on his part as to the evidence of his legal position when he had no doubt, ex. gr., by writing to the deceived party that while not admitting that the pretended agent is correct in asserting that he was authorized, the writer does not wish for the present to take the stand that he had absolutely no authority. [Ewing v. Dominion Bank, 35 Can. S.C.R. 133, and [1904] A.C. 806, considered.]

Wiggin and Elwell v. Browning, 7 D. L.R. 274, 4 O.W.N. 155.

Where one learns that another had been without authority purporting to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority as regards obligations afterwards entered into by such third person on the faith of the pretended agency. [Ewing v. Dominion Bank, 35 Can. S.C.R. 133, and Ewing v. Dominion Bank, [1904) A.C. 806, discussed.]

Wiggin and Elwell v. Browning, 7 D. L.R. 274, 4 O.W.N. 155.

No estoppel by conduct to deny an agent's authority is established on the part of the principal merely because one of its directors who had no particular management of the property in question upon being shewn a contract for the sale of pulp wood from the principal's land made by an agent who was employed for another purpose and for that alone, said nothing until he returned to the head office where he lost no time in informing the other directors as to the sale, resulting in the principal's solicitors at once taking the necessary steps to protect the principal's interest.

British North America Mining Co. v. The Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

(§ III D—65)—Power of attorney.

The giving, by one to whom a certificate of title was issued and the land transferred as security for a debt, to the grantor of a power of attorney to deal with the granted land estops the former from questioning a subsequent transfer for value by the grantor to a third person.

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

(§ III D—66)—By ratification.

To establish estoppel by ratification of a voidable transaction entered into between parties in a fiduciary relationship it must be shewn by clear and cogent evidence that the party against whom the estoppel is set up elected to proceed with the transaction as valid, notwithstanding the breach by the other party of the fiduciary obligation to disclose certain facts, and that such election was made after having brought to his mind the proper materials upon which to exercise his power of election. [See also United Shoe Co. of Canada v. Brunet, [1909] A.C. 330, 18 Que. K.B. 511, 2 Can. Ten Year Digest 3344.]

Laycock v. Lee & Fraser, 1 D.L.R. 91, 19 W.L.R. 841, 17 B.C.R. 73.

(§ III D—67)—By recital in contracts generally.

Where the assignee of a contract desires to set up a claim against the other contracting party which would not be available if set up by his assignor, ex. gr., his purchase without notice that a part of a sum recited in the contract to have been paid, had not in fact been paid by reason of dishonour of the cheque given therefor, and the estoppel against the other contracting party by reason of the assignee's innocent reliance upon the recital, the onus of proving such claim of equitable estoppel is upon the assignee. [Halsbury's Laws of England, vol. 13, p. 371, par. 523, approved.]

McKenzie v. Goddard, 2 D.L.R. 354, 20 W.L.R. 912.

E. By conduct, request, or admission generally.

(§ III E—72a)—Taking possession and paying instalment.

A buyer who has taken possession of the immovable sold and some time thereafter has paid an instalment on account of the purchase price, is estopped from later instituting a redhibitory action.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

An owner who takes possession of and occupies a house upon its completion cannot escape payment for alterations made by the contractor because, in building, the contractor had departed from the owner's instructions or from the pattern of house he had indicated when making the contract for its erection.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424.

(§ III E—73)—Submission.

If the lessor of hotel premises, having a covenant against the lessee's assignment of the lease and against sub-letting, encourages negotiations between the lessee and third parties to whom the lessee was arranging to sell out the hotel business with the lease of the hotel premises and the lessor's assignee of the rent, with the lessor's knowledge and consent, receives several months' rent from the new occupants, the lessor will be estopped from setting up the terms of such covenant against them.

Rudd v. Manahan, 5 D.L.R. 565, 21 W. L.R. 929.

When one party makes against another a claim in the existence and amount of which he has an honest belief, and the other agrees to pay it without investigation, such agreement, made in good faith, cannot afterwards be repudiated on the ground that the amount is excessive. [Dixon v. Evans, L.R. 5 H.L. 606, applied; Smith v. Cuff, 6 M. & S. 160, distinguished; see also Leake on Contracts, 6th ed., p. 259, and Lindsay Petroleum Co. v. Hurd, L.R. 5 P.C. 221.]

Brandon Electric Light Co. v. City of Brandon, 1 D.L.R. 793, 20 W.L.R. 658.

(§ III F—74)—Forbearance.

In the case of a subsidence or landslip through natural causes, from a high level land to a contiguous lower one, the proprietor of the part carried away, who, though notified to remove it, fails to do so, and when aware of its removal by the owner of the land on which it has fallen, stands by without objection or protest, is estopped, after the expiration of nearly two years, from suing to recover the value of it.

Bell's Asbestos Mines (plaintiffs, appellants) v. The King's Asbestos Mines (defendants, respondents), 21 Que. K.B. 234.

(§ III E—75)—WAIVER OF STRICT COMPLIANCE WITH TERMS OF CONTRACT.

Where a purchaser of lands on the small monthly instalment plan makes default in the monthly payments, and where after the occurrence of some of such defaults the vendor condones them and waives the strict condition as to time, that waiver applies to the instalments then overdue and not to those falling due at future dates. [Barclay v. Messenger, 43 L.J. Ch. 449, 456, referred to.]

Handel v. O'Kelly, 8 D.L.R. 44, 22 W. L.R. 407.

A strict compliance with the provision in an order for the purchase of an engine, that if the machine failed to develop the horse-power stipulated for in the order the seller should be immediately notified thereof by the purchaser in a specified manner, is waived by the seller sending out experts to remedy the defect upon a notice to them from the purchaser not exactly in accordance with such provision.

Lennox v. Goold, Shapley & Muir Co., Limited, 5 D.L.R. 836, 21 W.L.R. 918.

(§ III E—78)—TO DENY BEING SHAREHOLDER.

A shareholder's attendances as such at the meetings of the company may estop him from denying that he is a shareholder, but do not estop him from denying that he is a shareholder in respect of a greater number of shares than were covered by the certificates issued issued to him and on which alone his vote at the shareholders' meeting would be based.

Re Matthew Guy Carriage and Automobile Co., Limited (Thomas' Case), 1 D. L.R. 642, 3 O.W.N. 902, 21 O.W.R. 842.

(§ III E—79)—TO DENY BY RECEIVING RENT.

If a lessor of land who, after beginning suit against his lessee for possession, accepts rent from the lessee he thereby recognizes the latter as his tenant and his claim for possession must fail.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

(§ III E—79a)—TO DISPUTE LANDLORD'S TITLE.

Where, in proceedings against an alleged overholding tenant, certain evidence tendered by the alleged tenant in contradiction of the lease was improperly rejected by the trial Judge, the question of estoppel from disputing the landlord's title does not arise until evidence for and against the making of the lease has first been fully introduced, although it is competent for and the duty of the trial Judge to determine both questions (tenancy and estoppel) in their proper order.

Re St. David's and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, 23 O.W.R. 12.

(§ III E—79b)—TO DENY VALIDITY OF PATENT.

A master who uses an invention under a license from his servant, the patentee, which license is not express, but is implied by law from their relationship and from the circumstances surrounding the invention, is estopped from denying the validity of the patent. [Imperial Supply Co. v. Grand Trunk R. Co. (No. 1), 1 D. L.R. 243, 13 Can. Ex. R. 507, referred to.]

Imperial Supply Co. v. Grand Trunk R. Co., 7 D.L.R. 504, 11 East. L.R. 340.

F. By assent.

(§ III F—80)—BY ASSENT.

There can be no ratification of a sheriff's sale vitiated by reason of grave informalities by the defendant in the case, his consent being absolutely useless for this purpose as against the rights of third parties.

Savoie-Guay v. DesLauriers and DeBriere; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

G. By laches, silence, or acquiescence.

(§ III G 1—85)—BY LACHES, SILENCE OR ACQUIESCENCE.

Where an insolvent debtor assigns his estate for the benefit of his creditors; and where the defendant company was one of his creditors to the extent of $900, for which it held a lien against twenty-five shares of its capital stock, with a par value of $2,500, owned by the insolvent debtor; and where the defendant company stood by, and permitted the plaintiffs to enter into a contract for the purchase of these shares at 60 cents on the dollar, without asserting its claim, and even voted for the sale of the shares to the plaintiffs; an estoppel is not thereby raised against the defendant company to prevent it from subsequently asserting its lien against the shares, if subsequently to the sale, but prior to the payment of the purchase price they gave notice of the lien in consequence of which the plaintiff might have withheld sufficient funds out of the purchase money to be applied in payment of the lien in question.

Box v. Bird's Hill Sand Co., 8 D.L.R. 768, 22 W.L.R. 871.

A party who carries out an agreement and stands by for a number of years, after which a rescission of it must result in an unfair advantage to himself, is estopped from suing therefor.

Philé es-qual (intervenant, appellant) v. Coté et al. (plaintiffs, respondents), 21 Que. K.B. 128.

Since a liquidator in proceedings for the compulsory winding-up of a bank has no right under sec. 36 of the Winding-up Act, R.S.C. 1906, ch. 144, to accept less than full payment from stockholders under sec. 130 of the Bank Act, R.S.C. 1906, ch. 29, on a deficiency in the assets and property of the bank, an estoppel by reason of his laches cannot be asserted against him where he places upon the list of contributories the transferees of the stock instead of the holders on the day the proceedings

were commenced, since the liquidator cannot accomplish by mere laches that which he could not do with deliberation and intention. (Dictum per Garrow, J.A.) [In Re National Bank of Wales, [1907] 1 Ch. 298, distinguished; Re East India Cotton Agency, Limited, Sand's Case (1875), 32 L.T.R. 299, referred to for different view.]

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 4 O.W.N. 67.

The fact of a person seeing a prospectus wherein a company makes certain statements, which, if true, would affect such person's rights, and of not proceeding immediately to protest against such statements is no proof of acquiescence in such statements and of ratification of the acts or deeds therein described.

Consumers Cordage Co., Limited v. Molson, 2 D.L.R. 451.

(§ III G 1—87)—AS TO INSURANCE.

The fact that an agent, who had no authority to waive any of the conditions of a policy of insurance, after the expiration of the two years in which an assured person was, by the terms of the policy, prohibited from entering the employment of a railway without a permit from the company, acquired knowledge that the former was engaged in such employment, which was never communicated to the company, cannot amount to a waiver of such condition of the policy. [Wells v. Independent Order of Foresters, 17 O.R. 317; Wing v. Harvey, 5 DeG. M. & G. 265; Imperial Bank v. Royal Ins. Co., 12 O.L.R. 519, specially referred to.]

Smith v. Excelsior Life Insurance Co., 4 D.L.R. 99, 3 O.W.N. 1521, 11 O.W.R. 863.

(§ III G 1—87a)—AS TO CONTRACTS; MODIFICATION OF TERMS; ACQUIESCENCE; WAIVER.

A condition that a proposal to modify the terms of an existing contract should not become effective until a new written agreement was entered into, is not waived by the conduct of the parties where they did nothing whatever in reliance upon such proposal after it was made.

Wallace Bell Co., Limited v. City of Moose Jaw (No. 2), 4 D.L.R. 438, 21 W.L.R. 871.

(§ III G—87b)—AS TO INFANT.

Where a bank has more than $500 on deposit in the name of an infant, and has paid a cheque for over $500 drawn by him upon his account during his infancy, and the infant has made no objection to such payment for more than a year and a half after coming of age, he will be precluded by his laches from recovering the amount of the cheque from the bank notwithstanding that he believed himself to be a year younger than he was.

Freeman v. Bank of Montreal, 5 D.L.R. 418, 3 O.W.N. 1364, 22 O.W.R. 276, 26 O.L.R. 451.

(§ III G 1—88)—AS TO FORGERY OF INDORSEMENT.

Where money had been paid by the defendant on account of the plaintiff on an unauthorized order, the plaintiff was held not to be estopped from denying or repudiating it simply because he had retained the forged order in his possession without prosecuting the wrong-doer, the defendant's position not having been materially altered to its disadvantage by the conduct of the plaintiff in this respect. 2. An act relied on as a waiver should (unless it has altered the position of the other party, thereby giving rise to an estoppel), be of a nature inconsistent with the exercise of the right claimed to have been waived.

Langley v. Peel Lumber Co., Limited, 11 E.L.R. 126.

(§ III G 2—94)—OF TENANT.

A tenant after having given notice of the exercise of an option to renew a lease, but which notice is unsigned, and who agrees in writing to surrender two years of the renewal term of five years, is estopped from asserting that the renewed term was to exist for more than three years. [See also Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793.]

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816.

(§ III G 2—102)—AS TO PURCHASE INDUCED BY FRAUD AND MISREPRESENTATION.

It cannot be held that one who was induced to purchase land through fraud and misrepresentation, elected to abide by the sale because of delay thereafter in suing for redress, if the deception that had been practiced upon him was of such a character as to preclude the discovery of the fraud until the time of bringing the action.

Stocks v. Boulter, 5 D.L.R. 268, 3 O.W.N. 1397, 22 O.W.R. 464.

J. By inconsistency in acts, claims, etc.

(§ III J—120)—BY INCONSISTENCY IN ACTS, CLAIMS, ETC.

The accuracy of the weighing apparatus of a threshing machine that complied with the requirements of sec. 33 of the Weights and Measures Act, cannot, even if the question could be raised without being pleaded, be attacked on the ground that the manner of ascertaining the number of bushels of grain threshed was contrary to the provisions of such Act, by one who tacitly assented to the use of such method of measurement by taking the grain from the separator, and afterwards, without attempting to ascertain the quantity under the Weights and Measures Act, broke the bulk thereof by drawing some of the grain to market. [Conn v. Fitzgerald, 5 Terr. L. R. 346, specially referred to.]

Kyles and Chester v. Wilson, 3 D.L.R. 702, 21 W.L.R. 416.

(§ III J 2—125)—AS TO TITLE.

Where the plaintiff, after the death of

one from whom he obtained title to land with warranty, discovered that the grantor had only a life interest and a mortgagee's title thereto, and informed the executrix, as well as the remainder-men, that he had a right of action against them on the warranty, but that rather than have difficulty he would give them $250 for a quit-claim deed of their interest in the land, which was refused, but subsequently, upon the plaintiff threatening to foreclose the mortgage and bring an action against them on the warranty, they executed and delivered him such deed upon the payment of $500, the plaintiff not suggesting that he reserved or intended to reserve any further claim against them, he cannot subsequently maintain an action against them on the warranty.

VanBuskirk v. McDermott, 5 D.L.R. 5, 11 E.L.R. 100.

(§ III J 2—126)—To patent or accepting title.

An estoppel against a person licensed to use a patent of invention from his disputing the validity of the patent may arise from the relative positions of the parties even without recital in the written license.

The Imperial Supply Co., Limited v. The Grand Trunk R. Co., 1 D.L.R. 243, 10 East. L.R. 414, 13 Can. Ex. R. 507.

(§ III J 3—130)—Acts or claims in judicial proceeding.

The vendor who sues for the cancellation of a promise of sale of lands is not thereby estopped from praying for the demolition of work done in contravention to such promise of sale.

Lapierre v. Magnan and Viens, 2 D.L. R. 544, 42 Que. S.C. 59.

The trial of a contentious case in a Surrogate Court upon a date upon which, under the Surrogate Courts Act, 10 Edw. VII. (Ont.) ch. 31, sec. 29 (1), such a case cannot properly be tried, is not a nullity, but an irregularity only, and one who, by his counsel, appears at the trial, cross-examines witnesses, and argues as to costs, will be held to have waived the irregularity. (Per Riddell, J.)

Connors v. Reid, 3 D.L.R. 636, 3 O.W. N. 1137.

Payment of the costs of an action, by the plaintiff to the defendant's attorney, made solely for the purpose of releasing the real estate of the plaintiff from the encumbrance resulting from the registry of the judgment, in order by this means to enable the plaintiff to sell such real estate but without any intention on the part of the plaintiff to waive his right to further prosecute the claim set up in his action, or the benefit of his proceedings in appeal against such judgment, does not constitute an estoppel by way of acquiescence in the judgment appealed against and does not put an end to the plaintiff's action nor invalidate his appeal in so far at least as the debt itself, and the costs of the appeal are concerned; and in these circumstances a motion on the part of the defendant asking the dismissal of the plaintiff's appeal based on such alleged acquiescence will be dismissed with costs.

Leroux v. Reade, 18 Rev. de Jur. 323.

K. By receiving benefits.

(§ III K—139)—Legatee; beneficiaries.

Beneficiaries of a testator who have received all or part of the purchase money on the sale of the land of the estate cannot subsequently set up the claim that the sale was void or voidable. [Steen v. Steen (1907), 9 O.W.R. 65, 10 O.W.R. 720 (C.A.), and Clark v. Phinney (1895), 25 Can. S.C.R. 633, referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

Where a partner sold his interest in the business to the other members of the firm for a sum payable at a specified time and payment was not enforced when due (the selling partner having died before its maturity) a trustee and executor of his estate who was also a cestui que trust under the will and who acquiesced in allowing the debt to remain uncollected and received his share of the interest paid thereon from time to time by the firm and who with full knowledge of his rights executed a release and discharge under seal to his predecessors in the trusteeship to whom the firm had repaid the debt has no right to also claim an accounting of the profits earned in excess of the interest by the loan after it became due. [Chillingworth v. Chambers, [1896] 1 Ch. 685, specially referred to.]

Carvell v. Aitken, 2 D.L.R. 709, 10 E.L. R. 432.

(§ III K—142)—Receiving interest.

Where one agrees to sell securities for another within a limited time, for the face value thereof, or, if after the time agreed, for the face value thereof with accrued interest, and puts off the owner of the securities from time to time with promises to fulfil his agreement, the owner does not, by accepting interest and surrendering the coupons on the securities, waive his right to insist upon a sale.

Martin v. Munns, 3 D.L.R. 435, 3 O.W. N. 1055.

(§ III K—143)—Receiving payments.

A condition in a contract for the plowing and improving of land that it should be plowed to a certain depth, is not waived by the payment of money on the contract during the performance of the work where the inspector, whose decision, by the terms of the contract was final, had approved of such payment only upon the understanding that portions of the land should be replowed to the required depth.

Schultz v. Faber & Co., 4 D.L.R. 707, 21 W.L.R. 163.

ESTREAT OF BAIL.

See Bail and Recognizance.

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I. Judicial notice.

A. Laws and ordinances.

(§ I A—6)—CITY ORDINANCES.

A municipal by-law need not be set out in a conviction before a magistrate for its violation, since, by sec. 68 of the Summary Conviction Act, judicial notice must be taken of such by-law.

The King v. Elderman, 19 Can. Cr. Cas. 445.

(§ I A—8)—TREATY.

Judicial notice is to be taken under sec. 8 of the Extradition Act, R.S.C. 1906, ch. 155 of extradition treaties and extradition orders-in-council published in the Canada Gazette, the official paper of the Government of Canada, without production in evidence of a copy of the Gazette. [See also sec. 1128 of the Criminal Code.]

Republic of France v. Peugnet, 1 D. L.R. 204, 19 W.L.R. 938, 19 Can. Cr. Cas. 179.

C. Official and judicial character of Acts.

(§ I C—20)—OFFICIAL AND JUDICIAL CHARACTER OF ACTS.

On an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of objection provided for by the Controverted Elections Act, sec. 10 (ch. 2 of Alberta, 1907) is that the petitioner is a Judge of the Supreme Court or of one of the District Courts, the Court is entitled to take judicial notice of the fact that the petitioner is not the holder of such an office. (Per Stuart, J.) [Carstairs v. Cross, Re Edmonton Election (Decision No. 2), 7 D.L.R. 192, affirmed on an equal division.]

Carstairs v. Cross, Re Edmonton Election (No. 3), 8 D.L.R. 369, 22 W.L.R. 797.

E. Other matters.

(§ I E—69)—FISH AND FISHERY RIGHTS.

The Court is not bound to take judicial notice, as of a public deed, of a grant made to the Crown of a fishery right by the seigneurs who theretofore had proprietary rights or seigneurial title therein under Quebec law. (Per Lavergne, J.)

Robertson v. Grant, 3 D.L.R. 201.

F. By jury.

(§ I F—90)—JURY.

To support a jury's finding of negligence in not transferring a train at a particular place to the right-hand track from the unusual left-hand track on which it had been running temporarily because of an accident on the other track, there must be evidence as to the location of the switches at which the cross-over could have been made; and the finding cannot be supported in the absence of such evidence on the assumption that the jury acted upon local knowledge of the location of switches at or near the locus in quo. [Kessowji Issur v. Great Indian Peninsula R. Co. (1907), 96 L.T.R. 859, applied.]

Graham v. Grand Trunk R. Co., 1 D. L.R. 554, 3 O.W.N. 538, 20 O.W.R. 965, 25 O.L.R. 429, 13 Can. Ry. Cas. 232.

II. Presumptions and burden of proof.

A. In general; laws; ordinances.

(§ II A—95)—PRESUMPTIONS AND BURDEN OF PROOF; LAWS; ORDINANCES.

Though, under the statute, sec. 303 of the Municipal Act, ch. 170, R.S.B.C. 1911,

providing that licenses, taxes, rate or rents payable to a municipality shall be a debt due to the municipality recoverable by action, a certified copy of the collector's roll is made prima facie evidence of the debt, such evidence may be rebutted.

Municipality of Saanich v. French, 8 D.L.R. 637.

(§ II A—102)—Foreign language.

It will be presumed that English-speaking people in Canada are not conversant with the Chinese language so as to understand an overheard dialogue in that tongue between two Chinamen and the conversation between the Chinamen in the presence of the chief of police but in which the officer took no part is to be treated as if the latter were not present as regards the proof of an admission or confession made therein. Per Newlands, J., Lamont. J., concurring.

The King v. Hoo Sam, 1 D.L.R. 569, 20 W.L.R. 571, 19 Can. Cr. Cas. 259.

B. Establishing allegations or claims.

(§ II B—105)—Establishing allegations or claims.

The onus is upon a boom company whose unlawful operation in the wrongful construction of works in an international river causes confusion in connection with the driving of logs down the said river and which claimed the right to recover for services rendered in respect to the booming, sorting, rafting and driving of the logs, to shew affirmatively the quantity of such logs which lawfully came into its possession. [Warde v. Æyre, 2 Bulst. 323, applied.]

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

(§ II B—108)—Torts; negligence.

In an action for damages for negligence, causing death, the personal representative, suing under Lord Campbell's Act, must shew more than the omission by the defendant employer of a statutory duty to guard the machinery; he must prove also that the fatal accident was occasioned by the neglect of the statutory duty, and where there was no witness of the accident, nor was there any evidence from which an inference could be drawn from the position of the body or otherwise that the neglect of the statutory duty was the cause of death, the action must be dismissed. [Canadian Coloured Cotton Mills v. Kervin, 29 Can. S.C.R. 478, applied; Grand Trunk R. Co. v. Griffith, 45 Can. S.C.R. 380, and Swansea Vale v. Rice, [1912] A.C. 239, referred to.]

Loffmark v. Adams, 7 D.L.R. 696, 22 W.L.R. 547.

That death was caused by negligence of a master may be inferred, where there were no eye-witnesses, from the fact that a careful and experienced painter was required to work in a cramped and insecure position on a scaffold within a few inches of improperly insulated and unprotected wires carrying a dangerous current of electricity, notwithstanding that he had been warned of their dangerous nature, where the painter's death resulted from contact with the live wire.

Lefebvre v. Trethewey Silver Cobalt Mine, Ltd., 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

The onus rests upon the plaintiff of establishing the negligence of the defendant in an action for injuries sustained as the result thereof, and if, in the absence of direct proof, the circumstances are equally consistent with both the plaintiff's and the defendant's case, the plaintiff fails. [Wakelin v. London and South Western R. Co. (1886), 56 L.J.Q.B. 229, 12 App. Cas. 41, 55 L.T.N.S. 709, specially referred to.]

Queer v. Greig, 5 D.L.R. 308.

(§ II B—112)—In patent cases.

The onus of proving that a device does not display the novelty required for a valid patent under Canadian law lies on the person attacking the patent. [Dompierre v. Baril. 18 R.L. (Que.) 597, followed; Allen v. Reid, 14 Que. L.R. 126, disapproved.]

Rolland v. Fournier, 4 D.L.R. 756.

(§ II B—113)—In prosecutions under Liquor License Act.

Evidence that in an unlicensed hotel there is a bar, and on the bar a beer pump used to pump a non-intoxicating beverage called "local option beer," and that brewer's calendars were there displayed is insufficient to convict the occupant of the offence of keeping up a sign or having a bar containing bottles or casks displayed so as to induce a reasonable belief that the premises were licensed for the sale of liquor, where the former official license sign over the door had been removed, and there was no display of bottles or casks such as are used distinctively for intoxicating liquors nor was there, apart from the brewer's calendars, any display of advertising matter suggestive of the sale of intoxicants in the place.

Rex v. Bevan, 8 D.L.R. 86, 4 O.W.N. 400.

C. Defences.

(§ II C—119)—Contracts generally.

The burden of proof rests upon the defendant in an action to recover for making a number of suits of clothing, to establish the truth of an affirmative counterclaim that the suits were not made according to a designated sample, as required by the contract, as well as to shew the defective quality of the workmanship of the suits.

Wener v. Rubin. 5 D.L.R. 539.

The party called upon to pay an account for work ordered done by the Public Util-

ities Commission has the right to have the value thereof established upon a hearing of the evidence pro and con, and if such right is denied him the order to pay is illegal.

La Compagnie Electrique de Grand'-mere v. Public Utilities Commission, 6 D.L.R. 92.

D. Exceptions or exemptions.

(§ II D—127) — EXEMPTIONS; SAVING CLAUSE.

When there has been a deviation from a statutory requirement the onus lies upon those supporting the deviation to shew that the effect of same comes within the terms of a statutory saving clause intended to validate the result of the voting, notwithstanding the occurrence of certain errors and irregularities in procedure. [Re Giles and Town of Almonte (1910), 21 O.L.R. 362, distinguished.]

Re Milne and Township of Thorold, 1 D.L.R. 540, 25 O.L.R. 421.

E. Concerning person.

(§ II E 1—140)—PARTNERSHIP AND DISSOLUTION.

In an action for winding up a partnership made for a fixed term, the onus is upon the defendant who sets up a dissolution by agreement during such term, to prove the same.

Town v. Kelly, 5 D.L.R. 14, 21 W.L.R. 610.

In an action for winding up a partnership, if the partnership be at will, the onus is on the plaintiff to shew by what acts the partnership was terminated.

Town v. Kelly, 5 D.L.R. 14, 21 W.L.R. 610.

(§ II E 1—142a)—AGENCY.

It is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents, in making the contract, as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; such evidence in no way contradicts the written agreement. [Rossiter v. Miller, 3 App. Cas. 1125; McClung v. McCracken, 3 O.R. 596; McCarthy v. Cooper, 12 A.R. (Ont.) 286, specially referred to.]

Morgan v. Johnson, 4 D.L.R. 643, 3 O. W.N. 1526, 22 O.W.R. 868.

Assent by a principal to an unauthorized agreement for the sale of land made by his agent, is not shewn where the former continually repudiated the agent's act, although he at one time said he would sign the agreement, but immediately afterward refused to do so, and refused to accept the money paid by the purchaser on the agreement to the agent.

Margolis v. Birnie, 5 D.L.R. 534, 21 W. L.R. 462.

(§ II E 1—145)—REPRESENTATIVE CAPACITY; DESCRIPTIVE TERM.

If the name of the maker, payee or an endorser of a negotiable instrument be followed by words indicating a representative capacity, they are generally considered merely descriptio personae, and as such are immaterial. [See Encyclopaedia of Pleading and Practice, sec. V., Negotiable Instruments, at pp. 50 and 471.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

(§ II E 1—149)—LICENSEE; INVITEE; TRESPASSER.

The burden of proof rests upon the plaintiff in an action brought under the provisions of the Workmen's Compensation for Injuries Act (Ont.) and the Fatal Accidents Act (Ont.) for the recovery of damages for the death of her husband who had fallen into the hold of a vessel moored to a dock for the winter, while such vessel was lying between the dock and another vessel upon which the deceased had worked as an engineer during the previous navigation season and upon which he had been re-engaged for the ensuing season not yet commenced, to prove the right of the deceased to be where he was when he was killed.

King v. Northern Navigation Co., 6 D. L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

(§ II E 2—151)—MARRIAGE.

A cogent legal presumption is raised in favour of any marriage which is shewn to be celebrated de facto, and this presumption of law is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. [Taylor on Evidence, 10th ed., par. 172, referred to.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W. L.R. 336.

(§ II E 2—152)—IDENTITY; NAME.

It is not to be inferred merely from the similarity of name of the proposed purchaser in a written offer of purchase and of a member of the firm of real estate agents as disclosed upon the printed letter-head accompanying such offer that the proposed vendor, on whose behalf the real estate firm were commissioned to sell the property, knew that such purchaser was the identical person who belonged to the firm, particularly where the firm were charging him a commission as for an alleged sale to which they would not legally be entitled on a sale to one of themselves for their joint benefit. [Edgar v. Caskey, 4 D.L.R. 460, reversed.]

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

(§ II E 3—156)—DEATH.

In an action to declare valid a title by possession where the party named as defendant has not been heard of for seven years, the Court may act upon the presumption that he is dead, and appoint counsel to represent his estate under Alberta Rule 57.

Wallace v. Potter, 7 D.L.R. 114, 22 W. L.R. 281.

(§ II E 4—161)—ASSENT.

The consent of one of the members of a partnership to the acquirement and ownership by the other of an interest in a business competing with that of the firm may be inferred from the surrounding facts and circumstances, and such consent, if established, will relieve the partner so interested from the obligation to account to his firm for the profits derived from such interest. [Kelly v. Kelly, 20 Man. L.R 579, referred to; Aas v. Behnam, [1891] 2 Ch. 244 at p. 255, applied.]

Livingston v. Livingston, 4 D.L.R. 345, 21 O.W.R. 901, 3 O.W.N. 1066, 26 O.L.R. 246.

(§ II E 4—162)—AUTHORITY.

The onus rests upon the defendant, in an action by an agent to recover commission for securing a purchaser for the former's property, to shew that the agent's authority was withdrawn before he found a buyer.

George v. Howard, 4 D.L.R. 257.

(§ II E 5—165)—NOTICE.

The onus is upon the agent who seeks to enforce against his principal an alleged purchase on his own account of the principal's property which he had been employed to sell to establish to the satisfaction of the Court that he disclosed to his principal the fact that the offer was on his own behalf.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which may be profitable to him, and is accountable for damages accordingly. [10 Halsbury's Laws of England 317, discussed; Lloy v. Dartmouth, 30 N.S.R. 208, specially referred to.]

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 20 W.L.R. 161.

(§ II E 5—166)—KNOWLEDGE.

Where the seller of a boiler and its attachments is a wholesale dealer and manufacturer of such machinery, and where the attachments sent under the contract of sale are misfits and not workable, the seller will be held strictly to knowledge of their requirements in an action by the buyer for damages for delay in returning the attachments for readjustment and alterations.

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the night-time, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

Cunningham v. Michigan Central R. Co., 4 D.L.R. 221, 3 O.W.N. 1395, 22 O.W.R. 481.

Knowledge of a dealer in books, who had a stock of 150,000 to 250,000 volumes, of the obscene character of a book, cannot be inferred from the fact that a clerk had, without his employer's knowledge, ordered a few of them and sold one, and that the defendant had, about a year before, upon receiving a few copies of such book, without reading one of them, returned them to the publisher because he had heard that the book was immoral.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

In the absence of actual knowledge, it cannot be assumed that one who purchased land under a certificate of title free from any reservation, without notice of the existence therein of footings, which were concealed from view, for sustaining a wall of a building on an adjoining lot, knew of their existence, where the wall could have been built without extending any of the footings into the land so purchased.

The National Trust Co., Ltd. v. The Western Trust Co., 4 D.L.R. 455, 21 W. L.R. 571.

(§ II E 5—167)—OF PRINCIPAL OR AGENT.

Where one who has engaged an independent contractor has an agent upon the work, though the agent be without authority to authorize or adopt a wrongful taking of chattels by the contractor for the purpose of the work, yet, if he have knowledge of such a wrongful taking, such knowledge may be imputed to his principal. [Commercial Bank v. Morrison, 32 Can. S.C.R. 98, at p. 105; Halsbury's Laws of England, vol. 1, pp. 215-6, and Bowstead on Agency, 4th ed., p. 346, specially referred to.]

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

(§ II E 5—169)—OF CORPORATION.

Acquiescence of the manager of a mortgagor in the making of extensive improvements on encumbered property by a mort-

gagee who was in possession, cannot be inferred from the fact that the former lived in the immediate neighborhood of the property and was aware of such improvements, where he did not object thereto for fear that the mortgagee would sell under the power in his mortgage. [Shepard v. Jones, 21 Ch.D. 469, referred to.]

Manitoba Lumber Co., Ltd. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

(§ II E 5—172)—TESTAMENTARY CAPACITY.

Oddities of habits and eccentric acts are not per se sufficient to justify a conclusion of unsound mind, especially when the provisions of the will itself are perfectly rational and logical, and evidence based on purely theoretical assertions is most dangerous and should not carry much weight as against testimony of facts.

Madore v. Martin, 3 D.L.R. 731, 18 La Rev. de Jur. 480.

Statements made by a testator in his lifetime were admitted on the contest of a will, as they bore, or might bear on the question of his capacity to make a will and of its due execution. [Suller v. Saddler, 3 C.B.N.S. 87, 99, referred to.]

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

As a general rule the onus of proving that a testator was of unsound mind at the time of the making of the will rests on the person attacking the validity of the will, although special circumstances (e.g., intervals of unsoundness of mind) may shift such onus on the person defending such will.

Madore v. Martin, 3 D.L.R. 731, 18 La Rev. de Jur. 480.

(§ II E 5—177)—INTENT.

Upon an agreement to purchase vacant land on small monthly instalments where the purchaser now seeks specific performance and the vendor pleads abandonment, the intention of the purchaser to abandon the contract may properly be inferred from long continued default on the monthly payments. [Cyc. vol. 1. p. 7, referred to.]

Handel v. O'Kelly, 8 D.L.R. 44, 22 W. L.R. 407.

There is reasonable cause for believing that the defendant is about to quit the Province within the meaning of the Arrest and Imprisonment for Debt Act, R.S. B.C. 1911, ch. 12, if the intended absence is likely to prove of such duration as would, before the abolition of imprisonment for debt, have prevented the taking of the defendant's person in execution. [Larchin v. Willan, 4 M. & W. 351, referred to.]

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261.

(§ II E 6—180)—MALICE; CRIMINAL INTENT; PROBABLE CAUSE.

In an action for damages resulting from false arrest the onus of proving that the defendant acted imprudently and without reasonable and probable cause in procuring such arrest lies upon the plaintiff.

Canadian Pacific Railway Co. (appellant, defendant) v. Waller (respondent, plaintiff), 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

(§ II E 6—181)—MALICE.

Where the alleged libel complained of is a privileged communication, the burden is upon the plaintiff to prove express malice.

Winnipeg Steel Granary and Culvert Co., Ltd. v. Canada Ingot Iron Culvert Co., Ltd., 7 D.L.R. 707, 22 W.L.R. 387.

Malice in laying the criminal charge may be inferred from the want of reasonable and probable cause in laying the information and proceeding with the prosecution. [See also 19 Halsbury's Laws of England, p. 684.]

Geers v. Nestman, 1 D.L.R. 312, 20 W. L.R. 212.

(§ II E 7—185)—FRAUD OR GOOD FAITH; UNDUE INFLUENCE.

In an action to set aside conveyances of a debtor as fraudulent and void as against creditors the good faith of the transaction may be shewn by the uncorroborated testimony of the debtor where he gives his recital in an honest, straightforward manner without attempting to conceal anything tending to support the creditor's contention and no evidence is offered to contradict him. [Merchants Bank v. Hoover, 5 W.L.R. 516, not followed.]

Burns v. Matejka, 1 D.L.R. 837, 19 W. L.R. 863.

(§ II E 7—186)—FRAUD IN GENERAL.

A party suing on a negotiable instrument need not allege, nor at the outset prove, that he gave consideration, or is a holder in due course since these presumptions are in his favour; but. if fraud or illegality be shewn, the burden is shifted, and he must shew that, subsequently to such fraud or illegality, he gave value in good faith. [Tatam v. Haslar, 23 Q.B.D. 345, specially referred to; see also Phipson on Evidence, 5th ed., 24.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

Fraudulent intent must be proved in an action for deceit. [Smith v. Chadwick, 9 A.C. 157, at p. 190; Derry v. Peek, 14 A.C. 337, and Tackey v. McBain. [1912] A.C. 186, followed.]

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O.W.N. 966, 22 O.W.R. 979.

(§ II E 7—187)—IN CONTRACT.

Where an incorporated company attacks a contract between itself and one of its directors on the ground of misrepresentation, the onus is upon the director to prove affirmatively the truth of the repre-

sentation complained of. [Imperial Mercantile Credit Association v. Coleman, L.R. 6 H.L. 189; Gibson v. Jeyes, 6 Ves. 266, referred to; see also Kerr on Fraud and Mistake, 4th ed., p. 147; and Bowstead on Agency, 5th ed., p. 137.]

Denman v. The Clover Bar Coal Co., Ltd., 7 D.L.R. 96, 22 W.L.R. 128.

(§ II E 7—189)—In sale or pledge.

Fraud and misrepresentation as to the probable yield of timber from land cannot be inferred from the vendor's exaggerated estimate thereof, where there was room for a wide difference of opinion on the question.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52.

The onus of shewing ratification by the seller of a sale of company shares, which was induced by fraud of the purchaser, after the former acquires knowledge thereof, rests upon the purchaser.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886.

Every violation of the provisions of the law regarding the procedure to be followed at sheriff's sale raises a presumption of fraud juris et de jure which cannot be rebutted.

Savoie-Guay v. DesLauriers and DeBriere; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

Where a promissory note is given in payment for tenant's fixtures on the faith of the vendor's representation that there will be no difficulty in getting possession thereof, the inference may properly be drawn that the promissory note would not have been given but for that representation.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

(§ II E 7—191) — Fraudulent transfers or assignments.

Where a transfer of property made by a debtor is attacked by his creditors as fraudulent and intended to defeat or delay the creditors, and the transaction is shewn to be surrounded by suspicious circumstances, it will not be sustained on the uncorroborated evidence of the parties to the transaction; the onus is on them to disprove the fraud. as to which a presumption has been raised against the parties to the transaction. (Per Brodeur, J.)

Green, Swift & Co. v. Lawrence, 7 D. L.R. 589.

A fraudulent intent will be inferred from a voluntary conveyance of his property by a debtor, the effect of which is to defeat, hinder or delay his creditors. [Freeman v. Pope, L.R. 5 Ch. App. 538; Crossley v. Elworthy, L.R. 12 Eq. 158, and Mackay v. Douglas, L.R. 14 Eq. 106, followed.]

Jack v. Kearney, 4 D.L.R. 836, 10 E. L.R. 298.

(§ II E 7—193)—In insurance.

In an action on a policy of insurance exempting the insurer from liability if statements material to the risk made in the application upon which the policy was issued, were untrue, where it appears that the insured made a misrepresentation in his application and that the insurer relies thereon as a defence. the burden is upon the insurer to establish the materiality of the matter misrepresented unless the circumstances themselves raise that inference.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

(§ II E 7—196)—Good faith; contract; interest in company-shares.

Warfield v. Bugg, 1 D.L.R. 897.

(§ II E 7—198)—In negotiable instrument.

Where, in an action upon a promissory note, it is shewn that a previous negotiation of the note was a fraud upon the defendant, the plaintiff must shew not only that value has been given subsequent to such negotiation by some other holder in due course, but also that it has been given in good faith without notice of the fraud. [Tatam v. Haslar, 23 Q.B.D. 345, followed; Talbot v. Von Boris, [1911] 1 K.B. 854, referred to; see also Byles on Bills of Exchange, 17th ed., footnote. at p. 144.]

Noble v. Boothby, 7 D.L.R. 1, 22 W. L.R. 232.

In an action on a promissory note given pursuant to an agreement under which several persons advanced money to enable the payee to go on a prospecting trip for minerals for the benefit of all of them, fraud and collusion between the payee and makers of other notes that were given under such agreement will not be assumed from the unexplained fact that the payee returned their notes to them.

Lilly v. Robertson, 4 D.L.R. 852, 21 W. L.R. 585.

(§ II E 8—204)—Guilt; presumption of.

The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

Rex v. Whistnant, 8 D.L.R. 468, 22 W. L.R. 762.

(§ II E 9—205)—From silence; withholding or destroying evidence.

Per Irving, J.A.:—A presumption is raised against a spoliator who destroys or conceals the things, the finding of

which would be evidence against him, and such presumption is applicable in matters of international law. For other cases see Odgers' Law of Evidence, Canadian edition, 1911, pp. 408-410.]

The King v. Chlopek, 1 D.L.R. 96, 19 W.L.R. 837, 17 B.C.R. 50, 19 Can. Cr. Cas. 277, 48 C.L.J. 158.

The fact that one of the parties to an alleged contract with a corporation embodied in a corporate resolution, although present when the resolution was read, raised no objection or dissent, is not conclusive of his assent by silence, as such party is entitled to adduce evidence in explanation of his silence.

Re St. David's and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, 23 O.W.R. 12.

Where reticence is accompanied by such circumstances as to give it an exceptionally misleading aspect, it can be assimilated to an affirmative false statement, and a contract entered into as the result of such reticence will be voided and set aside.

Liddell, Lesperance & Co., Limited v. Lacroix, 8 D.L.R. 502.

(§ II E 9—206) — PRESUMPTION AGAINST SPOLIATOR.

In computing the amount of damages recoverable for clandestine use of a water supply the maxim "omnia praesumuntur contra spoliatorem" applies. [Lamb v. Kincaid, 38 Can. S.C.R. 516, specially referred to; see also The King v. Chlopek, 1 D.L.R. 96.]

Brandon Electric Light Co. v. City of Brandon, 1 D.L.R. 793, 20 W.L.R. 658.

F. Corporations; partnership.

(§ II F—211)—POWERS AND ACTS.

In winding-up proceedings, the onus is on the liquidator who seeks to place a person on the list of contributories.

Re Port Hope Brewing and Malting Co.; Johnson's Case, 3 D.L.R. 426, 3 O.W.N. 1048.

(§ II F—217)—DIRECTORS.

The presumption in the case of a director of a company is that his services as such are to be gratuitous.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

H. As to skill; negligence; care.

(§ II H 1—224)—AS TO SKILL; NEGLIGENCE; CARE.

The maxim res ipsa loquitur applies to shew a prima facie case of actionable negligence on the part of a defendant who while riding a bicycle on a city street violently collided with and seriously injured a foot passenger who was crossing the street, where it appeared, (a) that there was nothing to prevent the defendant from seeing the plaintiff; (b) that he was in a better position to see the plaintiff than the plaintiff was to see him; (c) that the defendant did see the plaintiff long enough before the actual collision to warn him. (Per Garrow, J.A.)

Woolman v. Cummer, 8 D.L.R. 835, 23 O.W.R. 504, 4 O.W.N. 371.

(§ II H 1—227)—COLLISION.

Deceased, an employee of defendant company, was killed in a collision between the car of the defendant company on which he was travelling to his work, and a freight car which had been allowed to get loose and run down grade alone. There was no proof of how this car got away. Some evidence was given of a pass from the company having been found on deceased, but not to shew that this pass had been issued to him over that portion of the line, nor was the pass produced:—Held, that the onus was on the defendant company to shew that deceased was travelling on a pass, and that it was not shewn that he was being carried in such circumstances as to make him a fellow-servant with those operating the line. Per Irving, J.A.:—That the case had not been tried out, because the trial Judge, after instructing the jury that defendant company would not be liable if it was found that deceased was travelling on a pass by reason of the negligence of a fellow-servant, asked the jury to find whether the accident was due to a defective system without explaining to them what constituted a defective system.

Wilkinson v. British Columbia Electric R.W. Co., 16 B.C.R. 113, 13 Can. Ry. Cas. 378.

(§ II H 1—234)—BAGGAGE.

In case of accidental destruction of goods in a bailee's custody, where an accident is proved to have been caused by a hidden defect of such a nature that it could not be guarded against in the process of construction, nor discovered by subsequent examination, the presumption that the loss has resulted from the bailee's negligence is rebutted. [See Beven on Negligence, 3rd ed., p. 116 et seq.]

Carlisle v. Grand Trunk R. Co., 1 D.L.R. 130, 3 O.W.N. 510, 20 O.W.R. 860, 25 O. L.R. 372.

(§ II H 1—237)—DAMAGE.

The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. (Per Irving, J.A.) [Hennell v. Davies, [1893] 1 Q.B. 367, followed.]

Albo v. Great Northern R. Co., 2 D.L.R. 290, 20 W.L.R. 844, 17 B.C.R. 226.

(§ II H 1—241)—RAILROADS GENERALLY.

In an action against a railway company for negligence causing death, the plaintiff is not bound to call the engineer or fireman on whose alleged neglect the action is based to prove a breach of duty by themselves.

Graham v. Grand Trunk R. Co., 1 D.

L.R. 554, 3 O.W.N. 538, 20 O.W.R. 965, 25 O.L.R. 429, 13 Can. Ry. Cas. 232.

(§ II H 1d—251)—ELECTRIC RAILWAY.

Where an explosion occurs in the controller of a car, which controller was entirely under the management of the defendant carrier, and the resulting accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords of itself sufficient evidence that the accident arose from want of care, in the absence of explanation by the carrier. [Scott v. London Dock Co., 3 H. & C. 596, followed.]

Fleming v. Toronto R. Co., 8 D.L.R. 507, 4 O.W.N. 323, 23 O.W.R. 385.

Where a controller of a car is shewn to have been "overhauled" by the defendant carrier shortly before an explosion occurred resulting in injury to a passenger, the burden is upon the defendant to shew that it had been properly done.

Fleming v. Toronto R. Co., 8 D.L.R. 507, 4 O.W.N. 323, 23 O.W.R. 385.

(§ II H 1—263)—OF BAILEE; WAREHOUSEMEN.

The burden of proving the exercise of reasonable care and that a suitable place for storage has been furnished lies upon the warehouseman when he delivers in a damaged condition goods received by him in apparently good state.

Roy v. Adamson, 3 D.L.R. 139.

(§ II H 1—265)—OF MUNICIPAL CORPORATIONS.

In the absence of direct evidence to shew that the deceased walked into the unprotected portion of an excavation in the street, which was being made by the municipal corporation and which was left with a partial protection only so that as to the remainder it constituted a dangerous trap, an inference to that effect may be drawn from the position in which his body was found and from the fact that deceased had left his house in a hurry to catch a car and that the trench was on his direct route to do so.

McDonald v. The City of Sydney, 8 D. L.R. 99.

In an action against a municipality for neglect to take precautions against fire whereby the death of a prisoner resulted while occupying a wooden cell after his arrest, it is incumbent on the plaintiff to establish, by the burden of proof, that the deceased's death was caused by the defendant's negligence, from a negligent act or omission, to which the death of the deceased can be attributed and traced; and if there is no direct proof of negligence, and the circumstances proven are equally consistent with the absence of negligence as with its existence, the burden has not been sustained by plaintiff, and a recovery cannot be had. [Wakelin v. South Western R. Co., 12 A.C. 41, applied.]

McKenzie v. Township of Chilliwack, 8 D.L.R. 692, [1912] A.C. 888.

(§ II H—270)—AUTOMOBILES AND MOTOR VEHICLES.

Section 33 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, providing that the onus of shewing that any loss or damage incurred by any person from the operation of a motor vehicle did not arise through the negligence or improper conduct of the owner or driver thereof, shall rest upon the owner or driver, merely establishes a new rule of evidence in civil cases, and does not alter the common law liability of the owner or driver for the negligent operation of a motor vehicle.

The B. & R. Co. v. Hugh S. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

Section 42 of the Motor Vehicles Act, R.S.B.C. 1911, ch. 169, by which in any prosecution for any offence against its provisions occurring while the motor vehicle was in motion on any highway the person in charge or control of the motor vehicle, on being prosecuted therefor, shall be deemed to have been driving at an unlawful speed until the contrary is proven and is further required to prove the actual rate of speed at which the motor vehicle was being driven, does not apply to cast the same onus of proof on the defendant in a purely civil action for damages although the same default or neglect is relied upon as might be the subject of a prosecution for penalties under that statute.

Queer v. Greig, 5 D.L.R. 308.

The driver of an automobile must be held to be aware of the tendency of automobiles to frighten horses, especially in places where automobiles are so little used as to be strange objects to horses. [See David's Law of Motor Vehicles at p. 104.]

Stewart v. Steele, 6 D.L.R. 1, 22 W. L.R. 6.

I. As to official acts.

(§ II I—299)—ELECTIONS.

The onus of proving that the petitioner is not disqualified under the Alberta Elections Act, 1909, ch. 3, is discharged by his statement that he was a qualified elector and, thereupon the burden of proving disqualification is on the respondent raising the preliminary objection; proof that the petitioner was a qualified elector at the time of the election is sufficient.

Carstairs v. Cross (No. 2), 7 D.L.R. 192.

The onus probandi is upon the petitioner in proceedings under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2 to support the regularity of his proceedings necessary to the maintenance of a petition when attacked by a motion to quash the petition, as regards the statutory grounds for setting aside election

petitions under sec. 10 of that statute. [Stanstead Election Case, 20 Can. S.C.R. 12, followed.]

Carstairs v. Cross (No. 1), 6 D.L.R. 59, 22 W.L.R. 48.

On an application by way of preliminary objection to the filing of an election petition under the provisions of the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, that the returning officer has not returned the respondent as duly elected, and that the notice prescribed by sec. 119 of the Territories Election Ordinance had not been given, the onus of proof is upon the respondent raising that objection.

Carstairs v. Cross (No. 1), 6 D.L.R. 59, 22 W.L.R. 48.

In the absence of evidence to the contrary, a petitioner who has signed an election petition under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, is presumed to know its contents; and the onus of supporting by proof the respondent's preliminary objection that the petitioner was not aware of the contents of the petition and therefore was not a petitioner in fact, is upon the respondent who raises it.

Carstairs v. Cross (No. 1), 6 D.L.R. 59, 22 W.L.R. 48.

Residence in Canada for several years does not raise a presumption either of law or of fact that the resident is a British subject. [Iler v. Elliott, 32 U.C. Q.B. 434, considered; Currie v. Stairs, 25 N.B.R. 8; Doe dem Thomas v. Acklam, 2 B. & C. 779; Reg. v. Lynch, 26 U.C.Q.B. 208, distinguished; Johnson v. Twenty-one Bales, 2 Paine (U.S.) 601, and State of Vermont v. Jackson, 8 L.R.A. (N.S.) 1245, referred to; see also 7 Cyc. 147.]

McVaught v. McKenzie (Re Claresholm Provincial Election), 8 D.L.R. 58.

The onus is upon the petitioner presenting an election petition under the Controverted Elections Act (Alta.) to shew that he is himself a duly qualified elector at the date of filing the petition, and failure to prove himself a British subject, which is an essential element of an elector's qualification, may be given effect to upon the hearing of preliminary objections to the petition. [Carstairs v. Cross, re Edmonton Election (No. 1), 6 D.L.R. 59; Carstairs v. Cross, re Edmonton Election (No. 2), 7 D.L.R. 192; Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, referred to.]

McVaught v. McKenzie (Re Claresholm Provincial Election), 8 D.L.R. 58.

In the absence of evidence to the contrary, a petitioner who has signed an election petition under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, is presumed to know its contents; and the onus of supporting by proof the respondent's preliminary objection that the petitioner was not aware of the contents of the petition and therefore was not a petitioner in fact, is upon the respondent who raises it. [Carstairs v. Cross, re Edmonton Election, 6 D.L.R. 59, followed.]

McVaught v. McKenzie (Re Claresholm Provincial Election), 8 D.L.R. 58.

The onus probandi is upon the petitioner in proceedings under the Controverted Elections Act, 7 Edw. VII. (Alta.) ch. 2, to support the regularity of his proceedings necessary to the maintenance of a petition when attacked by a motion to quash the petition, as regards the statutory grounds for setting aside election petitions under sec. 10 of that statute. [Carstairs v. Cross, re Edmonton Election, 6 D.L.R. 59, applied.]

McVaught v. McKenzie (Re Claresholm Provincial Election), 8 D.L.R. 58.

(§ II I—300)—Sale by sheriff.

The onus of shewing that all of the requirements pertaining to a sheriff's sale of land under execution were complied with, rests on the person applying for confirmation thereof.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

(§ II I—303)—Judicial act.

When it is proved that a prisoner consented that the charge against him should be summarily tried by a magistrate under the Criminal Code, sec. 778, the presumption arises that the preliminary requirement of stating to the prisoner his option as prescribed by sec. 778 was complied with by the magistrate.

The King v. Mali (No. 1), 1 D.L.R. 256, 20 W.L.R. 217, 48 C.L.J. 157, 22 Man. L.R. 29.

Where there is any conflict or discrepancy as to the action of a Judge or Court officer in any matter of routine, the presumption that all was done rightly should prevail.

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.L.R. 381.

J. From circumstances and course of business.

(§ II J—305)—From circumstances and course of business.

In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent character, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown.

Rex v. Canadian Pacific R. Co., 5 D.L.R. 176, 21 W.L.R. 709.

(§ II J—307)—SECONDARY MEANING OF TRADEMARK.

The onus is on the user of a merely descriptive word or term, not registered as a trademark, to shew, in his action to prevent sales of similar goods by others using the same mark as a "passing off" of their goods as his, that the mark as used by him had acquired a secondary technical and superinduced meaning denoting his goods as distinguished from the natural meaning.

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 3 O.W.N. 729, 21 O.W.R. 540, 25 O.L.R. 561.

(§ II J—308)—WHAT IS COMPETITIVE BUSINESS.

Whether or not a separate business, in which one of the members of a partnership is interested, competes with the business of his firm, so as to render him liable to account to his firm for the profits derived by him from his interest therein, is a question of fact to be decided upon the circumstances of each case.

Livingston v. Livingston, 4 D.L.R. 345, 21 O.W.R. 901, 3 O.W.N. 1066, 26 O.L.R. 246.

K. As to rights, contracts, instruments, and property.

(§ II K 1—311)—CONTRACT GENERALLY.

In an action upon a document purporting to be a promissory note, but which is in fact not a promissory note but an agreement in writing, consideration will not be presumed in favour of the plaintiff.

Imperial Life Insurance Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372.

(§ II K—311)—CONTRACTS GENERALLY.

Burden of proof—Failure of plaintiff to satisfy.

McFarlane v. Collier, 3 D.L.R. 889, 3 O.W.N. 1510, 22 O.W.R. 579.

The onus rests upon the plaintiff, a real estate broker, in an action for one-half of the net profits from a sale of land by him under a contract with the defendant, of shewing that he was relieved by the former of the duty imposed upon him by such contract, of sub-dividing the land into lots at his own expense, and of advertising it for sale.

Cruikshank and Brien v. Irving, 6 D. L.R. 237, 21 W.L.R. 172.

Where a written contract for the sale of goods contains a clause for delivery on a certain date with a proviso that "if for any reason the seller may be unable to fill the order or deliver the goods at the time stated, the buyer will not in any way hold the seller responsible for damages," the onus is upon the seller, in case of failure to deliver promptly to establish his inability to deliver at the stated time. [Attwood v. Emery, 1 C.B.N.S. 108, specially referred to, and distinguished.]

Leonard & Son v. Kremer, 7 D.L.R. 244, 20 W.L.R. 147.

Where, after nearly half of the purchase price had been paid on a contract for the sale of land, the vendor sought to cancel the agreement, notwithstanding he had knowledge that the vendee was ready and willing to pay the balance due within three days of the time limited for payment in the notice of cancellation, in an action by the vendee for specific performance, the onus rests on the vendor to shew that such cancellation was in strict accord with the requirements of the contract of sale.

Brown v. Roberts, 2 D.L.R. 523, 17 B. C.R. 16.

In order to maintain a plea of prescription the defendant must prove affirmatively that the plaintiff did not attack the contract he seeks to have avoided, within the year following his knowledge of the existence of such contract.

Banque Nationale v. Godbout et al., 8 D.L.R. 668.

Where a publishing firm which publishes annually a residence and business city directory, sells under a written contract to the plaintiff, a practising barrister, a copy of the directory, and is bound by custom to insert in the directory in large, heavy type the subscriber's name, calling and office address, and where the contract specifies the name and office address, but where the publishing firm by custom (for its protection) gives public newspaper notice to all citizens to call or write and see to the correctness of their names and addresses in the proof leaves of the directory, the subscriber may safely rely upon the specific mention of his name and address contained in his contract, and need not call or write to ensure accuracy.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

(§ II K—313)—INSURANCE.

In an action on a policy of fire insurance, the onus rests upon the insurance company of establishing the materiality of alleged misrepresentations or concealments by the applicant of material circumstances affecting the risk. [Lount v. London Mutual Fire Ins. Co., 9 O.L.R. 549, 555, referred to.]

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O. W.N. 140, 23 O.W.R. 122.

In order that the acceptance of payments of premiums on a contract of life insurance shall constitute a waiver by the insurer of a condition of the contract that it shall be void if the insured should, without a permit, within two years from date of contract, enter into the employment of a railway, the onus rests upon those claiming under the policy to shew that the payments were accepted by the insurance company with notice or knowl-

edge of the fact that the insured had violated such condition of the policy. [Western Assce. Co. v. Doull, 12 Can. S.C.R. 446, and Torrop v. Imperial Fire, 26 Can. S.C.R. 585, specially referred to.]

Smith v. Excelsior Life Insurance Co., 4 D.L.R. 99, 3 O.W.N. 1521, 22 O.W.R. 863.

(§ II K 1—314)—DEEDS.

Where $250 is paid by the husband to his wife on the execution of a deed of separation which did not contain any alimentary provision and did not stipulate that such sum was intended for the wife's maintenance, it cannot be presumed that such payment was intended to relieve her husband from his duty to support her as, apart from its inadequacy, the payment may have been made for other purposes, and the wife is, therefore, entitled to an alimentary allowance.

Frémont v. Frémont, 6 D.L.R. 465, 3 O.W.N. 789, 21 O.W.R. 644, 26 O.L.R. 6.

(§ II K 1—316) — MORTGAGE; CHATTEL MORTGAGE.

The onus of proving absence of consideration in a mortgage deed is upon the person setting it up. The discovery of new evidence which is merely in corroboration of that adduced at the trial is not a sufficient ground for directing a new trial. Quære, whether an admission by a next of kin of a deceased person is binding on the administrator or other persons interested in the estate.

McLorg v. Cook, 7 Terr. L.R. 371.

The onus rests upon a mortgagee in possession of encumbered property of shewing that he had purchased the mortgagor's equity of redemption, since "once a mortgage, always a mortgage."

Manitoba Lumber Co., Ltd. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

(§ II K—317)—WILL.

On a motion to construe a will the Court cannot look beyond the document itself and must reject the affidavit of the party who drew the will as to the testator's intention. [Re Davis, 40 N.B.R. 23, followed.]

Re Piper, 2 D.L.R. 132, 3 O.W.N. 1243.

Where there was an evident doubt in the mind of a testator whether one of his sons or a daughter would inherit under a devise in their grandfather's will, and the testator declared in his will that no provision was thereby made for such son because of his being a devisee under his grandfather's will, but that in case such daughter, instead of such son, should take thereunder, that the latter should replace the daughter as one of the testator's universal legatees, then in order that such son, who, as a fact, did not take under his grandfather's will, may take as universal legatee to the exclusion of his sister, he must shew that he was not provided for by the will of his grandfather, and that the property he was supposed to take thereunder was a part of his father's estate.

Greece v. Greece, 3 D.L.R. 841.

Although the word "child" in C.C. 980 means not only child in the first degree, but all descendants, this presumption of law may be rebutted by other proof of the intention of the testator in making the will.

Trahan v. Cardinal, 8 D.L.R. 533.

(§ II K—318)—NEGOTIABLE PAPER.

The onus of proving the failure of the consideration for which a promissory note was given rests upon the maker thereof.

Lilly v. Robertson, 4 D.L.R. 852, 21 W.L.R. 585.

The true test to decide upon whom the burden of proof rests in an action on negotiable paper is to ask the question, which party would succeed if no further proof were adduced?

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

In an action on a negotiable instrument a plea of general denial by an endorser puts the plaintiff to the proof only that the defendant signed his name, the burden of proof is upon the defendant if he wish to shew that his signature was intended only in the capacity of a witness.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

The onus rests upon the holder of a promissory note payable to the order of the payee, to shew in an action thereon, that it was indorsed to him by the payee or someone by him duly authorized to do so.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

Where one defendant in an action upon a negotiable instrument relies upon a failure of consideration, either total or partial, or upon payment of the instrument or any part thereof, the onus is upon him to prove such failure or payment.

Merchants Bank of Canada v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

Where a negotiable instrument has been endorsed to and left with a bank by a customer thereof, the proper conclusion, in case of a conflict of evidence as to the terms upon which the instrument was so indorsed and left, will usually be that it was as collateral security for any advances by the bank to the customer, and not for collection only. (Per Meredith, J.A.; Moss, C.J.O., dubitante; Maclaren, J.A., contra.)

Merchants Bank of Canada v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

The fact that a promissory note bore conspicuously the words "renewable on payment of $50 cash" is some evidence

that the note was not given for accommodation only.

Walsh v. Hennessey, 3 D.L.R. 823, 21 W.L.R. 609.

(§ II K—321)—CAPITAL STOCK; SUBSCRIPTION TO STOCK.

A ratification of the sale of company shares to directors who made a secret profit from a sale of the company assets, cannot arise from the fact of the completion of the sale by the shareholders, where they did not learn until long afterward that the directors made such secret profit.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886.

(§ II K—322)—GIFT.

Express directions to executors to hold and invest all of the testator's property of all kinds until the time fixed for distribution thereof, precludes the inference of an intention to enlarge the gift of an annuity, which was expressly charged upon the income of his estate, so as to render it a charge upon the corpus thereof.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ II K 1—323)—TRUST.

In an action for a declaration that certain conveyances absolute in form were in fact executed in trust, the evidence at trial was contradictory and was evenly balanced on both sides, both as to the number of witnesses and the circumstances. The trial Judge believed the evidence on the part of the plaintiff, and such evidence if believed clearly and unquestionably established the trust:—Held, on appeal, that although in such an action the evidence of the trust must be of the clearest and most conclusive and unquestionable character, yet inasmuch as the trial Judge believed the evidence for the plaintiff, and as such evidence was sufficient, if believed, to establish the trust, the finding of the trial Judge should not be interfered with. It is not necessary in such an action that the character of the trust should be so clearly established as to enable the Court to direct a trust deed to be prepared, specifying clearly the nature of the trust. [Fowler v. Fowler, 4 DeG. & J. 250, distinguished.]

Hill v. Bible, 7 Terr. L.R. 386.

(§ II K 2—330)—OWNERSHIP OR POSSESSION.

On an application to the Court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with plaintiff, the plaintiff's status is proved primâ facie by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

Haney v. Winnipeg & Northern R. Co., 1 D.L.R. 387, 20 W.L.R. 540.

(§ II K 2—338)—PRESUMED GRANT; PRESUMPTION AS TO "LOST GRANT."

Where there is evidence of user, open and uninterrupted for twenty years, the jury may and ought to presume a lost grant. [Re Cockburn, 27 O.R. 450, followed; Goddard's Law of Easements, 7th ed., pp. 176-182, referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

(§ II K 2—339)—PRESUMPTION FROM POSSESSION.

In the case of chattels, as in the case of land, no presumption is made in favour of a wrongful possessor either as to the extent or as to the duration of his possession. [Ex parte Fletcher, 5 Ch. D. 809, at p. 813, and Trustees and Agency Co. v. Short, 13 A.C. 793, at p. 798, followed; Glenwood v. Phillips, [1904] A.C. 405, discussed and applied.]

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

(§ II K 2—343) — BOUNDARIES, STREET LINES, ETC.

In an action to restrain a municipality from interfering with a fence erected by the plaintiff along the centre line of land used as a highway, upon the ground that such centre line forms the boundary of the plaintiff's property, the onus is upon the plaintiff to establish that the boundary is as he alleges.

Lake Erie Excursion Co. v. Township of Bertie, 4 D.L.R. 585, 3 O.W.N. 1191, 22 O.W.R. 42.

In an action or counterclaim by a municipality for the removal of a fence erected upon and to restrain the obstruction of land alleged to form part of an allowance for road, the onus is upon the municipality to establish the existence and location of the allowance for road.

Lake Erie Excursion Co. v. Township of Bertie, 4 D.L.R. 585, 3 O.W.N. 1191, 22 O.W.R. 42.

Where, in a dispute as to the proper boundary between two farms, both owners claim a strip lying between them, and it appears that a fence, which has been standing for some thirty years, and was built by the defendant, throws the disputed strip on the plaintiff's side, and that the defendant's barn forms part of and is in line with the fence, though he says that he did not know the true boundary when he in respect of the same amounts as the rebuilt the fence and barn, and a road has been made upon the strip by the plaintiff, who has had such use and occupation as is possible in the case of such land, and the defendant has repeatedly attempted to purchase the strip from the plaintiff, and there is evidence tending to shew an agreement by the defendant to fix as the boundary the line contended for by the plaintiff, the proper conclusion is that the plaintiff has

established title by possession to the strip in dispute.

Snair v. Hume, 5 D.L.R. 687.

L. Payment; credit.

(§ II L—345)—PAYMENT; CREDIT.

Plaintiff sued for balance alleged due by defendant on a note. Certain payments were credited, and defendant produced receipts shewing payments made. The company's books also shewed payments which did not correspond in date with the receipts produced, and if the receipts and entries were both credited the note would be overpaid. The company claimed that the payments credited on the books were in respect of the same amounts as the receipts, although differing in date. The witnesses called to prove this, however, could not swear positively to the fact, depending largely on the similarity of the amounts. The District Court Judge having found for the plaintiff, the defendant appealed:—Held, that the credit entries in the books of the plaintiff company, as well as the receipts for payments received, are as against the company to be taken as admissions of payments received, and are prima facie evidence that the defendant is entitled to be credited with the various sums represented by these entries and receipts, but it was open to the plaintiff to shew by other evidence that the payments represented by these entries and receipts were not in fact made, but that the entries and receipts were in respect of the same amounts, and the plaintiffs not having discharged the onus so resting upon them, the defendant was entitled to credit for all the amounts shewn.

The Massey-Harris Co., Ltd. v. F. Horning, 4 S.L.R. 448.

Where a claimant is a partner in a firm of ship-supply merchants and is also the owner of a one-third interest in a certain vessel, and where the claimant sells out his one-third interest in the vessel to the owners of the remaining two-third interest, and it appears that at the time of this sale there was a current account for ship supplies outstanding against the vessel in question and in favour of the firm of merchants of which the claimant was a partner, there is from these circumstances of themselves no presumption that the claimant by virtue of selling his interest in the vessel intended thereby to waive his claim as a merchant for the ship supplies, and this especially since none of the parties to the sale of the interest in the vessel appears to have so treated the supply account.

Ernst v. Slawenwhite (No. 2), 7 D.L.R. 239.

The fact of payment is and always has been a matter of defence, the onus of proving which is upon the defendant.

Ontario Asphalt Block Co. v. Cook, 4 D.L.R. 22, 3 O.W.N. 1289, 22 O.W.R. 203.

(§ II L—348a)—INSURANCE MONEY.

The fact that an insurance policy, issued by underwriters in England, is stamped with the name of an agent in Toronto, and bears a marginal note shewing the equivalent in Canadian currency of the face value of the policy, is an indication that it is payable in Ontario.

Farmers Bank v. Heath (No. 2), 5 D.L.R. 291, 3 O.W.N. 805 and 879, 22 O.W.R. 614.

(§ II L—351)—CREDIT.

Apart from the fact that no surcharge was filed by the defendant as the rules require, the onus rests upon him of shewing that the plaintiff, a creditor, who was suing for a balance due him, and who had taken over and completed a contract the defendant had with a town, had received more money therefrom than he had accounted for.

Ontario Asphalt Block Co. v. Cook, 4 D.L.R. 22, 3 O.W.N. 1289, 22 O.W.R. 203.

(§ II L—353)—INSTALMENT PAYMENTS.

A receipt for "instalment due in November last with interest to date" is, unless the contrary be shewn, sufficient evidence that all previous instalments and interest have been duly paid.

Gillespie v. Wells, 2 D.L.R. 519, 22 Man. L.R. 355, 21 W.L.R. 231.

(§ II L—354a)—PRESUMPTION AS TO DEPOSIT UNDER ELECTION ACT.

The receipt for the required deposit of $200, accompanying the nomination papers, given under the provisions of section 97 of the Dominion Elections Act, is evidence merely of the production of the papers and not of the validity of the nomination.

Two Mountains Dominion Election; Fauteaux v. Ethier, 7 D.L.R. 126.

Payment of the deposit required on filing an election petition, under the Alberta Controverted Elections Act, is sufficient, if made by the petitioner's agent on his behalf.

Carstairs v. Cross (No. 2), 7 D.L.R. 192.

M. Miscellaneous.

(§ II M—362a)—MALICIOUS PROSECUTION.

The innocence of the plaintiff in an action for malicious prosecution of the charge against him is sufficiently established where the allegation of his statement of claim that the defendants falsely and maliciously prosecuted him, was not denied by the defendants in their defence, the truth of such allegation being thereby admitted under order 19, rule 13, of the B.C. Rules.

Harris v. Hickey and Co., 2 D.L.R. 356, 17 B.C.R. 21, 19 W.L.R. 948.

(§ II M—362b) — FALSE IMPRISONMENT; ONUS OF PROOF.

In an action against a town treasurer and a constable for false arrest and imprisonment, where the defendants set up that the plaintiff, if imprisoned, was not imprisoned against his own free will, the fact that the plaintiff when arrested by the constable did not resist but went willingly to gaol under the arrest does not prove or tend to

prove the defendants' plea, it being a legal duty not to resist the arresting officer.

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

In an action against a town treasurer and a constable for false arrest and imprisonment, where the defendants set up that the plaintiff, if imprisoned, was not imprisoned against his own free will, the onus is upon the defendants to prove plaintiff's willingness to go to gaol.

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

(§ II M—363)—LIBEL AND SLANDER.

In an action for libel, where the occasion is privileged, express malice may be proved in two ways: (1) by inference to be drawn from the excessive language of the document itself, and (2) by recklessly stating what was untrue or stating that which defendant knew to be untrue.

Winnipeg Steel Granary and Culvert Co., Ltd. v. Canada Ingot Iron Culvert Co., Ltd., 7 D.L.R. 707, 22 W.L.R. 387.

Under a plea of truth and public interest brought to an action for libel, the onus of proof lies on the defendant.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ II M—364a)—RESIDENCE, PRESUMPTION AS TO.

Where it is shewn that the petitioners presenting an election petition and whose status was in question had resided in the electoral district for four years, and preceding the election, for a whole year, and the date of the writ for the election was not shewn, it will be presumed that he had resided in such district for the three months immediately preceding the issue of the writ.

Carstairs v. Cross (No. 2), 7 D.L.R. 192.

III. Best and secondary evidence.

(§ III—365)—BEST AND SECONDARY EVIDENCE.

Defendant's counsel refused to produce a lease at the trial after notice to produce, and the plaintiff was compelled to prove it by secondary evidence. Later, defendant offered the lease in evidence, and upon its rejection offered secondary evidence by oral testimony, which was also rejected:—Held, affirming the judgment of the County Court Judge, that the evidence was properly rejected. The defendant, after refusing to produce a document in his possession when called for by the plaintiff, could not afterwards put it in evidence for his own advantage.

Cyr (defendant, appellant) v. DeRosier (plaintiff, respondent), 40 N.B.R. 373.

(§ III—372)—COPIES.

A copy of a notarial protest of a promissory note in the form prescribed by sec. 125 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, in duplicate, is sufficient in an action on the note to prove the protest, where the repertory of the notary shews the regular protestation of the note, since, by article 1209 of the Civil Code, the acts of notaries are declared to be authentic acts.

La Banque Nationale v. Joncas; Noel v. La Banque Nationale, 5 D.L.R. 276.

A copy of a notarial protest of a promissory note is sufficient evidence in an action on the note unless the defendant, as required by article 1211 of the Civil Code, shews that the original protest never existed.

La Banque Nationale v. Joncas; Noel v. La Banque Nationale, 5 D.L.R. 276.

IV. Documentary evidence.

B. Statutes; ordinances.

(§ IV B—396)—STATUTES.

Under the Alberta Evidence Act, 1910, ch. 3, the statute law of another Province of Canada may be proved on a legal proceeding in Alberta by the mere production (that is, without the introduction of an expert witness) of a statute purporting to be printed by the authority of the Legislature of the other Province, and the marking of a copy as an exhibit is merely for convenience.

Dodge v. Western Canada Fire Insurance Co. (No. 2), 6 D.L.R. 355.

C. Certificates; award.

(§ IV C—404)—CHURCH DECREES.

The civil power alone gives validity to a marriage and the action of the civil Courts, as far as marriage is concerned, is independent of the religious authority; therefore, an ecclesiastical decree of the Roman Catholic Archbishop of Montreal, declaring null and void a marriage between two Roman Catholics, performed by a Protestant minister of the Methodist persuasion, on the ground that the minister, being a Protestant, was not competent to perform such marriages in view of the provision of the "Ne Temere Decree" proclaimed by the congregation of the council of the Roman Catholic Church, has no legal value whatsoever even as evidence of one of the juridical facts necessary to establish a civil action brought by the husband who secured the decree for the purpose of having the marriage declared null as regards its civil effects and of having the Archbishop's decree ratified and confirmed for the purposes of the civil law, as such decree is neither in the form of a document to which the law attaches in any way the weight of an authentic writing nor in the form of evidence given under oath by an expert upon the subject. [L'Heureux v. Budgess, cited in Durocher v. Degré, R.J.Q. 20 S.C. 456, specially referred to.]

Hébert v. Clouâtre, 6 D.L.R. 411, 40 Que. S.C. 249, 10 East. L.R. 336, 13 Que. P.R. 249.

D. Official records, reports, and returns.

(§ IV D—405)—Official records, reports and returns.

Unless it is proved by a plaintiff en faux that the originals of protests of promissory notes never existed, certified copies of said documents will be held as true copies of the minutes of the notary.

La Banque Nationale v. Joncas & Noel, 13 Que. P.R. 341 (Sup. Ct.).

(§ IV D—406)—Land titles.

The production of further evidence to shew that an execution was lodged in the land titles office on a day prior to that stated in the certificate of execution issued by the registrar, may be permitted by the Court on an application to confirm a sale of land by the sheriff under such writ.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

(§ IV D—408a)—Sheriff's returns.

The truth of the sheriff's return of nulla bona to an execution, cannot be questioned on an application to confirm a sale of land thereunder, without a substantive application to set aside the return as a matter of record.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

(§ IV D—409a)—Annual statement under Companies Act.

In an action against the directors of a company for wages, under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34 (see now 2 Geo. V. ch. 31, sec. 96), a certified copy of the last annual statement to the Government of the affairs of the company, shewing that the defendants were then directors, and the minute-book of the company, shewing that the directorate has not since been changed, is sufficient proof that the defendants are directors of the company.

Pukulski v. Jardine; Perryman v. Jardin, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 983, 26 O.L.R. 323.

(§ IV D—409b)—Marriage registers.

The provisions of article 65 of the Civil Code (Que.) 1904, enumerating what is to appear in the acte of marriage in the registers of civil status and thus shewing the essential elements of this contract, shew the intention to exclude differences of religion from any rule of law regulating the jurisdiction of functionaries competent to celebrate marriage, there being nothing to shew that the acte should contain a declaration of the religion which the parties to the marriage profess, or that of the functionary.

Hébert v. Clouâtre, 6 D.L.R. 411, 40 Que. S.C. 249, 10 East. L.R. 336, 13 Que. P.R. 249.

(§ IV D—409c)—Report of commissioner.

Proceedings before commissioners appointed by the Crown to allot amongst the grantees named in a township grant the land to which they were entitled, as kept by the clerk of the commission, are admissible in evidence in cases subsequently arising concerning the allotments made by them. [Wiggins v. McLean, 6 N.B.R. 671; Pike v. Dyke, 2 Maine 213; DesBarres v. Shey, 29 L.T.N.S. 592, specially referred to.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

(§ IV D—409d)—Memoranda.

An allotment card containing the description of certain land allotted a person named in a township grant in Nova Scotia by the commissioners appointed by the Crown to allot it, is admissible in evidence in a subsequent action concerning the land described on such card.

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

E. Judgments and judicial records.

(§ IV E—410)—Judgments and judicial records.

Under sec. 103 (now 107) of the County Courts Act, the entry of a judgment in the procedure book constitutes the judgment, and as, by sec. 162 (now 168), County Courts are Courts of Record, the production of the procedure book shewing the entry proves the judgment and it is not necessary to prove the cause of action upon which such judgment was founded to shew that the Court had jurisdiction over it.

Dixon v. Mackay, 21 Man. R. 762.

(§ IV E—411a)—Extradition proceedings.

Under sec. 16 of the Extradition Act, R.S.C. 1906, ch. 155, authorizing the receiving in evidence in extradition proceedings of depositions or statements taken in a foreign state on oath, or copies of such depositions and statements and foreign certificates thereof, if duly authenticated, an affidavit tending to establish before the extradition commissioner the crime charged against a person sought to be extradited does not vitiate the extradition proceedings because such affidavit was taken by questions and answers and then written out in narrative form before being sworn to.

In Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

G. Evidence previously taken or used; affidavits.

(§ IV G—421)—Former testimony.

Where a new trial has been granted to the accused by a Court of criminal appeal on the ground that the principal witness for the prosecution had not been properly sworn at the first trial, the depositions of the accused given on the first trial as a witness on his own behalf and his cross-examination and re-examination, may notwithstanding be given in evidence on behalf of the prosecution on the second trial as

being evidence of admissions made by the accused.

The King v. Deakin (No. 2), 2 D.L.R. 232, 19 Can. Cr. Cas. 274, 17 B.C.R. 13.

(§ IV G—422)—Depositions.

The accused, an execution debtor, was examined under sub-sec. 2 of rule 380 J.O., for discovery in aid of execution. The order authorizing the examination improperly directed an examination upon matters beyond the scope of the rule, but the accused nevertheless submitted without objection to be examined in accordance with the order, and in giving his testimony did not object to answer any question on the ground that his answer might tend to criminate him:—Held, that the deposition taken on the examination was admissible in evidence against the accused on a criminal charge founded thereon.

Rex v. Van Metre, 7 Terr. L.R. 297.

Marking a letter as an exhibit to a party's deposition on discovery examination does not make the letter evidence, even when all the depositions are put in as evidence; but when both parties conduct their case before the trial Judge on the assumption that the letter so marked was in evidence, and no objection is made at the trial that it was not properly put in, an objection raised in appeal that it was not before the Court will not be entertained.

Richardson v. Ramsay, 2 D.L.R. 686, 20 W.L.R. 566.

In order that sec. 687 of the Criminal Code 1892, can apply, to make admissible at the trial a deposition taken at the preliminary inquiry of a witness, since deceased, the fact that the justice signed the deposition must appear from the document itself and cannot be proven by extrinsic evidence. At a preliminary inquiry adjournments were made from time to time, and the justice, after entering the adjournments as they respectively occurred, signed his name to each. Except for a general heading to each day's proceedings, there was no caption to any deposition, and there were no signatures by the justice other than those mentioned:—Held, that the deposition should be read together as one continuous document, but that what appeared on the document was not sufficient to enable the Court to say that the deposition purported to be signed by the justice, and it was, therefore, inadmissible as evidence at the trial and a conviction based thereon was quashed.

Rex v. Thompson (alias Peterson), 7 Terr. L.R. 188.

In an action on a promissory note made by the defendant to a payee who endorsed to the plaintiff, upon an application by plaintiff to use at the trial his own evidence (taken on an examination for discovery, leave having been given on such examination to have the evidence taken as on a commission for use at the trial, subject to any order in respect to the use thereof which the trial Judge might make), the trial Judge, on the motion, while giving due weight to strong affidavits of physical inability, will, in his judicial discretion, consider whether plaintiff has an adequate legal remedy for the recovery from the payee upon his endorsement of the note, the obtaining of which from the defendant maker was tinged with fraud, particularly where the plaintiff with knowledge of many such fraudulent notes continues to associate himself with the payee by buying from him notes of other makers similarly obtained and tinged with fraud. [Coch v. Allcock and Co., 21 Q.B.D. 178; Hunt v. Roberts (1892), 9 L.T. 93, referred to.]

Park v. Schneider, 6 D.L.R. 451, 22 W.L.R. 70.

Upon an application to use at the trial the evidence of the plaintiff taken on a commission, upon the ground of physical inability to attend, the fact that plaintiff is associated with a fraudulent payee of the note sued upon, and can introduce his alleged material evidence through that fraudulent payee, will be considered by the trial Judge on the motion. [Berdan v. Greenwood (1880), 20 Ch.D. 764n, 46 L.T. 524n, referred to.]

Park v. Schneider, 6 D.L.R. 451, 22 W. L.R. 70.

Where an action is brought on a promissory note made by the defendant to a payee who endorsed to the plaintiff, and an application is made to the trial Judge by the plaintiff to use at the trial his own evidence, taken upon commission on an examination for discovery out of the jurisdiction, leave having been given to have the evidence taken as for use at the trial, subject to any order to be made by the trial Judge as to its admission, the trial Judge may properly examine and consider the testimony so taken on the commission as well as the affidavits for and against the application and if fraud vitiated the original transaction and many other similar ones in which the plaintiff admittedly was, and with knowledge of the fraud is now continuing to be, a beneficiary associated with the fraudulent payee of the note in question and of similar notes, the Court may, in its judicial discretion, refuse to admit such depositions, even against strong affidavits of physical disability preventing his attendance at the trial. [Re Boyse, Crofton v. Crofton, 20 Ch.D. 760, 46 L.T. 522; Berdan v. Greenwood (1880), 20 Ch.D. 764n, 46 L.T. 524n; Peters v. Perras (1908), 1 Alta. L.R. 1 and 201, and Peters v. Perras, 42 Can. S.C.R. 244, referred to.]

Park v. Schneider, 6 D.L.R. 451, 22 W. L.R. 70.

The depositions taken before justices on a preliminary inquiry are not part of the trial proceedings, though in certain circumstances the Court may give leave to have them read as evidence at the trial.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63.

(§ IV G—423)—Affidavits.

Evidence given by affidavit stands on the same ground as evidence given in any other way, so that an affidavit need not of necessity be altogether disregarded merely because of an erroneous statement therein either by accident or design.

Sjostrom v. Gale, 7 Terr. L.R. 198.

The Court may permit it to be shewn by affidavit that a sheriff's sale of land under an execution was held at the hour specified in the notice of sale, where the application to confirm the sale did not disclose such fact.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

It is unnecessary in Saskatchewan to produce the original or certified copies of the execution, and its renewal, as well as the sheriff's return of nulla bona thereof, on an application to confirm a sale of land thereunder, the practice of the Court for many years in that Province having permitted such facts to be shewn by affidavit.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

I. Deeds; wills; leases; mortgages.

(§ IV I—431)—Deeds.

An admission or statement in a Crown grant will not adversely affect any interest in the land after the Crown has parted with all of its interest therein, the same rule applying in that respect as well to the Crown as to a private person.

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

The rights of a grantee from the Crown under a patent are limited by the terms of the patent and these cannot be enlarged by reference to petitions, memorials, reports or correspondence in the Crown Lands Department leading up to the grant.

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

(§ IV I—434)—Mortgages.

Proof of acquiescence in the discharge of a mortgage signed by executors will not be inferred: there must be positive documentary evidence to that effect or at least a commencement of proof in writing or the admission of the interested party.

Consumers' Cordage Co., Ltd. v. Molson, 2 D.L.R. 451.

J. Accounts and account books.

(§ IV J—435)—Accounts and account books.

Where the bookkeeping entries for goods supplied are made as in the name of the wife of the defendant in respect of goods supplied to a woman introduced by the defendant as his wife, the defendant will be held liable for the price of the goods notwithstanding that the book account was not in his name, where the goods were in fact supplied on his credit and in faith of his representations and not on the woman's credit, if the method of charging was made in like manner as in the ordinary case of a wife buying as agent of her husband.

Redferns, Limited v. Inwood, 8 D.L.R. 618, 4 O.W.N. 75, 27 O.L.R. 213.

(§ IV J—437)—Solicitor's docket.

Entries in a solicitor's docket, while not conclusive, are primâ facie evidence of the proper remuneration for his services.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

K. Letters, telegrams, etc.

(§ IV K—441)—Letters.

Letters written without prejudice, and bonâ fide to induce the settlement of litigation, are not admissible in evidence against the party sending them, but this rule does not protect a letter not written for the purpose of a bonâ fide offer of compromise, but containing threats. [Pirie v. Wyld, 11 O.R. 422, followed; Kurtz & Co. v. Spence & Sons. 58 L.T.R. 438; Phipson on Evidence, 5th ed., p. 211, referred to.]

Underwood v. Cox, 4 D.L.R. 66, 21 O. W.R. 757, 3 O.W.N. 1112, 26 O.L.R. 303.

(§ IV K—444)—Telegrams.

The testimony of a telegraph agent that the original of a telegram, if it ever existed, would have been destroyed long before the trial, but since he had never seen the original of the telegram, he could not say that that particular document had been destroyed, is not sufficient as a foundation for the admission in evidence of the copy received by the addressee.

Adamson v. Vachon, 8 D.L.R. 240, 22 W.L.R. 494.

Before a copy of a telegram is admissible in evidence it must be first proved that it was sent and that the original, if it cannot be produced, was lost or destroyed.

Adamson v. Vachon, 8 D.L.R. 240, 22 W.L.R. 494.

P. For purposes of comparison.

(§ IV P—471)—To prove authorship.

The presence of lexicographical errors common both to the copyright book and to the later publication, alleged to be an infringement thereof, is primâ facie evidence that the later publication was copied from the other. [Murray v. Bogue, 1 Drew. 353: Kelly v. Morris (1866), L.R. 1 Eq. 697; Pike v. Nicholas (1869), L.R. 5 Ch. 251, and Cox v. Land and Water Journal Co. (1869), L.R. 9 Eq. 324, specially referred to; see also Cadieux v Beauchemin (1901), 31 Can. S.C.R. 370.]

Cartwright v. Wharton, 1 D.L.R. 392, 3 O.W.N. 499, 25 O.L.R. 357.

R. Miscellaneous.

(§ IV R—483)—MAPS; PLATS; SKETCH.

A township plan which shews an overlapping of different grants is to that extent erroneous and such overlapping as to the land last granted must be rejected as false description.

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

A plan or sketch of the locus in quo will be excluded on being produced to witnesses being examined as to the position and movements of a tug and its tow in a negligence action, if the sketch purports to shew on its face the relative position of the tug and tow at different points in their course, and such positions are involved in the questions at issue. [Beamon v. Ellice, 4 Car. & P. 585, applied.]

Wattsburg Lumber Co. v. Cook Lumber Co., 4 D.L.R. 8, 20 W.L.R. 833.

S. Paper produced on notice.

(§ IV S—496)—NOTICE TO PRODUCE.

A notice to produce "all . . . reports, documents, questions and answers relating in any respect to the examination, relating to the matter in question in" an action for alleged conspiracy between the examiners and the College of Dental Surgeons to undermark the plaintiff's examination papers so as to prevent his admission to such college, is not sufficient to apprise the defendant that discovery of the examination papers and answers of other candidates at the same examination was required. (Per Irving, J.A.)

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779.

V. Demonstrative evidence; articles and things; view of jury.

(§ V—510)—ADMISSIBILITY OF ARTICLES SEIZED UNDER SEARCH WARRANT.

Upon a trial for keeping a common betting house in violation of secs. 227 and 228 of the Criminal Code, R.S.C. 1906. ch. 146, articles for recording bets which were seized upon the premises by police officers, are admissible in evidence against the prisoner, irrespective of a claim by the accused that the alleged search warrant was illegal and that the police officers had obtained possession of the articles by means of their own trespass. [Rex v. White (1908), 15 Can. Cr. Cas. 30, 18 O. L.R. 640, specially referred to.]

Rex v. Honan, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 3 O.W.N. 1412, 26 O.L.R. 484, 20 O.W.R. 527.

VI. Parol and extrinsic evidence concerning writings.

A. In general.

(§ VI A—515)—IN GENERAL.

Though terms cannot be imported into a written contract to vary it, evidence of circumstances surrounding the making of the contract or contemporaneous with its performance in whole or in part, may be taken into consideration in determining the amount of damages for breach of the contract.

Kelly v. Nepigon Construction Co., 8 D.L.R. 116, 4 O.W.N. 279, 23 O.W.R. 298.

Verbal representations, not contained in a written contract, cannot be relied upon to defeat it where the contract plainly provides that no representation not contained in the contract shall be binding, but in such a case the language of such proviso must be so clear that the average man entering into it would know that he was debarring himself from relying upon the outside representation.

Eisler v. Canadian Fairbanks Co., 8 D. L.R. 390, 22 W.L.R. 888.

Where a "satisfaction slip" is signed by one party to a contract for the purchase of an engine, which slip states that the "work done and supplies furnished" are accepted and satisfactory, such party is not thereby estopped from setting up that the engine purchased was defective and unsatisfactory, where the party signing did not read the slip, nor was it read to him, and his signature was obtained by defendant's agent stating to him that it was a certificate of the time spent by the seller's expert at his place in fitting up the engine.

Eisler v. Canadian Fairbanks Co., 8 D. L.R. 390, 22 W.L.R. 888.

C. Prior and collateral parol agreements.

(§ VI C—525)—PRIOR AND COLLATERAL PAROL AGREEMENTS.

Representation or guaranty—Oral testimony—Admissibility—Fraud and misrepresentation—Contemporaneous or prior oral agreement—Discount on price—Demurrage—Evidence—Counterclaim.

M. Hilty Lumber Co. v. Thessalon Lumber Co., 3 D.L.R. 894, 3 O.W.N. 1593, 22 O.W.R. 770.

In an action to recover an amount claimed to be due on a written contract for cutting and hauling logs for a paper manufacturing company which contained the following clauses: (1) the plaintiff "agrees to haul none but good, sound, merchantable logs"; (2) all logs hauled by him "to be scaled by——or some other competent person to be appointed" by the company, "whose scale shall be final between the parties to this instrument"; and (3) "logs to be scaled by scaler to what in his judgment will make good merchantable lumber," parol evidence is admissible to shew that the parties entered into a collateral verbal agreement that the logs were to be scaled on the same scale as had been used by the company's scalers in scaling logs hauled for it by the plaintiff under similar written

contracts during the two preceding seasons and that the parties entered into the written contract on the faith of the verbal agreement, where it appeared that the company's scalers did not use the method of scaling of the preceding seasons, but used, at the direction of the company, another method which materially reduced the plaintiff's remuneration, upon the ground that such evidence explained and made clear the aforesaid clauses therein which were so doubtful and uncertain in their meaning that without it the actual intention of the parties might and probably would be defeated, such evidence in no way altering the written contract.

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 11 E.L.R. 81.

D. Subsequent change.

(§ VI D—530)—SUBSEQUENT CHANGES.

In an action for money received by the defendant for goods sold by him for the plaintiffs as their agent, the dispute was as to the amount of commission the agent was to receive, the agent claiming five per cent. commission under a written agreement, and the plaintiffs claiming by subsequent oral agreement the defendant was to receive thereafter one-half such commission, the plaintiffs' contention was upheld where the evidence shewed that after the date of the alleged oral agreement, the defendant received a statement from the plaintiffs bearing the words "two and a half per cent. commission, when sold" and never disputed it, and he sent them his own statement charging only two and a half per cent. and that all the plaintiffs' cheques were made out to the defendant on the two and a half per cent. basis and their correctness was never disputed by him.

Niagara Falls Co. v. Wiley, 4 D.L.R. 96, 21 W.L.R. 93.

E. Meaning; intention; explanation.

(§ VI E—535)—MEANING; INTENTION; EXPLANATION.

Held, upon the evidence, that the work for the price of which the plaintiffs sued was completed before the commencement of the action. Held, also, that the onus was on the defendants to prove their plea that the written memorandum of contract was signed on the condition that the plaintiffs should not be entitled to payment until certain village debentures were sold; and that the defendants had not satisfied the onus. But, if the defendants had conveyed to the minds of the plaintiffs their (defendants') intention not to make payment until the debentures were sold, a mere unenforceable understanding, and not an effective agreement, would have resulted—an expectation, based upon representations of circumstances, that, though payment might be legally enforced upon performance, it would not then in fact be demanded. [Cuddihy v. Costigan, Newfoundland Reports (1897-1903), p. 567, considered.]

Perrini & Co. v. Peacock, 19 W.L.R. 910.

Oral evidence is admissible to make plain an ambiguous and uncertain provision of a written agreement in order to put the Court and jury in possession of facts which throw light upon the intention of the parties which was obscured by their doubtful language in expressing it. [Shore v. Wilson, 9 Cl. & F. 355; Bourne v. Gatliff, 11 Cl. & F. 45; Fitzgerald v. Grand Trunk R. Co., 28 U.C.C.P. 586, affirmed on appeal sub nom. Grand Trunk R. Co. v. Fitzgerald, 5 Can. S.C.R. 204; McAdie v. Sills, 24 U.C.C.P. 606; and Harris v. Moore, 10 O.A.R. 10, specially referred to.]

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 11 E.L.R. 81.

Oral testimony will not be admitted to explain a written agreement and amplify its terms on the ground that it does not express sufficiently the intention of the parties. In a sale or assignment by the contractor for manufacturing and supplying lumber, who contracted for the work with sub-contractors, of his claim against the purchaser, the agreement that the assignee "will be responsible for, and hold the assignor indemnified against, all costs. expenses and damages whatsoever in connection with suits of the sub-contractors respecting the wood furnished or to be furnished" applies only to suits actually pending and not to claims which might afterwards give rise to actions.

Dubuc v. Laroche, Q.R. 21 K.B. 398.

Parol testimony is not admissible in contradiction of the contents of a writing, but the complete admission of the opposite party may be allowed as proof of a condition not expressed in the writing; the party himself may very well admit and acknowledge that the writing which is validly made does not contain all the conditions agreed upon.

Audet v. Jolicoeur, 5 D.L.R. 68.

(§ VI E—538)—WILLS.

Declarations of a testator are not admissible to prove what he meant by his will, but extrinsic evidence of surrounding circumstances is admissible to shew what he probably intended. [Davidson v. Boomer (1868), 17 Gr. 509, followed.]

Re Anne Campbell, 7 D.L.R. 452, 4 O. W.N. 221, 23 O.W.R. 233.

F. As to commercial paper.

(§ VI F—544)—CHEQUES.

The judgment in a prior action authorizing the amendment of a cheque by the curator in the insolvency of the drawer's estate so as to make it payable to the person found to be the legal holder instead of to a government official who made no claim thereto and declined to en-

dorse same because of his official position, may be regarded in an action against the bank to recover the amount of the cheque, as evidence that such new payee is the lawful holder, where no valid objection to payment by the bank is shewn nor had it taken any steps to annul such judgment.

Brossard v. Sterling Bank and Turgeon es qual, 8 D.L.R. 889.

(§ VI F—540)—As to commercial paper.

Where a loan is made which is evidenced by a promissory note and a cheque is produced shewing payment of the alleged amount of the loan (less discount) bearing the endorsement of the borrower, he is not allowed to parol testimony to prove that he only signed this note as "additional security" at the request of another party to guarantee or secure any depreciation in the value of shares transferred or sold by this latter party to a stranger, the alleged agent of the party who loaned the money, with a right of redemption under the provisions contained in a deed, as this would be varying by parol testimony a written contract.

Vineberg v. Jones, 8 D.L.R. 513.

Parol testimony is only allowed under sec. 40 of the Bills of Exchange Act to prove "conditional" delivery or delivery "for a special purpose only and not for the purpose of transferring the property in the bill," but these words have only a limited application, and when the note is delivered and the property in it has passed, even if only for purposes of security, then parol evidence is inadmissible to vary or explain the contract, and secs. 40 and 41 of the Act do not in fact change the law as to the admissibility or inadmissibility of parol evidence. [Burke v. Dulaney, 153 U.S. 229, referred to; New London Credit Syndicate v. Neale, [1898] 2 Q.B. 487; Chamberlain v. Ball, 5 L.C.J. 88, followed.]

Vineberg v. Jones, 8 D.L.R. 513.

(§ VI F—543)—Endorsements.

Verbal testimony upon facts and circumstances connected with the making and endorsement of a bill, not objected to at trial or hearing can be taken into account by the Court, and such facts and circumstances might be sufficiently cogent to render the defendant's pretensions plausible and constitute a groundwork for admission of verbal testimony which would, standing by itself, be inadmissible; but the mere assertion of a contemporaneous verbal agreement is one which, being in contradiction of a written contract, cannot be put forward in verbal testimony. [Macdonald v. Whitfield (1883), A.C. 733, explained.]

Vineberg v. Jones, 8 D.L.R. 513.

(§ VI F—544a)—Negotiable instruments.

An alleged oral agreement made prior to the making of a promissory note by which the payee and the proposed endorsee were to renew it at maturity for a further fixed period, cannot be shewn in contradiction of the effect of the note itself so as to extend the time for payment.

Union Bank v. MacCullough, 7 D.L.R. 694.

Where a debtor alleges payment and satisfaction of a claim against him in the hands of an assignee, and tenders parol evidence of an alleged agreement made between himself and the assignor under which the debtor joined the assignor in a promissory note and agreed to pay the note to the extent, and in satisfaction of the assigned claim, and where it appears that neither the debtor nor the assignor was a trader, and that their agreement was therefore not a commercial matter, parol evidence of the agreement is not admissible.

Reader v. Calumet Metals Co., 6 D.L.R. 496, 10 La Rev. de Jur. 346.

It may be shewn by parol evidence that the persons who signed a negotiable instrument ostensibly as agents were in fact not acting for any principal but for themselves. (Per Howell, C.J.M.)

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

G. Consideration, or value of subject-matter.

(§ VI G—551)—Contract generally.

Where the document relied upon by the plaintiff to make out a contract for sale of lands under the Statute of Frauds does not purport to contain all of the terms of the bargain, it is open to the defendant to shew either by a cross-examination of the plaintiff or by other parol evidence, that the writing does not in fact contain all the terms of agreement and is therefore an insufficient memorandum under the statute.

Rogers v. Hewer (No. 2), 8 D.L.R. 288, 22 W.L.R. 807.

(§ VI G—553)—Of deed.

Per White, J.:—Where a deed sets out only a nominal consideration the parties thereto may give parol evidence of the real consideration and there is no onus of proof upon the grantor.

Shaw et al. (plaintiffs), appellants v. Robinson et al. (defendants), respondents, 40 N.B.R. 473.

I. Condition; trust; mortgage.

(§ VI I—565a)—Guarantees.

The numerous contradictions in the testimony of a party examined as a witness, and improbabilities in his statements form a commencement of proof by writing and render admissible oral evidence of a guarantee in writing of the debt of a third party exceeding $50. The creditor who, when the debt was paid, remitted the

guarantee to the person who had signed it may prove by witnesses (a) the existence of the guarantee; (b) the possession which he had had of it; and (c) the remittance that he had made of it.

Pelletier v. Ackerman, Q.R. 41 S.C. 224 (Ct. Rev.).

(§ VI I—569)—EQUITABLE MORTGAGE.

The intention to create an equitable mortgage by delivery or deposit of documents of title may be established by parol evidence alone, and it is sufficient if only some or one of the material documents of title be so delivered or deposited. [See Russel v. Russel, 1 Bro. C.C. 269; Ex p. Haigh, 11 Ves. 403; Ex p. Mountfort, 14 Ves. 606; Ex p. Kensington, 2 Ves. & B. 79; Ex p. Arkwright, 3 Mont. D and DeG. 129, and Lacon v. Allen, 3 Drew. 579.]

Zimmerman v. Sproat, 5 D.L.R. 452, 3 O.W.N. 1361, 26 O.L.R. 448.

J. To identify subject or person.

(§ VI J—571)—SUBJECT.

The production for reference at the trial of what purports to be a copy of a registered plan the correctness of which alleged copy was neither admitted nor proved, is insufficient in an action for taxes, to prove that lots and subdivisions referred to in assessment rolls are identical with those shewn on the registered plans, so as to prove compliance with sec. 22 of the Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 22.

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

Where an agreement for the sale of land is evidenced by a receipt signed by the owner, which stated that he had received from the purchaser a certain sum of money "on acct. of purchase of 3 acres of land at" a certain price per acre on a specified body of water, such description is sufficient within the Statute of Frauds to permit the admission of parol evidence for the purpose of identifying the land which evidence is that the owner and the purchaser, before the agreement was made, went to the land and there found that three of the boundary lines were clearly visible to the eye because made by natural objects, and that the other was a line dividing the land from that of an adjoining owner which was pointed out to the purchaser by the owner. [Plant v. Bourne, [1897] 2 Ch. 281, followed.]

Baxter v. Rollo, 5 D.L.R. 764, 21 W. L.R. 892.

Where the instruments relied upon to shew a contract for the sale of land described the property sold with such certainty that its identity could be ascertained, parol evidence to identify it is admissible.

Rogers v. Hewer, 1 D.L.R. 747, 19 W. L.R. 868.

(§ VI J—572)—PERSONS.

Parol evidence is admissible in proof of the connection of separate writings so as to form a complete memorandum to satisfy the Statute of Frauds. [Maybury v. O'Brien (1911), 3 O.W.N. 393, 25 O.L.R. 229, and Martin v. Haubner, 26 Can. S. C.R. 142, specially referred to.]

Bailey v. Dawson, 1 D.L.R. 487, 3 O. W.N. 560, 20 O.W.R. 908, 25 O.L.R. 387.

A bequest in the following terms: "to the party at whose house I die," may be construed in the light of the surrounding circumstances as a gift to the son-in-law of the decedent as head of the household where the testator was making his home at the time of his decease, and not to the owner of the house. [See Odgers' Law of Evidence, 1911 ed., pp. 561 et seq.]

Re Woeffle, 1 D.L.R. 105, 3 O.W.N. 518, 20 O.W.R. 896.

L. Concerning records.

(§ VI L—580)—CONCERNING RECORDS.

In an action to determine the boundary of a street as appears by a regularly recorded sub-division plan or plat, evidence of instructions given to surveyors who laid out the street and made the plans at the instance of a private owner of the entire tract is not admissible to contradict what is shewn by the plan itself as to the intended width of the street.

City of Saskatoon v. Temperance Colonization Society, Limited, 8 D.L.R. 875, 22 W.L.R. 897.

M. Character of party.

(§ VI M—586)—AGENCY.

Parol evidence may be given to shew that a contract is binding not only on those whom, on the face of it, it purports to bind, but that it also binds another, by reason that the act of one of the contracting parties in signing the agreement was in fact done as the agent of such other and is in law the act of the principal. [Rossiter v. Miller, 3 App. Cas. 1125, specially referred to.]

Morgan v. Johnson, 4 D.L.R. 643, 3 O. W.N. 1526, 22 O.W.R. 868.

VII. Opinions and conclusions.

A. In general.

(§ VII A—590)—IN GENERAL.

A party can only demand an expertise or an order to his adversary to appoint an expert by means of an ordinary and direct action. The fact that the applicant, instead of stating the grounds of his claim in a declaration proceeds by the usual petition, is not a ground of nullity if this petition is accompanied by the ordinary writ of summons. The architect is an employee of the person for whom he superintends the construction of a building and cannot be appointed expert for such person in respect to said work.

Carbonneau v. Matton, 13 Que. P.R. 287 (Sup. Ct.).

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. [Potter v. Campbell, 16 U.C.R. 109, and State v. Davis, 33 S.E. 449, 55 S.C. 339, referred to.]

Rice v. Sockett, 8 D.L.R. 84, 4 O.W.N. 397.

Upon the proper interpretation of sec. 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.

In Re Scamen v. Canadian Northern R. Co., 6 D.L.R. 142, 22 W.L.R. 105.

Sec. 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, is an attempt to put a limit to what is commonly known as expert evidence, and it should not be extended to all evidence which might literally be called opinion evidence, but should be given a fair interpretation so as to make it reasonable and workable.

In Re Scamen v. Canadian Northern R. Co., 6 D.L.R. 142, 22 W.L.R. 105.

The evidence of expert witnesses should not necessarily prevail over that of disinterested non-expert witnesses. [Lafeunteum v. Beaudoin, 28 Can. S.C.R. 89, and Deschenes v. Langlois, 15 Que. K.B. 388, referred to.]

Wilson v. The H. G. Hogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

E. Sanity; capacity; character.

(§ VII E—615)—SANITY; CAPACITY; CHARACTER.

The evidence of one medical man that a person is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian of his estate on the ground that he is insane, at least two being required. [Re Bulger, 21 Man. L.R. 702, referred to.]

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

F. Values; damages.

(§ VII F—621)—SERVICES.

Affidavits of counsel expressing opinions regarding the propriety of a solicitor's conduct in obtaining money from his client as a retainer are most improper on an application by the client for delivery of a bill of costs and for an account of moneys handed by the client to the solicitor.

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

G. Contingent results; what might have been.

(§ VII G—625) — CONTINGENT RESULTS; WHAT MIGHT HAVE BEEN.

While the general rule is that in a civil action any fact which tends to affect the amount of damages is relevant and admissible, opinion evidence is not admissible in support of a claim for special damage for delay in delivery of a chattel ex. gr. (a dredge) under a contract of sale, to shew a mere probability that the purchaser, had he obtained the earlier delivery contracted for, might have obtained a contract with certain commissioners for public works for the use thereof but was deprived of the opportunity of so doing by the delay. (Per Irving, J.A.)

Brown v. Hope, 2 D.L.R. 615, 20 W.L.R. 907, 17 B.C.R. 220.

In determining whether the freight and passenger tolls of a railway company should be reduced, the Board of Railway Commissioners will not act upon the supposition that a reduction in rates would, by attracting additional traffic, result in an increase of earnings where it is impossible to discover any source from which such additional traffic could be obtained.

Dawson Board of Trade v. White Pass and Yukon R. Co., 2 D.L.R. 532, 21 W.L.R. 7.

H. Legal questions; meaning of terms; foreign laws.

(§ VII H—632)—FOREIGN LAWS.

A question as to the law of a foreign jurisdiction is one of fact and not of law, and the Court should, therefore, accept the opinion of an expert in the foreign law in preference to its own upon the construction of a statute of the foreign jurisdiction.

United States v. Webber (No. 2), 5 D.L.R. 866, 20 Can. Cr. Cas. 6.

In a prosecution for bigamy the clergyman who, in a foreign country performed the marriage ceremony is competent to give expert evidence regarding the statute from which he derived his authority. [See also Phipson on Evidence, 4th ed., p. 356, Wharton's Cr. Evid., 10th ed., p. 414.]

The King v. Bleiler, 1 D.L.R. 878, 21 W.L.R. 18, 19 Can. Cr. Cas. 249.

In an action for criminal conversation, the admission of the defendant, that he knew the plaintiff to be married, coupled with the affirmative testimony of those present at the ceremony, is evidence of the marriage, though it took place in a foreign country, but it is not sufficient to prove the foreign marriage law. [Rex v. Naoum (1911), 24 O.L.R. 306; R. v. Creamer, 10 L.C.R. 404, 450 (n), referred to.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336.

VIII. Confessions; testimony or evidence wrongfully obtained.

(§ VIII—670)—CONFESSIONS.

The admission of misconduct by the wife,

defendant in an action en séparation de corps for adultery, may be proved by the plaintiff without violating the provisions of article 186 C.C. and article 1006 C.P.Q.

Hamilton v. Church, Q.R. 42 S.C. 233 (Sup. Ct.).

A distinction is to be drawn between a solemn confession made before a justice of the peace or before any person having such authority over the accused as will bring the latter to believe that any promises made to him will be observed, and a confession made at any other time and under different circumstances.

Rex v. Cummings, 5 D.L.R. 86.

An admission of the prisoner made on the witness stand and a letter written by him saying, among other things, "I can't marry you now," and making reference to procuring medicine for the girl's pregnancy is corroborative of a charge of seduction under promise of marriage.

The King v. Comeau, 5 D.L.R. 250, 11 E.L.R. 37 and 104.

(§ VIII—671)—TESTIMONY AT CORONER'S INQUEST.

An answer given by a prisoner charged with murder, to a question put to him by the coroner in a conversation held before the opening of the inquest, is voluntarily made, and admissible against him on the trial. (Per Cross, J.)

Trepanier v. The King, 19 Can. Cr. Cas. 290.

(§ VIII—671b)—TESTIMONY AT PRELIMINARY INQUIRY.

In an action for libel complaining of the statement in a report of a Police Court trial that the plaintiff had been found guilty of blackmail, where the defence is an honest misunderstanding of what was said by the magistrate, and an apology, questions as to what was said about the plaintiff by the witnesses in the Police Court are not admissible in cross-examination of the plaintiff. [Rex v. Prasiloski (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, referred to.]

Dickinson v. "The World," 5 D.L.R. 148, 21 W.L.R. 529.

Where Police Court proceedings are relevant in an action the proper method of proving them is to put in the record of such proceedings. [Rex v. Prasiloski (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, referred to.]

Dickinson v. "The World," 5 D.L.R. 148, 21 W.L.R. 529.

A statement made by the prisoner after the statutory caution upon a preliminary enquiry being held upon a charge of escape from custody will, if relevant, be admitted in evidence against him upon a subsequent trial for murder.

Rex v. James, 4 D.L.R. 717, 19 Can. Cr. Cas. 391, 17 B.C.R. 165, 21 W.L.R. 563.

A statement made voluntarily by a person upon a preliminary enquiry on an offence with which he was charged, and in which he gave an account of a shooting connected with the charge then being inquired into and admitted firing the shot, will be admitted in evidence upon a charge of murder laid against him after the death of the person injured by the shooting although such death occurred subsequent to the preliminary enquiry upon which the admission was made.

Rex v. James, 4 D.L.R. 717, 19 Can. Cr. Cas. 391, 17 B.C.R. 165, 21 W.L.R. 563.

(§ VIII—673)—MIXED QUESTION OF LAW AND FACT.

An admission of the first marriage is to be received with caution on a prosecution for bigamy, because of the motives which might induce such a representation to be made whether true or not, and because it is an admission of a mixed question of law and fact. [See Taylor on Evidence, 10th ed., sec. 865; 1 Wharton's Crim. Evid., 10th ed., secs. 171, 172.]

The King v. Naoum, 19 Can. Cr. Cas. 102, 24 O.L.R. 306.

(§ VIII—674)—PROOF THAT VOLUNTARY.

An entirely voluntary confession by the accused made to one in authority and without interrogation by the person in authority, is admissible although no caution or formal warning was given the accused.

The King v. Hoo Sam, 1 D.L.R. 569, 20 W.L.R. 571, 19 Can. Cr. Cas. 259.

A confession made to one not in authority in the presence of a person in authority need not be preceded by a warning, if it is shewn affirmatively that the confession was free and voluntary.

The King v. Hoo Sam, 1 D.L.R. 569, 20 W.L.R. 571, 19 Can. Cr. Cas. 259.

In order that evidence of a confession of crime by an accused person may be admitted against him, his mind should be disabused of all idea of hope of securing leniency by making it, and he must not be led to expect that some benefit may be obtained by making such confession. (Per Trenholme, J.)

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

In order that evidence of a confession of guilt made by one charged with crime, may be admitted on the trial therefor, it must be first affirmatively shewn that it was freely and voluntarily made after the accused had been warned that what he said might be used against him, and, where there is any doubt as to the sufficiency of such warning, the evidence of the confession should not be admitted, especially on a trial of a person for his life.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

A confession of crime is not voluntarily made where a person accused of murder, who had for nearly a week been on a drunken debauch, while confined in a tavern crowded with curiosity seekers, was pri-

vately plied with questions by detectives, and who, after being told that his wife and son had made statements contradictory to his own, said he would tell all, and made the alleged confession after he was warned that what he said might be used for or against him.

Trepanier v. The King, 19 Can. Cr. Cas. 290.

Evidence of a confession of crime is inadmissible against a prisoner where, before making it, he was informed by the officers having him in charge, that whatever he might say would be taken down and might be used "for or against him." (Per Trenholme, J.)

Trepanier v. The King, 19 Can. Cr. Cas. 290.

A confession of crime made by a person accused therewith, in connection with an appeal for assistance from his plight, is not admissible against him.

Trepanier v. The King, 19 Can. Cr. Cas. 290.

A confession made in the office of the chief detective of the city, in his presence, and that of his assistant and one or two newspaper men who happened to be there, without pressure upon the accused, or threats or promises of immunity, but upon his own initiative and after he had been warned by the chief detective in the following words: "Now, I am going to ask you a few questions. Make a statement if you want to; but I am going to tell you that you are not obliged to make one, but if you do, it will be taken down and may be used in connection with your trial," is admissible in evidence on the trial of the accused.

Rex v. Cummings, 5 D.L.R. 86.

IX. Admissions.

(No cases.)

X. Hearsay; declarations; res gestae.

A. In general; pedigree; reputation.

(§ X A—680)—HEARSAY; DECLARATION; RES GESTAE; PEDIGREE; REPUTATION.

Administration—Next of kin—Matter of pedigree—Hearsay—Declarations admitted—Costs.

Re Woods, Brown v. Carter, 4 O.W.N. 388, 23 O.W.R. 353.

(§ X A—683)—BOUNDARIES.

The location of a township boundary line may be proved by hearsay evidence. [Thomas v. Jenkins, 6 A. & E. 575, referred to.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

B. Confidential communications.

(§ X B—693) — CONVERSATIONS WITHOUT PREJUDICE.

In an action on a policy of fire insurance it was error to admit evidence on the part of plaintiff that the defendants had through their agents denied liability altogether, the same being offered by the plaintiff because of his contention that the requirement in the policy as to arbitration did not apply if the insured denied any liability whatever, where the defendants objected to such evidence on the ground that the denial had been made during negotiations looking to a compromise of the plaintiff's claim and that the negotiations were without prejudice and that it had been so stated at the time, without first hearing the evidence tendered in support of the objection to prove that the statement was made without prejudice in settlement negotiations.

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

C. Party's own acts and declaration.

(§ X C—696)—AGAINST INTEREST; ADMISSIONS UNDER OATH.

Evidence of statements made to a witness by a deceased person is admissible if they are statements against the interest of the deceased. [Thompson v. Coulter, 34 Can. S.C.R. 261, referred to.]

Little v. Hyslop, 7 D.L.R. 478, 4 O.W.N. 285, 23 O.W.R. 247.

The rule that permits the use of affidavits based upon information and belief cannot be made the means of introducing, on an application for an interlocutory injunction in a suit to set aside a fraudulent transfer of property, the evidence of the judgment debtor taken in the suit in which the judgment was rendered.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

Where the defendant sued for damages for malicious prosecution is called as a witness on his own behalf, and with a mistaken notice of benefiting his own defence denies ever having entertained any belief of the plaintiff's guilt, a Judge trying the case without a jury is bound to give effect to his denial as proving for the plaintiff that there was a want of reasonable and probable cause for the prosecution, although he may be of opinion that there was reasonable and probable cause and that the defendant did believe in the charge he laid and that his contradiction of such belief, under oath, was falsely made with a mistaken view of evading responsibility such as might be attributed to a very ignorant and stupid man acting from motives of low cunning.

Geers v. Westman, 1 D.L.R. 312, 20 W. L.R. 212.

Any statement of the accused made against self-interest is admissible if made voluntarily.

Rex v. James, 4 D.L.R. 717, 19 Can. Cr. Cas. 391, 17 B.C.R. 165, 21 W.L.R. 563.

As on an application by a wife for interim alimony proof of marriage is all that is necessary, her cross-examination on the motion as to matters which might disen-

title her to permanent alimony will not be considered where the plaintiff alleges cruelty. [Cook v. Cook (1892), 12 C.L.T. Occ. No. 73, followed; Nolan v. Nolan, 1 Ch. C. 368; Campbell v. Campbell (1873), 6 P.R. 128, and Keith v. Keith (1876), 7 P.R. 41, specially referred to.]

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

(§ X C—697)—MOTIVES AND PURPOSES.

Evidence of an alleged incriminating admission said to have been made by the plaintiff, after his acquittal, is not admissible for the defence in an action for malicious prosecution in proof of reasonable and probable cause where the question of guilt is not in issue. [Compare Watt v. Clark, 18 O.R. 602.]

Canadian Pacific Railway Co. (appellant, defendant) v. Waller (respondent, plaintiff), 1 D.L.R. 47, 19 Can. Crim. Cas. 190.

(§ X C—699)—CRIMINAL CASES.

Detective officers may properly interrogate a prisoner charged with crime, while under arrest or being kept in sight in view of arrest, and answers given without threat or inducement may be given in evidence against him. (Per Cross, J.) [Rogers v. Hawkins (1898), 67 L.J.Q.B. 526, referred to. R. v. McCraw, 12 Can. Cr. Cas. 253, distinguished.]

Trepanier v. The King, 19 Can. Cr. Cas. 290.

D. Acts and declarations of third persons generally.

(§ X D—701)—AS TO ACCIDENTS OR INJURY.

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the Grand Trunk Railway, nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal. Held, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

Grand Trunk R.W. Co. v. Griffith, 13 Can. Ry. Cas. 302.

E. Acts and declarations of former party in interest; testator or former owner.

(§ X E—710)—AGENTS GENERALLY.

In an action to recover the purchase price of certain liquor sold to the defendant, evidence by the plaintiff's attorney of statements made to him by defendant's husband that he was defendant's agent to purchase goods and that he purchased the goods in question as such agent, where such statements were made after action brought and one year after the purchase in question, is not admissible.

LeBlanc (defendant, appellant) and LaPorte Martin & Co. (plaintiff, respondent), 40 N.B.R. 468.

(§ X E—714)—CARRIER'S AGENT.

The plaintiff was a passenger upon the electric street car of the defendants, when an electric explosion occurred in the car, and the plaintiff was injured by being forced out of the car and thrown upon the ground by his panic-stricken fellow-passengers. In an action to recover damages for his injury, he alleged as negligence on the part of the defendants, among other things, that they had not properly inspected the controller. At the trial, which took place thirteen months after the explosion, the defendants called as a witness the foreman at one of their barns to shew that there had been a proper inspection. The witness could not, from memory alone, testify to an inspection shortly before the accident. Counsel for the defendants proposed to put into the witness's hands a report, signed by him in the usual course of his work, shewing that the car had been examined three days before the explosion. Upon objection by the plaintiff, the trial Judge ruled that the witness could not refresh his recollection by looking at the report, unless he had a recollection to refresh, which he did not profess to have; and, therefore, excluded the testimony. The jury found negligence on the part of the defendants in that: (1) the motorman was incompetent to handle a car in case of emergency; (2) had he used the air-brake, the car could have been brought to a stop before the accident happened; and (3) that the car was not properly inspected; and judgment was entered for the plaintiff:—Held, upon appeal, that the testimony of the foreman was improperly rejected. Held, also, per Meredith, J.A., that the finding as to the incompetence of the motorman afforded, in itself, no cause of action; and that there was no reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire. A new trial was directed.

Fleming v. Toronto R.W. Co., 13 Can. Ry. Cas. 278, 25 O.L.R. 317.

G. Acts and declarations of partner; associate or co-conspirator.

(§ X G—728)—AGENTS, REPRESENTATIVES, OR ASSOCIATES.

Where the charge is for carrying on an

illegal lottery business and not for fraudulently representing that the accused was carrying on such business, the prosecution must prove that the business was in fact carried on as alleged and not merely that the accused represented that she was conducting such business or that she authorized her agents to so represent.

The King v. Lumgair, 19 Can. Cr. Cas. 123; 3 O.W.N. 309.

H. Complaints of injuries and suffering.

(§ X H—730)—COMPLAINTS OF INJURIES AND SUFFERING.

In a suit to enforce an accident insurance policy, evidence for the limited purpose of proving the physical condition of the person making the statement, of what the insured said immediately after the alleged accident, is admissible on behalf of the plaintiff.

Youlden v. London Guarantee and Accident Co., 4 D.L.R. 721, 3 O.W.N. 832, 21 O.W.R. 674, 26 O.L.R. 75.

J. Telephone conversations.

(§ X J—740)—TELEPHONE CONVERSATIONS.

Where an alleged telephone conversation is set up and the defendant tenders the evidence of his stenographer who heard the defendant's end of the talk, the stenographer's evidence is admissible, such elements in the problem as (a) the fragmentary nature of the testimony; (b) the possibility of a dishonest party talking into a telephone in the hearing of his witness without having any connection with the person to whom he was purporting to talk and giving answers to questions that were never asked, merely go to the weight, not to the admissibility of such evidence. [Warren v. Forst, 24 O. L.R. 282, affirmed on appeal.]

Warren, Gzowski & Co. v. Forst & Co., 8 D.L.R. 640, 23 O.W.R. 311, 46 Can. S.C.R. 642.

L. Dying declarations, or those made in travail.

(§ X L—750)—DYING DECLARATIONS.

The essential element in a dying declaration is the abandonment of hope of recovery, and the time when the statement is made, though a circumstance for consideration, is not a guide to its admissibility or otherwise. A statement in writing prepared by another, but read over to and signed by the deceased when he had no hope of recovery, is admissible as a dying declaration. R. v. Mitchell (17 Cox C.C.), disapproved.

Rex v. Magyar, 7 Terr. L.R. 491.

M. Former testimony.

(§ X M—755)—FORMER TESTIMONY.

Evidence is admissible against the accused on a charge of assault tried upon indictment that he had pleaded guilty to another identical charge for the same offence laid before a magistrate, on which charge no sentence had been pronounced or further proceedings taken for lack of jurisdiction in the magistrate to try the charge.

The King v. Burke, 19 Can. Cr. Cas. 141.

As the question of the guilt or innocence of an accused person cannot be considered upon an application to change the place of trial, a copy of his cross-examination on a trial which resulted in a disagreement, will not be referred to, although filed with such application. [Regina v. Palmer, 5 A. & E. 1023, specially referred to.]

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

Notwithstanding certain departures from the rules of evidence are permitted in the interlocutory stages of a proceeding, the reading therein of depositions of another party taken in a different action is not thereby authorized.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

XI. Relevancy and materiality.

A. In general.

(§ XI A—760)—IN GENERAL.

The pleadings in this case raised an issue whether or not the plaintiff, in order to induce the defendants to enter into the agreement sued on, falsely represented to them that, by virtue of his own interest and the interest of others represented by him, he controlled a certain company and could determine whether the company would accept the defendants' offer or not. A letter had been written by the plaintiff to one of the defendants before the acceptance of the offer in which he spoke of other parties as interested in the sale and holding out for a larger sum:—Held (Richards, J.A., dissenting), that interrogatories put by the defendants to the plaintiff, under Rule 407b added to the King's Bench Act by 5 & 6 Edw. VII., ch. 17, sec. 2, asking for information as to the names of the other parties referred to, and as to all communications between them and the plaintiff relating to the proposed sale, were relevant to the issue and should be fully answered.

Affleck v. Mason, 21 Man. R. 759.

(§ XI A—761)—AS TO CONCURRENT DATES.

On a charge of obtaining money under false pretence of ownership of certain chattels, the testimony of a witness taken nearly a year after the alleged offence, stating merely that such witness "was" the owner, is insufficient to negative the alleged pretence, unless such deposition by its context or otherwise indicates the date of the offence as the time at which he was the owner.

Re William Staggs (No. 2), 8 D.L.R. 284.

C. Character; reputation; age.

(§ XI C—770)—CHARACTER.

In an action for false imprisonment for non-payment of a municipal tax, the fact that the plaintiff had been previously arrested and held within the prison limits for debt is not relevant on the question of quantum of damages.

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

D. Knowledge; notice; belief; mental capacity.

(§ XI D—776)—KNOWLEDGE; NOTICE.

In an action to enforce a separation agreement evidence is admissible to prove when and how the plaintiff became aware of the adultery of the other party relied upon as a cause of separation, provided that the adultery itself is regularly proved. [See also Wigmore on Evidence, vol. 1, sec. 261.]

Nargang v. Nargang, 1 D.L.R. 323, 20 W.L.R. 206.

(§ XI D—777)—MENTAL CAPACITY.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a primâ facie case of insanity is made out, so as to cast upon those supporting the conveyance the onus of proving that it was executed during a lucid interval, an affidavit of execution in the ordinary form attached to the conveyance, and formal statements in printed discharges from an asylum, not borne out by the material which should interpret them, are not sufficient evidence that the conveyance was so executed.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

F. Prices; values.

(§ XI F—794)—SERVICES.

Evidence that the workman was earning a certain sum per day at the time of the injuries complained of is not relevant for the ascertainment of the "estimated earnings" during the three years preceding the injury which is an element in fixing the workman's compensation for the injury under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 7. [Nigro v. Donati, 6 D.L.R. 316, affirmed.]

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

G. Damage.

(§ XI G—802)—PERSONAL INJURIES.

Contributions made by the employer before action towards the medical and hospital expenses of an employee who afterwards sued him for damages alleging that he has been injured by the negligence of the employer's foreman and that the employer was liable therefor under the Workmen's Compensation Act (Ont.) should not, in a subsequent action for the injuries, be taken as evidence of the payer's liability, unless expressly made upon that basis, but should count to his advantage in assessing the damages. [Nigro v. Donati, 6 D.L.R. 316, 4 O.W.N. 2, 22 O.W.R. 974, affirmed.]

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

H. Care; skill; negligence.

(§ XI H—810)—NEGLIGENCE.

The rule that the failure of any person to perform a duty imposed on him by statute or other legal authority should be considered evidence of negligence applies only to violations of a statutory or valid municipal regulation established for the benefit of private persons, where the action is brought by a person belonging to the protected class, and only if other elements of actionable negligence concur. (Dictum per Macdonald, J.) [Deering on Negligence, sec. 6; Shearman and Redfield on Negligence, 5th ed., sec. 13, specially referred to.]

Bears v. Central Garage Co., 3 D.L.R. 387, 22 Man. L.R. 292, 21 W.L.R. 252.

K. Similar acts or facts.

(§ XI K—831)—LIBEL AND SLANDER.

Evidence of a slander spoken to a witness, but not complained of in the statement of claim, is not admissible to prove a subsequent slander which is complained of in the action. (Decision of Supreme Court of Alberta affirmed on appeal without opinion.)

Wickens v. McConkey, 7 D.L.R. 602.

O. Contracts; breach; waiver.

(§ XI O—855) — CONTRACTS; BREACH; WAIVER.

Upon the question of breach of implied warranty as to fitness on the sale of an engine the following are tests: (a) would the engine properly govern; (b) were the castings unfit for use to seller's actual or presumed knowledge; (c) was the crank case defective; (d) were the frequent breaks due to inherent defects; (e) was one of the pistons defective and secretly plugged by the seller before delivery; (f) was it deficient in power; (g) was its workmanship of inferior grade.

Alabastine Company, Paris, Limited v. Canada Producer and Gas Engine Co., Limited, 8 D.L.R. 405, 4 O.W.N. 486, 23 O.W.R. 841.

(§ XI O—857)—BREACH.

Under the statute C.S.N.B. 1903, ch. 116, sec. 41, sub-sec. (2), a plea of the general issue in an action for a breach of warranty of soundness of a horse, will permit the defendant to adduce evidence to shew that it was sound prior to and at the time of the sale. (Per Barry, J.)

Hale v. Tompkins, 6 D.L.R. 502, 11 East. L.R. 91.

R. Persons; personal relations.

(§ XI R—871)—CRIMINAL CASES.

It cannot be shewn on the trial of a person for rape, that a few minutes after the commission of the offence charged, or at any other time, he committed a similar crime against the person of a sister of the complaining witness, such evidence not being admissible either as part of the res gestae, or to shew a propensity on the part of the accused to commit such crimes. [Rex v. Bond, [1906] 2 K.B. 389, 21 Cox C.C. 252, followed, and Reg. v. Rearden, 4 F. & F. 76, distinguished.]

Rex v. Paul, 5 D.L.R. 347, 21 W.L.R. 699.

U. Title or possession.

(§ XI U—892)—OF REAL PROPERTY.

Possession of land must be considered in every case with reference to the peculiar circumstances; the character and value of the property, the suitable and natural mode of using it, and the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests must all be taken into account in determining the sufficiency of the possession. [The Lord Advocate v. Lord Lovat, 5 A.C. 273; and Johnson v. O'Neill, [1911] A.C. 552, referred to.]

Kirby v. Cowderoy, 5 D.L.R. 675, 105 L.T.N.S. 74.

XII. Weight, effect, and sufficiency.

A. In general; corroboration.

(§ XII A—920)—EFFECT; SUFFICIENCY.

As sec. 1003 of the Criminal Code (1906) specifically requires that the "testimony admitted by virtue of this section," i.e., a statement taken in Court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similarly taken from another child of tender years. (Dictum per Harvey, C.J.) [R. v. Pailleur, 15 Can. Cr. Cas. 339; R. v. Daun, 11 Can. Cr. Cas. 244, 12 O.L.R. 277; R. v. Iman Din, 18 Can. Cr. Cas. 82, referred to.]

Rex v. Whistnant, 8 D.L.R. 468, 22 W.L.R. 762.

Upon a sale of seed grain, where the buyer pleads that it lacked vitality, and was frosted, a random test of 100 seeds is unsafe upon which to base a conclusion as to the general vitality of 150 bushels of the grain, a more general and complete test being necessary under the circumstances. [Lawton v. Reid, 2 W.L.R. 240, applied.]

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Where the agreement under which the plaintiff seeks to hold the defendant liable is an unusual one, and there is nothing in writing to support the statements of the plaintiff, which are directly denied by the defendant, a very clear case must be made by the plaintiff to succeed and his evidence as to the terms of the alleged agreement should be clear and specific. [Kinsman v. Kinsman, 5 D.L.R. 871, reversed.]

Kinsman v. Kinsman (No. 2), 7 D.L.R. 31, 4 O.W.N. 20, 22 O.W.R. 979.

As between two witnesses, of whom one is interested and the other is not, credit should, as a general rule and in the absence of anything to the contrary, be given to the latter.

Bateman v. County of Middlesex, 6 D.L.R. 533, 3 O.W.N. 1541, 23 O.W.R. 685, 27 O.L.R. 122.

The rules of evidence applicable to a criminal prosecution requiring corroboration of the testimony of the complaining witness as to the fact of rape and requiring disclosure by her of the alleged act, do not apply to a civil action for damages for assaulting and ravishing the plaintiff without her consent.

Dunn v. Gibson, 8 D.L.R. 297, 4 O.W.N. 329, 23 O.W.R. 356, 20 Can. Cr. Cas. 195.

When the sole witness is an interested party and is giving evidence with respect to what took place between him and a deceased person it is a safe and judicious general rule to require corroboration, but there is no hard and fast rule to prevent a Judge or jury from action upon such evidence though not corroborated, where the inherent probabilities of the case are in favour of the truth of the evidence.

Power v. Munro, 5 D.L.R. 577.

In an action at the suit of the executrix of a grocer's estate for the balance on account of groceries furnished by the decedent to the defendant's wife, a corroboration of the alleged instruction by the defendant to his wife testified to by him not to run a bill, must be furnished to overcome the presumption that she had his implied authority to purchase on credit necessaries suitable to his degree and estate.

Scott v. Allen, 5 D.L.R. 767, 3 O.W.N. 1484, 22 O.W.R. 597, 26 O.L.R. 571.

(§ XII A—921)—EXPERT TESTIMONY; OPINIONS.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of the plaintiff under secs. 392 et seq. of the Code of Civil Procedure (Que.), for the appointment of viewers and experts, the trial Judge, sua sponte and over the defendant's objection, appoints a single viewer and expert, such appointment will on appeal be set aside as irregular where the directory provisions of the Code have not been strictly followed.

Pontbriand v. Chateauguay, 7 D.L.R. 22, 46 Can. S.C.R. 603.

In an action for negligent driving in a collision case where the defendant is asked by his counsel "whether anything more could have been done than was done to prevent the collision which occurred," the question may properly be excluded as being the point which the jury has to decide, the proper procedure being that the defendant should state the facts without giving his opinion and leave it to the jury to determine whether he could have done anything more than he did to avoid the collision. [Courser v. Kirkbride, 23 N.B.R. 404, followed.]

Campbell v. Pugsley, 7 D.L.R. 177.

(§ XII A—924)—False evidence.

The evidence of a witness will not necessarily be disregarded in toto because false in an immaterial particular.

Queer v. Greig, 5 D.L.R. 308.

B. Cause and effect.

(§ XII B—928)—Sufficiency of proof of negligence causing death.

In an action for negligently causing death, it is necessary that there be reasonable evidence from which it may be inferred that death was due to negligence, since it cannot be inferred from mere conjecture, yet it is not necessary that the manner of its occurrence should be shewn to a demonstration. [Evans v. Astley, [1911] A.C. 674, specially referred to.]

Lefebvre v. Trethewey Silver Cobalt Mine, Ltd., 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

(§ XII B—929)—Damages.

The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

Robinson v. Canadian Northern R. Co., 5 D.L.R. 716, 21 W.L.R. 916.

The Court will not be deterred, by the fact that the evidence is, from the nature of the case, uncertain and unsatisfactory, from an attempt to assess damages where some damages have been suffered. [Chaplin v. Hicks, [1911] 2 K.B. 786, followed; Williams v. Woodworth, 32 N.S.R. 271, specially referred to.]

Broderick v. Forbes, 5 D.L.R. 508.

C. Fraud or good faith; malice; undue influence.

(§ XII C—932)—Malice.

The fact that the examination papers of an applicant, who was refused admission to the College of Dental Surgeons, were undermarked as the result of a conspiracy between the examiners and the college, is not shewn, nor can a conspiracy be inferred where it appears that each examiner, who marked the applicant's papers differently, acted independently and without reference to the other, notwithstanding that expert witnesses for the plaintiff testified that he should have received higher markings.

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779.

(§ XII C—934)—Collusion.

Collusion between an architect and a contractor sufficient to invalidate the former's decision, which by contract was final as to the value of work performed or materials furnished for the defendant, is not shewn by the fact that the architect did not make any measurements, nor obtain any account of quantities, and that he acquiesced in the amount the plaintiff claimed therefor.

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

F. Matters as to persons; relation of parties.

(§ XII F—951)—Insolvency.

It cannot be inferred from a letter sent by a company to a creditor, which merely stated "have representative meet the creditors" at a specified time and place, that it was a meeting of the company's creditors called for the purpose of compounding with them, where the proceedings at the meeting are not disclosed, by means of which a special application or significance of the words of the letter might appear.

Re Manitoba Commission Co., Ltd., 2 D.L.R. 1, 21 W.L.R. 86, 22 Man. L.R. 268.

(§ XII F—952)—Marriage.

In a prosecution for bigamy the clergyman who performed the marriage ceremony is competent to testify that he was an ordained minister and, therefore, authorized to perform such ceremony.

The King v. Bleiler, 1 D.L.R. 878, 21 W.L.R. 18, 19 Can. Cr. Cas. 249.

The fact of a marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed.

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336, 20 Can. Cr. Cas. 205.

In an action for criminal conversation, where evidence of a marriage can be proved by an eye-witness, in a jurisdiction wherein the old common law disqualification has been removed and a party to the action is, therefore, a competent witness, the husband himself is one of the best eye-

witnesses and is competent. [Morris v. Miller (1767), 4 Burr. 2057; Birt v. Barlow (1779), 1 Doug. 171 (decided long prior to ch. 68 of 32 and 33 Vict. (Imp.) (1869), qualifying the husband), distinguished.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336, 20 Can. Cr. Cas. 205.

An extract from the baptismal register of a Presbyterian church in a foreign country certifying to the baptism of a child born of the marriage of two persons and signed by the officiating pastor is proof that such clergyman who signed such certificate is the custodian of records and authorized to issue certificates of baptism; and such proof coupled with that of an uninterrupted public status of legitimacy is abundant evidence of filiation.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

A certificate under the seal of the clerk of a County Court of a foreign state certifying to the fact that two persons were joined in matrimony is primâ facie proof of marriage in accordance with the law of such foreign state, and it is immaterial whether or not that marriage is considered ecclesiastically valid in view of the rules and regulations of a religious body to which either of them may have belonged.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ XII F—954)—INTENT.

Evidence is inadmissible to shew that the intention of a testator, as expressed after making a will, was to thereby benefit one child to a greater extent than other members of his family.

Re Boehmer, 3 D.L.R. 857, 22 O.W.R. 287, 3 O.W.N. 1353.

I. Contracts.

(§ XII—I—965)—CONTRACTS.

In an action for the recovery of a physician's bill for services, where the nature and duration of the services are in issue, and where the physician testifies in detail supporting the claim, and the other testimony is conflicting and unsatisfactory, the evidence of the physician should be given credence, under sub-sec. 7 of article 2260.

Reader v. Calumet Metals Co., 6 D.L.R 496, 10 La Rev. de Jur. 346.

Money lent—Promotion of company—Evidence.

Jackson v. Pearson, 4 O.W.N. 456, 23 O. W.R. 526.

(§ XII—I—969a)—WRITTEN OR PRINTED TERMS; WEIGHT OF.

A written clause of a contract is entitled to have greater effect attributed to it than a clause in a printed portion of the agreement pertaining to the same subject. [Glynn v. Margetson, [1893] A.C. 351, specially referred to.]

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 11 E.L.R. 81.

K. Miscellaneous civil cases.

(§ XII K—979)—INSURANCE MATTERS.

An inference of the cause of an injury may be drawn by the Court from statements made by the injured person as to his symptoms immediately after the injury; Courts like individuals habitually act upon a balance of probabilities. [Evans and Co. v. Astley, [1911] A.C. 674, followed; Grand Trunk R. Co. v. Griffith (1911), 45 Can. S.C.R. 380, specially referred to.]

Youlden v. London Guarantee and Accident Co., 4 D.L.R. 721, 3 O.W.N. 832, 21 O.W.R. 674, 26 O.L.R. 75.

In the absence of evidence of the value of insured property it is impossible to say that the failure of the applicant to disclose that the property was incumbered was a non-disclosure of a material circumstance of which the insurer should have been informed.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

Testimony of the president of an insurance company to the effect that in his opinion, the board of directors would not have passed an application for insurance had the existence of an incumbrance on the insured property been known, is inadmissible to shew that the company was prejudiced by the non-disclosure of such fact, since such testimony did not tend to shew that the board of directors would have taken a similar view. [Burrell v. Bederley, Holt, N.P. 285, and Campbell v. Richards, 5 B. & Ad. 841, referred to.]

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ XII K—983)—LIBEL OR SLANDER.

In an action for slander the witnesses must be able to swear to the exact words of the defendant, and not merely to the substance or effect of them. (Decision of Supreme Court of Alberta affirmed on appeal without opinion.)

Wickens v. McConkey, 7 D.L.R. 602.

L. Criminal cases.

(§ XII L—986)—CONFESSION.

A Court should weigh all the circumstances which precede and surround a confession, in order that it may decide as to its accuracy, the observation of the rules in such cases provided, and its validity or invalidity. [R. v. Day, 20 O.R. 209; R. v. Elliott, 3 Can. Crim. Cas. 95, and R. v. Viau, 7 Que. Q.B. 362, specially referred to.]

Rex v. Cummings, 5 D.L.R. 86.

(§ XII L—987)—REASONABLE DOUBT.

While neither the character, reputation or extent of one's business, constitutes a reason why he should not be convicted of a criminal offence, or punished if guilty, yet they all have weight in considering the probability of the truth of the charge, and

a bearing upon the question whether there was reasonable evidence of guilt, as well as upon the fact whether he was guilty or innocent.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 20 Can. Cr. Cas. 85, 26 O.L.R. 136.

(§ XII L—989)—CORROBORATION OF ACCOMPLICE OR ASSOCIATE.

While it is the duty of a Court to caution the jury as to the danger of convicting the accused on the uncorroborated evidence of an accomplice and to advise them not to convict him on such evidence, yet, notwithstanding such caution and advice, a verdict of guilty rendered by the jury will be legal and cannot be set aside on the ground alone that there was no evidence corroborative of that of the accomplice. [Rex v. Stubbs (1835), 25 L.J.M.C. 16; Rex v. Frank (1910), 16 Can. Crim. Cas. 237, 21 O.L.R. 196, 16 O.W.R. 50; Rex v. McNulty (1910), 17 Can. Crim. Cas. 26, 22 O.L.R. 350, 17 O.W.R. 611; Rex v. Reynolds (1908), 15 Can. Crim. Cas. 209, 1 Sask. L.R. 480, 9 W.L.R. 299, followed; Rex v. Tate, [1908] 2 K.B. 680; Rex v. Beauchamp (1909), 73 J.P. 224, referred to; Rex v. Warren (1909), 2 Cr. App. R. 194, 73 J.P. 359; Rex v. Everest (1909), 2 Cr. App. R. 116, 130, 73 J.P. 269, disapproved.]

Rex v. Betchell, 5 D.L.R. 497, 19 Can. Cr. Cas. 423, 21 W.L.R. 665.

(§ XII L—990)—THEFT.

The denial by a railway conductor of the receipt of a cash fare from a passenger, for which he did not account to the railway company, indicates a purpose to fraudulently convert it, sufficient to deprive him, on a trial for theft under sec. 355 of the Criminal Code, of the defence that he might have accounted for it at some other time and place than on the occasion when he made returns to the company for the trip on which he received it.

Rex v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 21 W.L.R. 658.

A primâ facie case of theft under sec. 355 of the Criminal Code is established by the facts that a railway conductor failed to account, as his duty required, to a railway company for cash received from a passenger in payment of fare, which he denied receiving.

Rex v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 21 W.L.R. 658.

(§ XII L—995)—EXTRADITABLE OFFENCES.

The evidence to warrant a committal for extradition need not be such as to justify a conviction at the trial. A primâ facie case only need be made.

United States v. Webber (No. 1), 5 D.L.R. 863, 20 Can. Cr. Cas. 1.

(§ XII L—999)—SEDUCTION.

A finding that a woman under the age of 21 years had sexual intercourse with the prisoner on a number of occasions in the year 1910, he being then over the age of 21 years, negatives a charge of seduction under promise of marriage based upon a similar act in the year 1911 alleged to have been induced by a promise of marriage. [Rex v. Romans, 13 Can. Cr. Cas. 68, distinguished; Rex v. Lougheed, 8 Can. Cr. Cas. 184, at p. 187, approved.]

The King v. Comeau, 5 D.L.R. 250, 11 E.L.R. 87 and 104.

XIII. Admissibility under pleadings; variance.

(No cases.)

EVOCATION (Quebec.)

See Removal of Causes.

EXAMINATION.

Of party for discovery, see Discovery.
Of witnesses, see Witnesses, II.
Of judgment debtor, see Judgment Debtor.

EXCEPTIONS.

Generally, see Appeal, V.
In deed, see Deeds, II.
Burden of proving, see Evidence, II.
Objections and exceptions at trial, see Trial, I.
Exceptions or exemptions, burden of proving, see Evidence, II.
Failure to take exception in lower Court and effect an appeal, see Appeal, V.

EXECUTION.

I. IN GENERAL.
II. SUPPLEMENTARY PROCEEDINGS.

Exemption from, see Exemptions.
Homestead execution, see Homestead.
Of wills, see Wills, I.

I. In general.

(§ I—1)—IN GENERAL.

It was a sufficient seizure of the buildings, which were locked up and unoccupied and in a small remote settlement, for the bailiff to put up notices that he had seized them and of the date of sale without leaving any person in possession or attempting to remove them. As a solicitor, at the time of the sale, on the defendant's behalf, gave the bailiff a written notice forbidding the sale, the debtor must be presumed to have known of the day finally fixed for the sale, and the fact that no notices of the several adjournments of the sale had been given by the bailiff became unimportant. Although the price obtained at the sale was only a small percentage of the cost of the buildings, the circumstances were such that it did not appear that any greater price could have been got, and the bailiff was not bound to apply to the Judge under sec. 185

(now 192) for power to sell, as that section is only for the bailiff's protection and his not acting under it should not affect the validity of the sale. If a seizure is made while the writ of execution is in force, a sale may be made after the writ has expired.

Dixon v. Mackay, 21 Man. R. 762.

In the absence of the legal representative of a company appointed to receive legal notice addressed to the company from the bailiwick of a sheriff where the company had an office, the notice required to be served on the company that such of its shares as were owned by an execution debtor were to be seized on execution cannot be served on any other person unless he has been authorized to receive the same on behalf of the representative.

Malouf v. Labadi (No. 1), 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575.

(§ I—2)—RIGHT TO; AGAINST WHOM.

Where, in an action against a mining company for wages, two executions have been issued, the one to the sheriff of the county where the head office of the company is situated, and the other to the sheriff of the county where the company carries on its business, the costs of the latter execution will be disallowed in a subsequent action against the directors of the company for the wages, under sec. 94 of the Ontario Companies Act, 7 Edw. VII., ch. 34 (see now 2 Geo. V., ch. 31, sec. 96). [Marquis of Salisbury v. Ray, 8 C.B.N.S. 193, and in Re Long, Ex p. Cuddeford, 20 Q.B.D. 316, referred to.]

Pukulski v. Jardine, 5 D.L.R. 242, 3 O.W.N. 1172, 21 O.W.R. 893, 26 O.L.R. 323.

(§ I—3)—AGAINST WHAT.

The provision of article 2134, R.S.Q. 1909, that the license is only transferable with the consent of the Minister, is a provision in favour of the Minister alone and lack of his consent to transfer cannot be set up by the debtor in opposition to the seizure. [Durand v. The City of Quebec, 13 Que. S.C. 308, approved.]

Rouleau v. International Asbestos Co., 5 D.L.R. 434.

The rights conferred by a mining license issued under the Quebec Mining Law, article 2098 and following, R.S.Q. 1909, are immovable property and may be seized under a writ of execution.

Rouleau v. International Asbestos Co., 5 D.L.R. 434.

The rights conferred upon a grantee under a license to work mines, issued in conformity with the mining laws by the Department of Mines of the Province of Quebec, covering certain locations therein designated, are real property rights subject to alienation, except as to the rights of the Crown therein, and accordingly are, as such, exigible under a distress against immoveables.

Rouleau v. International Asbestos Company, 18 Rev. de Jur. 295.

(§ I—4)—TIME OF ISSUING.

An execution lodged in the land titles office and duly renewed, will, by virtue of rule 346 of the Judicature Ordinance of 1898 (Sask.) (now rule 466 of the Sask. Rules of Court), have effect, and priority from the time of the original filing thereof.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

(§ I—8)—LIEN OF.

Where the sheriff seizes, under an execution, certain moneys belonging to the execution debtor, the execution creditor thereby acquires a lien upon the moneys so received, and such lien is protected on the execution debtor subsequently dying insolvent, and the administratrix of his estate is not entitled to delivery up of the moneys so seized for distribution pari passu under sec. 52 Trustee Act (Ont.), the saving clause of which section declares, in effect, that the statutory direction for distribution pari passu shall not prejudice "any lien existing in the lifetime of the debtor on any of his real or personal property." [Trustee Act, 1 Geo. V. (Ont.), ch. 26, sec. 52, construed.]

Re Hunter, 8 D.L.R. 102, 4 O.W.N. 451.

(§ I—9)—PAYMENT; SATISFACTION; DISCHARGE.

Where after judgment the plaintiff placed an execution in the hands of the sheriff and a garnishing order was also issued and the money was realized by the sheriff under the execution, the judgment debtor is not entitled to a discharge of the garnishing order until it has been ascertained whether other creditors, if any, will come in with executions upon which they would be entitled to share pro rata upon the fund in case such other executions were received by the sheriff within the statutory period of three months after the sheriff's notice is given under secs. 24 and 25 of the Executions Act, R.S.M. 1902, ch. 58. [Secs. 759 and 762 of the King's Bench Act, R.S.M. 1902, ch. 40, specially referred to.]

Kolega v. Genser, 6 D.L.R. 188, 22 W.L.R. 197.

(§ I—11)—STAY.

Opposition to seizure on immovables dismissed on motion—Charter of the city of St. John, Quebec—53 Vict. ch. 71, secs. 512 to 516, regulating chattel attachments and 532, 533 and 534 concerning seizure of immovables—C.P. old secs. 581, 651, amended by new secs. 645, 721.

Corporation of Saint John v. Louis Decelles, 18 Rev. de Jur. 524.

On an application for the stay of execution, leave will not be granted to file further material. [Barker v. Lavery, 14 Q.B.D. 769, followed.]

Williamson v. Grigor, 6 D.L.R. 53, 22 W.L.R. 29.

Stay—Pendency of appeal—Supplemental material—Terms.

Barnum v. Beckwith, 7 D.L.R. 931.

II. Supplementary proceedings.

(§ II—15)—Supplementary proceedings.

Where a conveyance absolute in form is held merely as a mortgage security, the equity of redemption may be sold under execution upon a judgment against the person entitled to the equity, although the right of redemption is not disclosed upon the documents of title or upon the registry records. [McCabe v. Thompson, 6 Grant 175, and Fitzgibbon v. Duggan, 11 Grant 188, distinguished. See also annotation to this case.]

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

Ontario Consolidated Rule 903 does not extend to authorize the summary examination of the transferee of a judgment debtor, although the transferee is within the jurisdiction if the sole property transferred was land outside of the jurisdiction and consequently not exigible under execution in Ontario. [Gowans v. Barnet, 12 P.R. (Ont.) 330, specially referred to; see also Canadian Mining and Investment Co. v. Wheeler, 3 O.L.R. 210; British Can. Loan and Investment Co. v. Britnell, 13 P.R. (Ont.) 310.]

Crucible Steel Co. v. Ffolkes, 1 D.L.R. 381, 3 O.W.N. 750, 21 O.W.R. 302.

(§ II—16)—Commitment of debtor; N.S. Collection Act.

On an examination of a judgment debtor, although it is the normal course for a judgment creditor to have a full explanation in answer to his questions, yet, if as a result of the whole examination one is able to glean the history of what has been done, it would appear to suffice, and a motion to punish the judgment debtor for contempt because his answers are not satisfactory should be denied. [Graham v. Devlin, 13 P.R. (Ont.) 245, referred to.]

Charlebois v. Martin, 8 D.L.R. 579, 4 O.W.N. 412, 23 O.W.R. 898.

Upon a motion by a judgment creditor to commit a debtor for contempt upon the ground that on his examination as a judgment debtor it appears that he had concealed or made away with his property in order to defeat and defraud his creditors, the Court should not commit the debtor merely on a reasonable suspicion but must be prepared to find as a fact that the debtor is guilty of the act charged. [Wallis v. Harper, 7 U.C.L.J., O.S. 72, distinguished.]

Charlebois v. Martin, 8 D.L.R. 579, 4 O.W.N. 412, 23 O.W.R. 898.

The Nova Scotia Supreme Court, on an appeal by a judgment debtor from the decision of the officer charged with the duty of examining such debtor as to his financial condition, etc., in the proceedings under sec. 5, Collection Act, R.S.N.S. 1900, ch. 182, has the power, upon the application of the judgment creditor, to make the same adjudication as such officer might have made under sec. 27 (e) of the Act aforesaid, providing that, if it appears to such officer that the debtor had made a fraudulent disposition of his property, the officer may commit him to gaol, though the officer stated in his decision that, while a good deal of evidence was given as to the debtor's dealing and transactions as to real and personal property owned by him, he had decided not to make any order under sec. 27 (e) aforesaid, on the ground that he was not asked so to do, and the Court may exercise such power, though there had been an election before the examining officer by the judgment creditor to proceed under another clause of sec. 27 aforesaid, thus making him not strictly entitled to raise the question on the appeal.

Henn v. Smith, 6 D.L.R. 48, 11 East. L.R. 1.

Supplementary proceedings — Committal of judgment debtor under the Collection Act, R.S.N.S., ch. 182—Fraudulent disposition of property.

Canadian Underskirt Co. v. Gorman, 6 D.L.R. 917, 11 East. L.R. 7.

(§ II—20)—Examination of officers of corporation.

Where an order for the examination of a director of a corporate judgment debtor purports to be made under the provisions of Rule 910 (Ont. C.R. 1897), but contains words indicating that it was intended to make rule 902 applicable also, and the Court making the order has said that in its opinion the case fell within rule 902, the examination may be as full and wide as though the director were being examined as an officer of the company under rule 902.

Powell-Rees, Limited v. Anglo-Canadian Mortgage Corporation, 8 D.L.R. 995, 23 O.W.R. 456, 4 O.W.N. 352.

The word "officers" in rule 902 (Ont. C.R. 1897), providing that the officers of a corporation may be examined under a judgment against the corporation, includes a director. [Societe Generale de Commerce et de l'Industrie en France v. Johann Maria Farine & Co., [1904] 1 K. B. 794, referred to; Powell-Rees v. Anglo-Canadian, 5 D.L.R. 818, 26 O.L.R. 490, affirmed.]

Powell-Rees, Limited v. Anglo-Canadian Mortgage Corporation, 8 D.L.R. 994, 27 O. L.R. 274, 4 O.W.N. 219.

Ontario Con. Rule 902, providing that the officers of a corporation may be examined under a judgment against the corporation, includes all who have been such officers. [Société Générale de Commerce et de l'Industrie en France v. Johann Maria Farina & Co., [1904] 1 K.B. 794, followed.]

Powell-Rees, Ltd. v. Anglo-Canadian Mortgage Corporation (No. 3), 5 D.L.R. 818, 3 O.W.N. 1444, 22 O.W.R. 529, 26 O.L.R. 490.

Examination of director.

Powell-Rees, Ltd. v. Anglo-Canadian Mortgage Co., 3 D.L.R. 879, 3 O.W.N. 1375, 22 O.W.R. 295.

One who has been mainly instrumental in obtaining letters patent incorporating a company in Ontario, and has twice been to England in connection with the company's affairs, and has been a director of the company and represented as the Canadian president, and purports and undertakes to act on behalf of the company, and does not deny that he knows all about its property, may be examined under a judgment against the company as an officer thereof, under Ontario Con. Rule 902.

Powell-Rees, Ltd. v. Anglo-Canadian Mortgage Corporation (No. 3), 5 D.L.R. 818, 3 O.W.N. 1444, 22 O.W.R. 529, 26 O.L.R. 490.

On an examination of a judgment debtor, where it does not appear that an execution had issued and had been returned by the sheriff nulla bona, an objection on that ground to the examination is without force, unless it is affirmatively shewn by the debtor that the process of the Court has been abused. [Grant v. Cook, 17 P.R. (Ont.) 362, referred to.]

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 373, 23 O.W.R. 489.

(§ II—25)—QUEBEC PRACTICE.

All immoveables to be sold at sheriff's sale should be described according to the prescriptions of the civil law with indication of their boundaries and of co-terminous lands and of the cadastral name and number. Failure to give these boundaries or the proper cadastral description is a fatal irregularity vitiating the sale.

Savoie-Guay v. Deslauriers and De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

In all execution proceedings the moveables of the debtor should be seized and discussed before his immoveables are sold, or at least it should be established by a return of nulla bona that there are no moveables to seize; and failure so to do is a fatal irregularity of which any interested party may avail himself to have the sale of the immoveables annulled.

Savoie-Guay Co. v. Deslauriers and De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

The amendment to art. 891 of the Code of Civil Procedure, Quebec, by 2 Geo. V. (Que.), ch. 50, enacting the proceedings to be taken where the judgment debtor's services are not valued in money does not apply to all debtors, but only to insolvents who have made an abandonment of their property for the benefit of their creditors pursuant to the terms of C.P. Que., art. 853 et seq.; nor does such amendment authorize the Court to place a valuation upon the services of the judgment debtor performed without salary for his wife carrying on business as a contractor.

Pion v. Fortier and DeReinillard, 6 D.L.R. 136, 14 Que. P.R. 74, 42 Que. S.C. 407.

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT; RESIGNATION; REMOVAL.
II. POWERS AND LIABILITIES; CONDUCT OF ESTATE; ASSETS.
A. Rights, powers and duties.
B. Liabilities.
C. Assets.
III. SUITS AFFECTING ESTATE.
A. On behalf of.
B. Suits and judgments against.
IV. INDEBTEDNESS; DISTRIBUTION; ACCOUNTING AND SETTLEMENT.
A. Debts and obligation.
B. Instructions and control by Court.
C. Distribution; accounting; settlement; discharge.
V. CREDITOR'S RIGHTS AGAINST LAND; SALE OF LAND FOR DEBTS.
VI. FOREIGN EXECUTORS AND ADMINISTRATORS.
VII. EXECUTORS DE SON TORT.

Measure of recovery by administrators for causing intestate's death, see Damages; Death.

As to legacies, generally, see Wills, III.

Appointment of trustees, generally, see Trusts, II.

Renunciation of executorship, retraction, see Will.

I. Appointment; resignation; removal.

(No cases.)

II. Powers and liabilities; conduct of estate; assets.

A. Rights, powers, and duties.

(§ II A—21)—AS TO INVESTMENTS.

Where trustees who are vested with absolute discretion as to the conversion of non-productive securities of an estate, delay the conversion thereof, the proceeds when realized enure to the benefit of life tenants so as to give them the same benefit as if the conversion had taken place within a reasonable time from the death. [Yates v. Yates, 28 Beav. 637; and Re Cameron, 2 O.L.R. 756, specially referred to; see also Leadlay v. Leadlay, 3 D.L.R. 487, 3 O.W.N. 1218, 22 O.W.R. 14.]

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

An executor cannot, except at his own risk, invest money of an estate in disregard of the express direction of a will that it should be deposited in a chartered bank at interest until the arrival of the

time fixed for the distribution thereof, and, as no discretion was conferred on the executor as to the disposal of the money, sec. 2 of ch. 130, R.S.O. 1897, giving authority to executors or trustees to invest trust moneys in their hands or to vary investments already made, at their discretion, is not applicable.

Re Richardson, 5 D.L.R. 449.

(§ II A 1—25)—Costs.

An administrator is justified in contesting a claim of a woman for all of his decedent's property because of the breach of the latter's agreement to devise it all to her in consideration of her keeping house for him during his lifetime, since he could not safely recognize the binding force of the claim without a decision of a Court in its favour and therefore he will be allowed his costs from the estate.

Legeas v. Trusts and Guarantee Co., 5 D.L.R. 389, 20 W.L.R. 172.

(§ II A 1—28)—Postponing sale and distribution.

Notwithstanding a clause in the will declaring that the trustees may postpone the sale and conversion of any part of the estate so long as they deem proper, it is their duty to sell and convert into money as soon as they reasonably can to realize a fund which would be immediately distributable in cash, using the power of postponement to obtain a better return but not for mere purposes of accumulation where there is no direction for accumulation in the will. [See Theobald on Wills, 7th ed., p. 461.]

Re Caswell Estate, 1 D.L.R. 497, 20 W. L.R. 469.

(§ II A 2—40)—Real property.

Notwithstanding the provisions of sec. 3 of the Land Title Act (Sask.) that the land of a deceased owner goes to his personal representatives, the title to such land will, pending the grant of letters of administration, devolve upon his heirs.

Junic's Case, 7 Terr. L.R. 269.

In Manitoba an administrator is liable to creditors for real estate assets in his hands. (Per Howell, C.J.M.)

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 W.L.R. 634.

(§ II A 2—41)—Partnership real estate.

Where the executors of a deceased member of a partnership are empowered by a Michigan Court of Chancery to sell to themselves partnership lands situated in Ontario and to execute the necessary conveyance thereof, the administrator of the surviving partner, who was appointed by the Surrogate Court of Ontario, need not join in such conveyance.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

(§ II A 2—42)—Sale by order of Court.

An application by administrators, for the approval of a sale of lands belonging to the estate may be made in Saskatchewan by way of an originating summons issued pursuant to the provisions of subsec. 8, sec. 624, of the Saskatchewan Rules of Court (1911), following statutory form number 80, and returnable before a Judge in Chambers.

Re Lockhart, 1 D.L.R. 754, 20 W.L.R. 413.

(§ II A 2—43)—Purchase by executor.

Administrators as trustees for the next of kin of the intestate have no right to purchase property belonging to the estate without the leave of the Court, but a sale of land by the estate to one of the administrators may be approved and leave given to the administrator to purchase where the sale is an advantageous one for the estate.

Re Lockhart, 1 D.L.R. 754, 20 W.L.R. 413.

A decree of a Court of competent jurisdiction directing the sale of lands of a deceased person to his executors will protect the purchasers where all or a part of the purchase money has been received by the testator's beneficiaries. [Maple v. Kussart, 53 Pa. St. 343, referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

(§ II B—43a)—Transferring property as security for decedent's debt.

An executor has no authority under Quebec law to transfer property of an estate to secure the payment of an unsecured debt of his decedent.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

(§ II A 2—44a)—Mortgage of real estate.

After land has been transferred and conveyed by executors to the one to whom it was devised, the former cannot be authorized, under paragraphs 7 and 8 of Saskatchewan Rule 624, to execute a mortgage thereon.

Re Materi Estate, 4 D.L.R. 6, 21 W. L.R. 283.

(§ II B—45)—Liabilities.

Under sub-sec. (b) of sec. 21 of the Devolution Act (Manitoba), declaring that the personal representative shall hold the land as trustee for the person beneficially entitled, the trust relationship of the administrator is the same in both real and personal property. (Per Howell, C. J.M.)

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 W.L.R. 634.

III. Suits affecting estate.

A. On behalf of.

(§ III A—69)—Advice of Court.

It is not within the power of the Court to advise an executor under sub-sec. (1), sec. 39, ch. 129, R.S.O. 1897, as to whether property belongs to the estate he represents or to another person, since that is

not a question pertaining to "the management or administration of the property" about which the Court may, under such sub-section, advise the personal representative of a deceased person. [Re Rally (1911), 25 O.L.R. 112, followed.]

Re Turner, 5 D.L.R. 731, 3 O.W.N. 1438, 22 O.W.R. 543.

Upon an application under Con. Rule 938, as amended 1904, by Rule 1269, the Court will decline to advise or direct an executor as to whether he should follow the opinion of his solicitor and lay claim, as part of the estate, to land held adversely thereto, such an application made summarily not being within the terms of Ont. C.R. 938 and 1269. [Suffolk v. Lawrence (1884), 32 W.R. 899, specially referred to.]

Re Gordon, 4 D.L.R. 3, 3 O.W.N. 1458, 22 O.W.R. 577.

IV. Indebtedness; distribution; accounting and settlement.

A. Debts and obligation.

(§ IV A 1—75)—In general.

Nova Scotia Probate Act, sec. 119—Final account—Setting up Statute of Limitations to claim filed—Amendment.

An executor or administrator, who has filed in the Probate Court a petition for the settlement of his account, and has formally cited the creditors and others interested to appear, etc., at such settlement, is, in respect of the claims of the parties so cited, in the position of a plaintiff and not a defendant; and, consequently is not bound to file an appearance to all or any of such claims. 2. It is not necessary, under the Nova Scotia Probate Act, for an executor or administrator in proceeding finally to settle his account, to file or deliver a written plea setting up the Statute of Limitations to any claim coming up for adjudication. Semble, that if such written plea were necessary under sec. 119 of the Act, the executor would be allowed to amend his proceedings by filing such plea in the hearing of his final account.

Re Estate of Eleazer Gidney, J. Wallace Gidney and Melbourne E. Armstrong, 11 E.L.R. 58.

(§ IV A 2—80)—Presentation and proof of claim.

In an action against executors on a contract of option alleged to have been entered into between plaintiff and the executors' decedent, the plaintiff must be held strictly to the proof of his claim, especially where he bases that claim on verbal statements and acts of the deceased.

Adamson v. Vachon, 8 D.L.R. 240, 22 W.L.R. 494.

A father who maintains his married daughter at his home is presumed to do so out of kindness and in fulfilment of a natural obligation and cannot recover from her estate or that of her husband the cost thereof, unless clear proof is adduced to the effect that in keeping his daughter he intended making money advances only. [Robin v. Robin, 11 Rev. de Jur. 503, followed.]

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

(§ IV A 4—90)—Burial expenses.

Where the effect of a will is to give to the testator's widow her maintenance for life out of the whole estate, and debts are incurred by her for maintenance on default of the executors to furnish her with sufficient means to provide for herself the amount of such debts must be reimbursed to her estate by her husband's estate as being maintenance but the expenses of the widow's funeral are not maintenance and must be paid for out of her own estate.

Re Swayzie, 3 D.L.R. 631, 21 O.W.R. 95, 3 O.W.N. 621.

B. Instructions and control by Court.

(§ IV B—95)—Instruction and control by Court.

Where a person who held certain real and personal property under conveyances from the deceased which were admitted to have been made to him in trust for the grantee and other creditors of deceased was also the executor of the decedent's estate, but his conduct, in dealing with the property, was consistent only with the assertion of an absolute title and he had neglected for a long time to prove the will or to file an inventory of the estate, or to have the estate appraised, those circumstances constitute sufficient grounds for ordering the estate to be administered by the Court.

Power v. Munro, 5 D.L.R. 577.

C. Distribution; accounting; settlement; discharge.

(§ IV C 1—100)—In general.

On an application to the Court for an order for payment out of the money deposited in Court by the administrators of an estate, under rule 1258 (Ont. C.R., 1897), of the shares of certain heirs, where it appears that there is a claim against the estate by one who alleges himself to be an heir, a sufficient amount will be ordered to be retained in Court to cover that claim and an issue directed to determine the fact of whether or not the claimant is a lawful heir.

Re Vine, 8 D.L.R. 505, 4 O.W.N. 408, 23 O.W.R. 486.

Where all the parties beneficially entitled to a decedent's real estate agree that they do not want the estate divided, the administrator should hand it over to them undistributed and undivided. (Dictum per Howell, C.J.M.) [Blake v. Bayne, [1908] A.C. 371; Cooper v. Cooper, L.R. 7 H.L. 53, referred to.]

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 W.L.R. 634.

An administrator, though he has the right to sell real estate for the purpose of distributing the estate among the parties beneficially entitled thereto, cannot convey undivided fractions of it to some of the next of kin and retain a fraction in his hands so as to charge the expense of the administration after such distribution to the balance left in his hands. (Per Perdue, J.A.)

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 W.L.R. 634.

Where a decedent's estate is of such a nature that the administrator can reasonably divide it and thus distribute it in specie amongst the parties beneficially entitled thereto, he may do so instead of converting it into money. (Dictum per Howell, C.J.M.)

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 W.L.R. 634.

Deceased, Thomas L. Carley, was son of Thomas Carley, and predeceased his father, who as sole next of kin procured administration and partially administered the estate before he also died. Thomas Carley left a will, and his executors procured administration de bonis non of the estate of the son. By the will the executor was directed to erect certain tombstones over the graves of deceased and certain members of his family. He also made several bequests of specific legacies. To have carried out the direction as to the tombstones would have exhausted the estate and left an insufficient amount to pay the legacies. The executor had also paid off out of the moneys of the estate an encumbrance upon a piece of land specifically devised. On an application to pass accounts and for directions:—Held, that as the direction to erect the tombstones if carried out would probably exhaust the estate and prevent the executor paying any legacies, and as none of the next of kin insisted on such direction being carried out, the executor might disregard such direction. 2. That the devisee of the land must take the same subject to the mortgage, and this having been paid out of the moneys of the estate, the devisee must before securing a conveyance of the land refund the amount so paid to the estate, and in default of such refund being made the executor should proceed against the land for the amount.

In re Thomas L. Carley, deceased, 4 S.L.R. 280.

(§ IV C—102)—Time for settlement; trustee's discretion.

A testamentary executor who under the will has had the administration of property for a lengthy and indefinite period is bound to render accounts of his administration to the interested legatees at reasonable intervals upon their demand and at their expense; this principle does not conflict with the provisions of art. 918 C.C. [Quinn v. Fraser, 10 Q.L.R. 320, approved and followed.]

Fiset v. Larue, 5 D.L.R. 509, 41 Que. S.C. 469.

When one of the universal co-legatees named in a will, is also thereby appointed executor and trustee, with power to carry on the testator's business as long as he sees fit, but not beyond ten years, after which he must cause an inventory of the estate to be made, wind it up and share the proceeds equally with his co-legatees, the latter, at the expiration of the above period, have an action to compel him to perform the several obligations just mentioned, and further to account for his management as trustee; also, they have the right, in the event of his failure to wind up within the delay fixed by the Court, to the appointment of a liquidator for the purpose; the whole, si mieux n'aime the defendant to pay over to them the value of their portion of the estate. The defendant cannot demur to such a demand on the ground that, being one of the legatees, and in possession of the estate, the only action the plaintiffs have, is one for a judicial partition, as provided in art. 693, C.C., and no other.

Tanguay et al. v. Tanguay, 42 Que. S.C. 193 (Sup. Ct.).

It is a necessary consequence of the conclusion that a gift has vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and cannot be postponed till a later day unless the testator has made some other destination of the income during the intermediate period; a trustees' discretion to defer payment will be ignored in the absence of such a provision. [Wharton v. Masterman, [1895] A.C. 186, applied.

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

(§ IV C—103)—Acceptance of legacy.

Where a niece went to live with her aunt, a widow and childless, but no arrangement was made as to the niece remaining any definite time and nothing being said by either party as to remuneration except a voluntary statement of the aunt that she would do well by the niece, and the niece ran errands, purchased provisions, and did a small portion of the housework and the aunt allowed her the sum of $10 a month, and by will bequeathed her $2,000 with a contingent interest in a further sum of $1,000, the niece cannot enforce any further claim for her services against her aunt's estate, for the period during which such allowance was accepted. [Walker v. Boughner, 18 O.R. 448; Mooney v. Grout, 6 O.R. 521; Johnston v. Brown, 13 O.W.R. 1212, 14 O.W.R. 272, specially referred to.]

Smith v. Hopper, 3 D.L.R. 339, 3 O.W.N. 1039, 21 O.W.R. 891.

(§ IV C 2—111)—COMMISSIONS GENERALLY.

There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees; they are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case. [Re Griffin, 3 O.W.N. 759, reversed on appeal; Robinson v. Pett, 2 White and Tudor, L.C. Eq. 214, followed.]

Re Griffin, 3 D.L.R. 165, 3 O.W.N. 1049.

Though shares in companies may be readily convertible, yet the risk of liability upon an executor in case of a loss to the estate owing to their fluctuation in value should be considered in fixing his compensation where a large part of the estate consists of corporate shares. [See annotation to this case.]

Re Griffin, 3 D.L.R. 165, 3 O.W.N. 1049.

Where an estate consists of assets in different Provinces, and there are a large number of pecuniary legacies, many of the legatees being infants, and a trust fund is created by the will, a sum equivalent to about 3 per cent. of the value of the estate is not too large a compensation to be allowed to the executors. [See annotation to this case.]

Re Griffin, 3 D.L.R. 165, 3 O.W.N. 1049.

(§ IV C 4—122)—IMPROVIDENT PAYMENTS.

The payment by an executor, in order to facilitate the settlement of an estate, of the succession duty on a legacy, on the theory that it created an annuity, is not improvident, notwithstanding it subsequently appeared to have been erroneously paid under a mistake of law.

Bethune v. The King, 4 D.L.R. 229, 21 O.W.R. 559, 26 O.L.R. 117, 3 O.W.N. 941.

V. Creditor's rights against land; sale of land for debts.

(No cases.)

VI. Foreign executors and administrators.

(No cases.)

VII. Executors de son tort.

(No cases.)

EXEMPLARY DAMAGES.

See Damages, II.

EXEMPTIONS.

I. IN GENERAL.
II. PROPERTY AND RIGHTS EXEMPT.
A. In general.
B. Tools, implements, etc.
III. WHO MAY CLAIM.

I. In general.

(No cases.)

II. Property and rights exempt.

A. In general.

(§ II A—5)—IN GENERAL.

The agreement for maintenance, as well as that ordered by judicial decree, ceases to be exigible on a change taking place in the condition of the creditor by which he is enabled to support himself. The debtor is not obliged to procure a judicial discharge of the agreement or decree.

Laflamme v. Saint Jacques, Q.R. 41 S.C. 172 (Ct. Rev.).

(§ II A—12)—PENSIONS AND PROCEEDS.

Exemption from seizure provided for in art. 599, sec. 13, C.P.C. (62 Vict. ch. 53) as to pensions created by financial institutions for their employees, extends itself to pension funds and provisions for old age created by a railroad company to assure the performance and efficiency of the service of public use. In consequence the benefits of the insurance of a railroad employee in the association established by such company and providing such funds are exempt from seizure.

Jetter v. Grand Trunk R. Co., 18 Rev. de Jur. 204.

B. Tools, implements, etc.

(§ II B—22a)—OF FARMER ON ASSIGNMENT FOR CREDITORS.

A farmer who operates a mill through an employee and who, when the season's work on his farm is over, buys and sells stock as opportunities occur, does not thereby cease to be a farmer; if he makes an assignment for benefit of his creditors he is entitled to retain two working horses and, if he sells them, the proceeds of such sale or the promissory notes representing the same. If in such case the curator, having allowed the insolvent, as a farmer, to keep the two horses refuses to deliver to him the note given on the sale of one of them and, with the authority of the inspectors, contests the proceedings by the insolvent for possession of said note although he had previously promised to deliver it over, he will be personally ordered to pay the costs of the proceedings.

Hébert v. Rondeau, 14 Que. P.R. 1 (Sup. Ct.).

III. Who may claim.

(No cases.)

EXPERT EVIDENCE.

In general, see Evidence.
Weight of, see Evidence.

EXPLOSIONS AND EXPLOSIVES.

I. REGULATION OF EXPLOSIVES.
II. INJURIES FROM ACCIDENTAL EXPLOSIONS.
A. In general.
B. Illegal or negligent storage or keeping.

c. Illegal or negligent consignment.
d. Illegal or negligent use.

I. Regulation of explosives.

(No cases.)

II. Injuries from accidental explosions.

B. Illegal or negligent storage or keeping.

(§ II B—5)—In general.

There can be no recovery on the ground of negligence for injuries sustained by an explosion of dynamite into which a pick was stuck by a mine employee, where the proof fails to shew any negligence on the part of the master in permitting the explosive to be in the place where the injury occurred, or as to how it came there, or that its presence could have been discovered by the most careful inspection, or, if the explosion was caused by an unexploded charge, by counting the explosions at the time a blast was made.

Root v. Vancouver Power Co., 2 D.L.R. 303, 20 W.L.R. 847, 17 B.C.R. 203.

D. Illegal or negligent use.

(§ II D—20)—Illegal or negligent use.

Where in a process of thawing dynamite one employs an illiterate labourer and fails to acquaint him with the directions in which the process of thawing is to be followed, and that the mode of thawing was carried on contrary to the directions issued with each box, as a result of which an explosion occurs killing such servant, the master is liable in an action for his death by the administrator of the deceased.

Toronto Construction Co. v. Strati, 46 Can. S.C.R. 631, affirming Strati v. Toronto Construction Co., 19 O.W.R. 88.

Illegal or negligent use—Injury to servant—Negligence—Uncovered receptacle—Cause of injury—Negligence of servant—Findings of fact of trial Judge.

Davidson v. Peters Coal Co., 2 D.L.R. 908, 3 O.W.N. 1160.

Illegal or negligent use—Injury to servant—Use of explosives—Unguarded receptacle—Findings of fact of trial Judge—Appeal.

Davidson v. Peters Coal Co. (No. 2), 5 D.L.R. 882, 4 O.W.N. 36, 23 O.W.R. 25.

EXPROPRIATION.

See Eminent Domain.

EXTENSION OF TIME.

For transfer, see Appeal, III (f).
For leave to appeal, see Appeal, XI.

EXTORTION.

See Blackmail; Illegal Fees.

EXTRADITION.

I. International.
II. Within British Empire.

I. International.

(§ I—3)—Persons subject to extradition.

Extradition will be ordered under the extradition treaties and conventions with the United States of America, only upon its being established that the extradition offence is a crime against the law of the demanding country, and if it had been committed in Canada would be a criminal offence there. [Re Latimer, 10 Can. Cr. Cas. 244, followed.]

Re William Staggs (No. 2), 8 D.L.R. 284.

Extradition will be ordered for an offence under the Federal Bankruptcy Act of the United States, sec. 29 (b), which enacts that "a person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently, while a bankrupt, or after his discharge, concealed from his trustee any of the property belonging to his estate in bankruptcy," such enactment being similar in its terms to sec. 417 of the Canadian Criminal Code, sub-sec. 2, which is in effect a bankruptcy law. [R. v. Stone (No. 2), 17 Can. Cr. Cas. 377, followed.]

Re Webber, 6 D.L.R. 805.

(§ I—4)—Proceedings.

Where the original arrest or imprisonment upon an extradition charge has been illegal as made without warrant upon a request by telegram, it is not necessary that the prisoner should be first discharged from the illegal custody in order to hold him under good process subsequently issued in a criminal matter. [R. v. Richards, 5 Q.B. 926, referred to; Hooper v. Lane, 6 H.L.C. 443, distinguished.]

Re Webber, 6 D.L.R. 805.

While a telegram from the authorities in the foreign country asking for the arrest of a fugitive criminal is not alone sufficient to justify an arrest, it is not an objection to an extradition warrant of arrest issued upon a sworn information that the information was not based upon personal knowledge, but merely upon such telegraphic communication.

Re Webber, 6 D.L.R. 805.

In determining whether the evidence upon a demand for extradition is sufficient for a commitment in extradition, the Judge or commissioner may order extradition if the evidence makes out a probable case of guilt by shewing circumstances which raise a presumption against the prisoner; but if, from the slender nature of the evidence, the unworthiness of the witnesses, or the conclusive proof of innocence produced in answer, the Judge

or commissioner is satisfied that the charge is not sustained and that if the trial were within this jurisdiction, the accused must be acquitted, an order for extradition should be refused. [Girvin v. The King (1911), 45 Can. S.C.R. 167, applied; 14 Halsbury's Laws of England, 412, approved.]

Republic of France v. Peugnet, 1 D.L.R. 204, 19 W.L.R. 938, 19 Can. Crim. Cas. 179.

The offence of fraudulent concealment of property by a bankrupt committed in the United States of America and for which extradition may be had from Canada is a continuing offence which may be begun before the date of the bankruptcy adjudication and continued to completion thereafter.

United States v. Webber (No. 1), 5 D. L.R. 863, 20 Can. Cr. Cas. 1.

A warrant issued by an extradition commissioner is not open to the objection, on an application for a writ of habeas corpus, that he acted merely upon the complaint, without taking any evidence, where, in his reason for his judgment, he sets out the various steps taken by him, since, under the statute, all that is necessary is that as a result of such proceedings, he shall be of the opinion that the warrant should issue.

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

It is no objection to a warrant of extradition that it contains more than one charge.

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

Where two countries have enacted criminal legislation to prevent a certain crime, in respect of which extradition proceedings are instituted in manifest good faith by one of such countries, too much regard should not be paid by the other country in such proceedings to the ordinary technicalities of criminal procedure; and extradition may be ordered notwithstanding a discrepancy between the date of the alleged offence in the information and the date proved by the evidence.

United States v. Webber (No. 1), 5 D. L.R. 863, 20 Can. Cr. Cas. 1.

(§ I—8)—Review of proceedings.

In an extradition proceeding under the Extradition Act, the omission of the extradition Judge to read the accused the statement set forth in sub-sec. 2 of sec. 684 Cr. Code 1906, is not fatal to the proceedings. [Can. Crim. Code, R.S.C. 1906, ch. 146, sec. 684, referred to; see also United States v. Webber (No. 1), 5 D.L. R. 863; Re Webber, 6 D.L.R. 805, concerning criminal procedure requirements.]

Re William Staggs (No. 1), 7 D.L.R. 738.

On an application for a writ of habeas corpus for discharge from custody of a person remanded by an extradition commissioner for extradition to a foreign country the decision of the commissioner as to the sufficiency of the evidence, where there is any evidence at all, as to the identity of the party remanded by him, cannot be reviewed.

Re Darracq, 5 D.L.R. 771, 19 Can. Cr. Cas. 483.

A foreign deposition for use in an extradition proceeding must purport to be certified as the original or a true copy thereof by a Judge, magistrate or officer of the foreign state; and it is not admissible in the extradition proceeding when it appears that the certificate is not given by any such foreign officer competent to certify that the original deposition contains a true record of the evidence given by the deponent. [Extradition Act, R.S. C. 1906, ch. 155, sec. 17, referred to.]

Re William Staggs (No. 1), 7 D.L.R. 738.

II. British Empire.

(No cases.)

EXTRA WORK.

Recovery for, in building contracts, see Contracts.

EXTRINSIC EVIDENCE.

See Evidence, VI.

FACTS.

Review of, on appeal, see Appeal.

FALSE IMPRISONMENT.

I. In general.
II. Who liable.
A. In general.
B. Officer.
III. Defences; justification.
IV. In civil cases.

Measure of damages for, see Damages, III.

As a part of malicious prosecution, see Malicious Prosecution.

Burden of proof to shew authority of law, see Evidence.

I. In general.

(No cases.)

II. Who liable.

A. In general.

(§ II A—8)—Principal or master.

Where the plaintiff, in an action for false arrest on capias from which he was discharged upon the quashing of the writ, alleged that the defendant acted with malice as the result of fraud and conspiracy, there is such a failure of proof as to the material allegations of the declaration which prevent a recovery by the plaintiff, where the evidence shewed that the defendant, a stenographer in the employ of a member of the Bar, took the action in which the

capias issued in her own name in the usual course of her employment, and, no doubt, without the slightest malice, signed the affidavit for the writ on the strength of fact explained by her employer, and possibly acted on the strength of what she had heard in the former's office regarding the circumstances of the plaintiff's claim, as, under such circumstances, the plaintiff should have amended his declaration by substituting for the allegation of malice, fraud and conspiracy one of mere imprudence on the part of the defendant, as well as want of probable cause for suing out the writ.

Serling v. Olsen, 3 D.L.R. 845.

B. Officer.

(§ II B—10) — OFFICER; FALSE IMPRISONMENT.

To constitute an arrest, it must appear that plaintiff was reasonably led to believe by either the language or conduct of the defendants or both, that plaintiff was deprived of her liberty of movement. The plaintiff was arrested on the charge of being an inmate of a bawdy-house, and it appeared that she had the care and management of a hotel, some rooms of which were used as a bawdy-house. In an action for wrongful arrest:—Held, that the occupants of rooms other than those used for a bawdy-house were not inmates of a bawdy-house within the meaning of sec. 228 of the Criminal Code. Held, also, that it must be shewn that plaintiff knew or ought to have known that some portion of the hotel was used as a bawdy-house, in order to constitute her a keeper of a bawdy-house; that this was a material element in estimating damages; and that the failure of the jury to find upon this question, was ground for a new trial. Held, also, that to entitle the plaintiff to exemplary damages in such an action it must be proved that defendants acted maliciously or with unnecessary harshness, or with wilful or grossly negligent disregard of plaintiff's rights in arresting her, and failure to so direct the jury is ground for a new trial. Held, also, that in order to justify an arrest under 11 Vict. ch. 12, sec. 7, it is not sufficient that defendant had an honest belief in the existence of a state of facts, which, if true, would have justified the arrest, but such belief must be based upon reasonable grounds. After the plaintiff was taken to the police station the defendant Clark, chief of police, made an entry of the arrest and entered her name on the charge sheet sent before the police magistrate, and also notified the plaintiff to appear at Court. Held, setting aside the verdict of the jury, that these acts did not constitute an arrest, and a verdict was entered for the defendant Clark. Defendant S., a police officer, in company with three other officers, was sent to assist in the raid upon the hotel in question. S. was directed to watch one exit of the hotel and remained there while the others entered and arrested the plaintiff and others, but S. took no further part. Held, even if the arrest was unlawful S. was not liable in an action for false arrest, inasmuch as it did not appear that the common purpose with which he and the other officers started out was unlawful, and he had no opportunity to assent to or dissent from the unlawful acts of the others.

Hopper v. Clark et al., 40 N.B.R. 568.

(§ II B—10)—OFFICER.

Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, is justified in arresting such person without warrant.

Lalonde v. City of Lachine, 18 Rev. de Jur. 360.

(§ II B—11)—OFFICER MAKING ARREST.

In an action against a constable for false arrest and imprisonment the statute respecting the protection of constables, C.S.N.B. 1903, ch. 64, sec. 2, requiring demand for perusal and copy of the warrant on which the plaintiff was arrested does not apply where it is admitted that the constable was not acting "in obedience to a warrant of a justice."

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

(§ II B—12)—MAGISTRATE.

An action for false imprisonment lies against a Justice of the Peace, when the liberty of a person has been restrained against his will without the authority of law. [See 19 Cyc. 319, upon the subject of false imprisonment generally.]

Washburn v. Robertson, 8 D.L.R. 183.

III. Defences; justification.

(§ III—15)—DEFENCES; JUSTIFICATION.

In an action against a justice of the peace for false imprisonment, where the defendant admits that the warrant under which plaintiff was arrested was his act, the onus is on him to plead and prove affirmatively the existence of reasonable cause as his justification. [Baker v. Tedford, 2 S.L.R. 309, referred to.]

Washburn v. Robertson, 8 D.L.R. 183.

Where an action for false imprisonment is brought against a justice of the peace on an alleged unlawful warrant, he must shew that he was authorized by law to issue the warrant when he did in fact issue it.

Washburn v. Robertson, 8 D.L.R. 183.

In an action for false imprisonment against a justice of the peace under a warrant issued in pursuance of the Master and Servants Act, R.S.S. ch. 149, the defendant must shew that a complaint was made to him upon oath by an employee of the plaintiff, that he issued a summons commanding the plaintiff to appear at a time stated in the summons, which must be a reasonable

time, that the plaintiff did not appear and that service of the summons upon him was proved either by the oral testimony of the person effecting such service or by his affidavit purporting to be made before a justice of the peace.

Washburn v. Robertson, 8 D.L.R. 183.

In an action against a justice of the peace for false imprisonment, where it must be shewn by the defendant that he had jurisdiction to issue the summons for non-attendance on which he had issued the warrant of arrest, such jurisdiction will not be presumed. [Rex v. Crooks, 4 S.L.R. 333, referred to.]

Washburn v. Robertson, 8 D.L.R. 183.

In an action against a justice of the peace for false imprisonment, in order for the defendant to take advantage of 11 and 12 Vict. ch. 44 (Imp.), being "An Act for the Protection of Justices of the Peace from Vexatious Actions," the defence must be pleaded. [Baker v. Tedford, 2 S.L.R. 309, referred to.]

Washburn v. Robertson, 8 D.L.R. 183.

In an action for false imprisonment, as soon as imprisonment is proved, the burden is upon defendant to prove that the imprisonment was not his act or was justified, [6 Encyc. Laws of England 20, referred to.]

Washburn v. Robertson, 8 D.L.R. 183.

An action for damages for false arrest will not lie in favour of a party who has pleaded guilty to a charge in respect of which he was arrested.

Mignault v. Grand Trunk R.W. Co., 10 East. L.R. 375.

In an action for damages for false arrest and imprisonment against certain police authorities, the defendants justified on the ground that the plaintiff was the keeper of a bawdy-house within the meaning of the Criminal Code (secs. 30 and 35), and the New Brunswick Statute, 11 Vict. ch. 12, sec. 7. The plaintiff, who was managing the hotel where the arrest was made, was charged in the arrest book of the police with being an inmate of a bawdy-house. The plaintiff was arrested without warrant. The facts shewed that the plaintiff was not personally guilty of immoral conduct on the occasion of the arrest, but the jury being asked: "Might the plaintiff reasonably from her observation and opportunities of observation of the people resorting to the hotel have come to the conclusion that a number of such persons were of ill repute." answered: "We don't know." Held, that while the defendants could not justify without warrant upon the facts, under secs. 30 and 35 of the Criminal Code, nor under the provincial enactment cited, yet because the jury had failed to answer the question stated, there should be a new trial.

Hopper v. Clark et al., 10 East. L.R. 305.

IV. In civil case.

(No cases.)

FALSE PRETENCES.

Sufficiency of proof, see Evidence.

Fraudulent representations in civil cases, see Fraud and Deceit.

(§ I—5)—Obtaining credit.

The president of a company is criminally liable for obtaining credit by false pretences, where goods were secured on credit by the company upon false representations contained in a report made by him for the benefit of the company, where he was the largest shareholder in the company and was benefited by the credit obtained and became thereby indebted himself as a shareholder.

Rex v. Amos Campbell, 5 D.L.R. 370.

Notwithstanding the distinction between "obtaining" and "procuring to be delivered to another person" made in sec. 405 of the Criminal Code and in English statute law, an accused person may, having regard to sec. 69 of the Code, be found guilty of obtaining credit by false pretences in incurring a debt (Code, sec. 405a), though the credit was obtained for a joint stock company in which the accused person was a shareholder and of which he was acting as manager in getting the credit. [The King v. Lalonde, Montreal, 30th December, 1908, referred to.]

The King v. Campbell, 18 Rev. de Jur. 317.

(§ I—6)—Elements of false pretences.

To make out a charge of obtaining money by false pretences it is not sufficient to prove that the false representation was made, and that the person making it got money from the person to whom he made it, but it also must be shewn that it was upon the strength of the representation thus made that the person wronged was induced to part with his money.

Re William Staggs (No. 2), 8 D.L.R. 284.

FALSE REPRESENTATIONS.

In insurance policy, see Insurance, III.

In general, see Fraud and Deceit.

FARES.

Of passengers, see Carriers.

FARM CROSSINGS.

Duty of railway company as to, see Railways.

FATAL ACCIDENT ACT.

See Death; Negligence.

FEE SIMPLE.

See Deeds, II.; Wills, III.

FEES.

In general, see Costs.
Of officers, see Officers, II.
Succession to duty, see Taxes, I.

FELLOW-SERVANTS.

Assumption of risk of negligence of, see Master and Servant, II.
Generally, see Master and Servant, II.

FENCES.

I. In general.
II. Division or line fence.
III. Malicious erection of.

As to line fence, see also Boundaries.
(No cases.)

FERRIES.

(§ I—4)—Exclusive right.
Exclusive privilege—Subsequent ferry.
Gibson v. Garvie, 7 D.L.R. 933.

FIDELITY INSURANCE.

See Bond, II.

FIDUCIARY RELATIONS.

Of agent, see Principal and Agent.
Of broker, see Brokers.

FIERI FACIAS.

See Execution.

FIGHTING.

See Assault and Battery.

FILING.

Of chattel mortgage, see Chattel Mortgages, II.
Of mechanics' lien, see Mechanics' Liens.
Of rates, see Carriers.

FINDER.

(§ I—1)—Rights of finder; absence of claim as lost property.

A wallet intentionally placed by one of a bank's customers on a desk furnished for their use, and forgotten by him, is not lost within the meaning of the rule of law giving title to lost property to the finder, and was under the protection of the bank, and a clerk of the bank who picked it up and at once turned it over to a superior officer of the bank without stating that he would claim it if the owner were not found, is not, as against the bank, entitled to the money in the wallet upon its remaining unclaimed for nearly four years. [Heddle v. Bank of Hamilton, 19 W.L.R. 897, affirmed on appeal.]

Heddle v. Bank of Hamilton, 5 D.L.R. 11, 21 W.L.R. 514.

FINDINGS.

Review of discretion in refusing to modify, see Appeal.
Discretion of trial Court as to giving or refusing special findings, see Appeal.
Review of, on appeal, see Appeal, VII.
By the Court, see Trial, IV.
By jury, see Trial, V.

FINE.

For contempt, see Contempt.
As to penalties generally, see Penalties.
As to summary conviction matters, see Summary Conviction.

FIRE DEPARTMENT.

(§ I—5) — Establishment of, by municipalities.

The power given to cities and towns (Que. statute of 1903) to establish and maintain a fire department, is a faculative power and does not compel them to protect the property of its ratepayers in case of fire or make it responsible for fire losses.

Quesnel v. Emard and City of Montreal; Cote v. Emard and City of Montreal, 8 D.L.R. 537.

Bodies politic, such as municipal corporations, are governed as to their powers, rights and obligations, by public law, which, in Canada, is the law of England. Therefore, a city corporation, not bound by its charter or by the Act under which it is constituted to supply means of protection in case of fire is not liable in damages for a death by asphyxiation at such a disaster.

Brousseau v. City of Quebec, 42 Que. S.C. 91 (Ct. Rev.).

FIRES.

As to fire escapes on buildings, see Buildings, II.
Liability of railway for, see Railways, II.

(§ I—1)—Negligent use of.

Where servants employed to build a cabin on uncleared lands set out fire for the purpose of clearing a part of the land for the erection of the cabin, and the fire spread and caused damage, the employer will be liable for the resultant damage due to the failure of the servants to take reasonable means to prevent it spreading, even though he had forbidden the servants setting out any fires.

Derby v. Ellison, 2 D.L.R. 279, 20 W.L.R. 794.

§ I—4)—Back fire.

An action for damages to the plaintiff's property from a prairie fire must be dismissed where it appears that on the day the damage occurred, there were two fires burning, one of which was kindled by the defendant for the purpose of backfiring to

save his property from the other fire which was coming in the direction of his farm and he kept his fire under control so far as his property was concerned and that the two fires merged on the farm of the defendant or very near it, and one or both of them ultimately terminated in the plaintiff's land, destroying his crop.

Sklariuk v. Whitehouse, 4 D.L.R. 327, 21 W.L.R. 654.

(§ I—6)—From threshing engine.

It was found that plaintiff's property was destroyed by a fire resulting from the operation of a threshing machine controlled and operated by the Department of Indian Affairs under the direction of defendant. The defendant was not present at the time the accident occurred, but he was shewn to have had knowledge of the fact that the operation of the machine was dangerous in that the engine was too small to run the separator without forcing, thereby adding to the danger of fire; and it was also shewn that certain statutory conditions imposed on the operation of threshing engines for the prevention of fires had not, to his knowledge, been observed. In an action for damages:—Held, an official of the Government having the management of some branch of the Government business is not responsible for any negligence or default on the part of other officials, not his servants or agents, in the same employment, but where he is himself guilty of a breach of duty imposed upon him by law he is personally responsible to any person who sustains injury thereby. 2. The defendant, being the person having charge of the management and operation of the machinery in question, was charged with the responsibility of seeing that the statutory conditions respecting its operation were complied with, and not having done so, and such failure having been the cause of the damage, he was liable therefor.

Carter v. Nichol, 4 S.L.R. 382.

Sparks from a threshing engine—Setting fire to property on adjoining land—Negligence.

Mikulasik v. Scouten, 7 D.L.R. 807, 21 W.L.R. 241.

(§ I—7)—Burning stubble.

Where for the purpose of getting rid of stubble a person built a fire on his land in a heavy wind, and without having first taken the precaution prescribed by law to prevent its spread, and after burning off the stubble, left the land with no one to look after any smouldering matter, he is guilty of gross carelessness subjecting him to liability for the loss entailed upon the adjoining land by the spread of the fire thereto. [See also Underhill on Torts, 3rd Can. ed., 200, 202b.]

Ryan v. Gabriel, 2 D.L.R. 18, 20 W.L.R. 649.

(§ I—9)—Prairie fires.

A person who kindles a fire on his own land and does not properly watch it to see that it does not escape, "lets or permits" it to do so, and if it does escape, he is guilty of an offence under the Prairie Fires Ordinance, C.O. 1898, ch. 87.

Macartney v. Miller, 7 Terr. L.R. 367.

The provisions of the Prairie Fires Ordinance respecting the kindling of fire and the letting of fire run at large, apply to the Canadian Pacific Railway Company in the operation of locomotive steam engines upon its railways. The provisions of sec. 239, secs. 1 and 2 of the Dominion Railway Act, are not in conflict with nor do they supersede the provisions of the Prairie Fires Ordinance. Section 25 (E) of the Dominion Railway Act does not in the absence of rules and regulations thereunder supersede the Prairie Fires Ordinance. On certiorari the Court cannot examine the evidence either in support of or in disproof of any findings of fact of the justices, nor for the purpose of finding any additional facts.

Rex v. Canadian Pacific Railway Company, 7 Terr. L.R. 443.

Defendant, being the owner of a lumber yard situate on the prairie and desiring to protect it from prairie fire, ploughed several strips of guard around the yard, intending to burn the grass between and thus make a fire-guard. None of these strips were twenty feet in width, and there were no other guards to prevent fire escaping. The defendant set fire to the grass between the strips of ploughing, on a dry, windy day, when the surrounding grass was very dry, and during the absence of one of the men guarding it the fire escaped, destroying plaintiff's goods:—Held, apart from the statutory provisions, the defendant was guilty of negligence in setting the fire on a dry, windy day, when the surrounding grass was very dry and inflammable. 2. The defendant was also liable in that he did not comply with the provisions of the Prairie Fire Ordinance in not providing a guard twenty feet wide and in not having the fire guarded throughout its continuance by three adult persons, and thereby must be deemed to have permitted the fire to escape.

Imperial Oil Company v. Bashford, 4 S.L.R. 360.

FIREWORKS.

(§ I—5)—Liability of municipal corporations.

A municipal corporation is not liable for the consequences resulting from the explosion of fireworks set off on one of its squares on the occasion of a political demonstration with no participation therein on its part except the presence of policemen sent to the square to maintain order and even though the fireworks had been set off contrary to the provisions of a by-law of the

corporation requiring the same to be authorized.

Hughes v. City of Montreal, Q.R. 21 K.B. 32.

FISHERIES.

I. PUBLIC FISHERIES GENERALLY.
A. In general.
B. Regulations and protection.
II. PRIVATE RIGHTS.
III. SHELL FISH, OYSTERS, AND CLAMS.

I. Public fisheries generally.

A. In general.

(§ I A—1)—IN GENERAL.

The possessor of fishery rights who brings a possessory action against a person interfering therewith is not obliged to prove that the right had, by valid legislation, been withdrawn from the public to become part of the private domain. The provision of sec. 35 R.S.C. 1860, ch. 62, that those in possession of fisheries on the 15th of August, 1858, should be deemed owners thereof, has remained in force by virtue of sec. 3 of 29 Vict. ch. 11 (Que.), which repealed the remainder of said ch. 62.

Robertson v. Grant, Q.R. 21 K.B. 279.

B. Regulations and protection.

(§ I B—9)—TACKLE AND APPLIANCES.

Dories used with a fishing vessel are a part of the fishing tackle or appliances of the vessel and proof that the fish were being transferred from her dories to a vessel not permitted to fish in Canadian waters at the point within Canadian jurisdiction, at which the vessel was overhauled, is evidence of illegal fishing within the Customs and Fisheries Protection Act (Canada). [For other cases see I Canadian Ten Year Digest, 1449-1453.]

The King v. Chlopek, 1 D.L.R. 96, 19 W.L.R. 837, 17 B.C.R. 50, 19 Can. Cr. Cas. 277, 48 C.L.J. 158.

II. Private rights.

(§ II—12)—FISHING STATIONS OR STANDS (STATUTORY RIGHTS.)

1. The Act, reproduced in ch. 62, Consolidated Statutes of Canada, was creative of title in favour of persons in possession of fisheries prior to the 16th August, 1858. [Lavoie v. Lepage, 12 Q.L.R. 104, cited.] 2. Where it is proved that, in consequence of the compensation of the coast line of a bay in which the plaintiff's post and fishery is situated and of the action of the rising and falling tidal waters therein, the setting up by the defendants of a new fishery in the same bay at a distance of three hundred feet from the plaintiff's fishery has the result that the fish are intercepted and caught in the new fishery whereby the catch in the plaintiff's fishery is greatly diminished, the defendants will be adjudged to take down the new fishery and not to set it up nearer than two hundred and fifty yards from the old fishery.

Robertson v. Grant, 18 Rev. du Jur. 135.

III. Shell fish, oysters and clams.

(No cases.)

FIXTURES.

I. GENERAL RULES.
II. WHAT ARE, GENERALLY.
III. BETWEEN VENDOR AND PURCHASER.
IV. BETWEEN LANDLORD AND TENANT.
V. EFFECT OF MORTGAGE.
VI. REMEDY.

I. General rules.

(§ I—1)—GENERAL RULES.

The conversion of a movable, by incorporation, into an immovable, can only take place when both the movable and the immovable into which it is incorporated are the property of the same owner, and this rule applies, not only between the owner of the movable and that of the immovable, but also between the latter and third parties, e.g., hypothecary creditors.

Genois v. Larouche & Goodday et al. & Cie., Savoie-Guay, 41 Que. S.C. 110 (Sup. Ct.).

II. What are, generally.

(§ II—7)—BUILDINGS.

Held, by the full Court, on appeal from Richards, J., that buildings erected by a squatter on Crown lands become the property of the Crown and part of the realty and cannot, therefore, be seized and sold under an execution against the goods of the squatter.

Dixon v. Mackay, 21 Man. R. 762.

(§ II—8)—MACHINERY.

Coal towers forming part of a coal plant and dependent on the power house for power, are immovable objects by destination, although they may be moved over a short distance on tracks built for the purpose, seeing they were placed on the property for a permanency and incorporated therewith: C.C. 379.

Nova Scotia Coal and Steel Co. v. City of Montreal, 3 D.L.R. 750.

III. Between vendor and purchaser.

(No cases.)

IV. Between landlord and tenant.

(§ IV—23)—BUILDINGS.

Landlord and tenant.

Thistlethwaite v. Sharp, 7 D.L.R. 801, 20 W.L.R. 474.

V. Effect of mortgage.

(No cases.)

VI. Remedy.

(No cases.)

FORCIBLE ENTRY AND DETAINER.

(§ I—1)—WHAT CONSTITUTES.

An owner is not justified in entering upon premises to which he has undisputed title, but which are, at the time of entry, in possession of a lessee under a claim of right, and where such owner removes the lessee's property and locks out the lessee's wife, all without giving the requisite legal notice of 30 days, he is liable in damages to the lessee. [Lewis v. McInnes, 17 W.L.R. 309, distinguished.]

Nilan v. McAndless, 8 D.L.R. 169, 22 W.L.R. 685.

(§ I—2)—WHO MAY MAINTAIN ACTION FOR.

A person who is in rightful possession of land has a right to recover substantial damages from one who forcibly enters and ejects him from the land, but he cannot get judgment to restore the possession to him without setting up his title to possession in the statement of claim and proving it at the trial.

Gardiner v. Ware, 7 D.L.R. 480.

FORECLOSURE.

See Mortgage.

FOREIGN COMMMISSION.

See Depositions.

FOREIGN COMPANIES.

See Corporations and Companies.

FOREIGN JUDGMENT.

See Judgment.

FORFEITURE.

As to stipulations for rescission of land purchase contracts generally, see Contracts, V.

FORMER JEOPARDY.

See Criminal Law, II. G.

FORMER SUIT PENDING.

As ground of abatement, see Abatement and Revivor.

FRAUD AND DECEIT.

I. IN GENERAL.
II. CONCEALMENT; FAILURE TO DISCLOSE FACTS.
III. MATTERS OF OPINION OR OF THE FUTURE.
IV. INTENT, KNOWLEDGE, BELIEF, AND RELIANCE OF PARTIES.
V. TO OBTAIN CREDIT.
VI. IN RESPECT TO NEGOTIABLE PAPER.
VII. MISINFORMATION BY THIRD PERSON.
VIII. REMEDIES.

Statute of Frauds, see Contracts.

Of corporate promoters, see Company, IV.

In issue of stock, see Company, V.

Sufficiency of evidence of, see Evidence, XII.

As to false pretences, see False Pretences.

In application for insurance, see Insurance, III.

Of agent, see Principal and Agent, II.

In sale of land, see Vendor and Purchaser.

As to commitment in supplementary proceedings for fraud in incurring debt, see Execution.

Conspiracy to set fire to building with intent to defraud, see Conspiracy, II.

I. In general.

(No cases.)

II. Concealment; failure to disclose facts.

(§ II—5)—CONCEALMENT; FAILURE TO DISCLOSE FACTS.

Where an agent of a vendor through whom a purchase of land was negotiated by the plaintiffs, a firm of real estate brokers, ostensibly for a customer, must have had knowledge of the fact that the purchaser was a member of such firm, the plaintiffs' failure to disclose such fact to the vendor did not make them the agent of the latter so as to invalidate the sale on the ground of non-disclosure of material facts. [Dunne v. English, L.R. 18 Eq. 524, at pp. 533-4, and Pommerenke v. Bate, 3 Sask. R. 417, at p. 425, 15 W.L.R. 542, at p. 545 (affirmed sub nom. Coy v. Pommerenke, 44 Can. S.C.R. 543), specially referred to.]

Edgar v. Caskey, 4 D.L.R. 460, 21 W.L.R. 444.

It is a fraud, sufficient to vitiate the sale, for a real estate agent to lead the owner of land to confide in him as his agent to get the best possible price for the property and to allow him to close a bargain on his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavour to get the property at as low a price as possible, without disclosing that fact to the owner. 2. The purchaser cannot under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent. 3. Such conduct on the part of an agent is fraud within the meaning of that word as used in sections 71 and 76 of the Real Property Act, R.S.M. 1902, ch. 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to

him upon payment of moneys received. [Pearson v. Dublin Corporation, [1907] A.C. 351, followed.]

Wolfson v. Oldfield (No. 1), 22 Man. R. 159, affirmed in 2 D.L.R. 110, 22 Man. R. 170, 20 W.L.R. 484.

Where it was not alleged that one who negotiated for the sale of land which was purchased for his benefit in the name of a stranger, was the vendor's agent, and he and the vendor acted at arm's length, false representations to the vendor that he knew of nothing that would enhance the value of the property, are not sufficient to justify setting aside the sale.

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

A sale of land will not be set aside on the ground that a third person for whose benefit it was purchased in the name of a stranger, obtained an option giving a firm of real estate brokers the right to purchase it which option he intended to use for his own benefit and concealed from the vendor knowledge of facts tending to enhance the value of the property, where the real estate brokers were not interested in such purchase other than to receive the commission which the vendor had agreed to give them if the property was sold and all negotiations pertaining to the sale to the stranger were conducted by the person for whose benefit it was purchased on his own behalf and not as agent for the brokers.

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

Where a debtor transfers all his assets, consisting of his stock-in-trade and of an immovable property, to a third party in payment of such third party's claim on the latter, assuming all of such debtor's liabilities, and the third party calls on a business creditor of the debtor ostensibly as the debtor's agent, and obtains a compromise agreement of fifty cents on the dollar on the representation that the debtor is insolvent and that his stock-in-trade is insufficient to meet his liabilities, but without disclosing that he is the transferee of the debtor's property, or mentioning the deed of transfer and the conditions therein mentioned, and without disclosing the fact that the debtor had an immovable property, such creditor on discovering the true state of affairs can have the deed of settlement he entered into with such third party set aside as being vitiated by fraud.

Liddell, Lesperance & Co., Limited v. Lacroix, 8 D.L.R. 502.

(§ II—6)—Sale of shares.

Fraud may be predicated on the part of directors of a corporation, as against its shareholders, where transfers from the latter were obtained in favour of the directors and the true purpose of the transfers was either concealed or misrepresented or the transfers misapplied.

Hyatt v. Allen, 8 D.L.R. 79, 3 O.W.N. 1401.

A sale of company shares is not vitiated in the absence of fraudulent concealment, or misrepresentation as to the value of such shares, by the fact that they were purchased by a third person for the benefit of the company directors without disclosing that the latter would make a secret profit from the sale of the company's assets. [Percival v. Wright, [1902] 2 Ch. 421; and Carpenter v. Darnworth, 52 Barb. (N.Y.) 581, followed.]

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886.

III. Matters of opinion or of the future.

(§ III—10)—Matters of opinion or of the future.

Where an agent of a vendor of land represented that the purchasers were buying a business lot in the business section of a proposed town and the vendees, who were buying on speculation, knew that no business section existed at that time, such a representation must be read in the light of existing circumstances, and must be considered as looking to the future development of the town, and hence is purely a matter of opinion and not a misrepresentation of a material ascertainable fact. [Cave v. Horsell (1912), 48 Times L.R. 543, 81 L.J.K.B. 981, specially referred to.]

Jackson v. People's Trust Co., Ltd., 7 D.L.R. 384, 22 W.L.R. 325.

It is merely an expression of opinion and not a misrepresentation of fact where an agent of a vendor of land represents to the purchaser that the latter would be able to dispose of the land at from two to three times the price before the third payment on the land was due.

Jackson v. People's Trust Co., Ltd., 7 D.L.R. 384, 22 W.L.R. 325.

A representation to a purchaser by the agent of the vendor of land in a proposed town that the main street of the town would become a principal street, does not amount to a representation at law, but is only an expression of opinion.

Jackson v. People's Trust Co., 7 D.L.R. 384, 22 W.L.R. 325.

(§ III—12)—Estimates and valuation.

A statement by a vendor as to the acreage of land sold will amount to actionable fraud where recklessly made without any bona fide conviction of its truth, and without regard to the actual facts of the case, notwithstanding the price to be paid therefor was based upon the quantity of lumber produced therefrom.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52.

IV. Intent, knowledge, belief, and reliance of parties.

(§ IV—15)—Reliance of parties.

A deed of land by which an illiterate person is alleged to have sold and conveyed a

substantial interest or equity in a farm in return for a lease given back by the grantee upon a "half-crop" rental will be looked upon with suspicion, and the transaction may be annulled, if the circumstances shew that the grantor misunderstood the nature of the transaction which he had been induced by the grantee to enter into without opportunity for independent advice. [See also Leake on Contracts, 6th ed., 291.]

Kokorutz v. Irwin, 1 D.L.R. 230, 19 W.L.R. 945.

Fraudulent misrepresentation—Sale of business—Evidence—Declaration of co-partnership—Failure to register—Remission of penalties—Costs.

Dixon v. Georgas Brothers, 4 O.W.N. 462, 23 O.W.R. 524.

(§ IV—16)—Of party deceiving or making statements.

A sale of land will not be set aside on an allegation that a third person by falsely representing that he was acting as an agent or employee of a firm of real estate brokers and, mentioning the name of a probable purchaser, obtained from the vendor an option giving the firm the right to purchase his property, though it was his intention to deceive the vendor and to purchase the property in another name for his own benefit.

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

A finding in an action where the pleadings presented a question of actual fraud, that a vendee "was overreached" in a sale of land, and that the vendor "must or should have known that [his] representations were false," means that the vendor's representations were not merely false, but known by him to be false, and that he made them for the purpose of deceiving the vendee.

Stocks v. Boulter, 5 D.L.R. 268, 3 O.W.N. 1397, 22 O.W.R. 464.

It is ground for rescission of the sale of farm lands that the vendor planned a deception of the purchaser by retaining a portion of same consisting of 30 acres separated from the remaining 270 acres by a road, while representing by the advertisement of sale, and otherwise, that he was selling a farm of 300 acres, although the thirty acres were not specifically indicated to the purchaser as a part of what he was getting, if the latter relied upon the vendor's representation as to the quantity being 300 acres without suspicion of any shortage. [Stocks v. Boulter, 3 O.W.N. 277, affirmed on appeal.]

Stocks v. Boulter, 5 D.L.R. 268, 3 O.W.N. 1397, 22 O.W.R. 464.

Where one was induced to purchase a farm, together with the stock and implements thereon, through false statements of the acreage knowingly made by the vendor, for the purpose of inducing the prospective purchaser to close the sale upon the vendor's assurance so given as to the quantity of land, and the purchaser is deceived by reliance thereon, the transaction will be set aside. [Stocks v. Boulter, 3 O.W.N. 277, affirmed.]

Stocks v. Boulter, 5 D.L.R. 268, 3 O.W.N. 1397, 22 O.W.R. 464.

Where one who has no bona fide claim against the estate files a caveat against the granting of probate of the will of his deceased father, and obtains from his sister, the principal beneficiary under the will, an agreement purporting to be a compromise of his claim, whereby she covenants to pay to him more than the amount which she receives under the will, and it appears that she was overmatched, overborne, and overreached by his superior shrewdness, and that, though she consulted her husband, he was, to the brother's knowledge, of no assistance to her, and that she had no independent or professional advice, and, further, that the agreement was obtained by misrepresentations as to the legal situation, and by threats to give publicity to a secret of her past life, the agreement cannot be enforced. [Underwood v. Cox, 3 O.W.N. 765, reversed.]

Underwood v. Cox, 4 D.L.R. 66, 21 O.W.R. 757, 26 O.L.R. 303, 3 O.W.N. 1112.

Sale of vehicle—Reliance on false representation—Damages.

McCutcheon v. Penman, 2 D.L.R. 904, 3 O.W.N. 1154.

(§ IV—17)—Knowledge and reliance of party defrauded.

A representation by an agent of a life insurance company to the insured made at the time of the issuance of the policy, based on an innocent error in calculation, as to the surrender value of the policy, is not a promissory representation to the insured where the correct amount could have been ascertained by him by reference to a mortality table. [Shaw v. Mutual Life Insurance Co. of New York, 23 O.L.R. 559, affirmed.]

Shaw v. Mutual Life Insurance Co. of New York, 7 D.L.R. 637, 46 Can. S.C.R. 606.

An agent who purchased for himself property belonging to his principal, is not guilty of fraud, where the latter was aware of such fact and no advantage was taken of him.

Frith v. Alliance Investment Co., 5 D.L.R. 491, 20 W.L.R. 551.

Where there is great disparity in intelligence between two persons, and the one, without proper information and advice, is overmatched and overreached by the other, so that he enters into an improvident bargain, he is entitled to have the bargain rescinded, even though there be no actual fraud. [Waters v. Donnelly, 9 O.R. 391, followed.]

Easton v. Sinclair, 3 D.L.R. 652, 21 O.W.R. 994, 3 O.W.N. 1103.

(§ IV—18)—EQUAL MEANS OF KNOWLEDGE.

Landlord and tenant—Lease—Action to set aside—Fraud and misrepresentation—Collateral agreement—Alleged breach of —Tenant in possession—Counterclaim—Costs.

Ruff v. McFee, 4 O.W.N. 501.

(§ IV—19) — MISUNDERSTANDING THROUGH WANT OF CARE.

A charge of fraud, deception or misrepresentation by a vendor as to the income derived from property the defendant agreed to purchase, or as to any other matter inducing the contract, cannot be sustained where any misunderstanding by the purchaser in relation thereto was the result of his own stupidity or want of care, and was not induced by any act or representation of the vendor.

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838.

Misunderstanding through want of care—Mining venture—Breach of agreement—Return of money paid—Damages.

Cheeseworth v. Davison, 2 D.L.R. 922, 3 O.W.N. 606, 20 O.W.R. 65.

V. To obtain credit.

(No cases.)

VI. In respect to negotiable paper.

(§ VI—25) — IN RESPECT TO NEGOTIABLE PAPER.

Promissory notes given for stock subscription—Misrepresentations of agent—Action against company and agent—Liability—Costs.

Thomson v. International Casualty Co. and Van Hummel, 7 D.L.R. 944.

A note is properly held to have been obtained by fraud where the agent of one who sold a stallion to a number of persons, fraudulently obtained their signatures to a joint and several note, instead of one by which each was liable only for his proportionate part of the purchase-price, as was contemplated by the agreement entered into by the parties.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

VII. Misinformation by third person.

(No cases.)

VIII. Remedies.

(§ VIII—35)—REMEDIES.

The judgment of Prendergast, J., 15 W.L.R. 197, finding the defendant liable in damages for representations made on the sale of a farm, as to its condition, upon which the plaintiff relied, and which proved to be untrue, was affirmed on appeal. Quære, whether the representation that the land was "all fit for cultivation" could be taken as wide enough to warrant the accessibility of a part of the farm which was cut off by a river.

Strome v. Craig, 17 W.L.R. 51.

An executed contract will not be set aside merely on the ground of misrepresentation not amounting to fraud. [Angel v. Jay, [1911] 1 K.B. 666, followed.]

Abrey v. Victoria Printing Co., 2 D.L.R. 208, 3 O.W.N. 868, 21 O.W.R. 444.

The recovery by a loan company from a borrower of the loss caused by fraudulent mis-statements in the application for the loan is not prevented by the fact that the local agent of the company was a party to the fraud.

Dominion Permanent v. Morgan, 4 D.L.R. 331, 21 W.L.R. 748.

FRAUDULENT CONVEYANCES.

I. IN GENERAL.
II. CONSIDERATION.
III. PREFERENCES; SECURITY.
IV. NOTICE; RIGHTS AND LIABILITIES OF PURCHASER.
V. RESERVATION OF INTEREST; CHANGE OF POSSESSION.
VI. TRANSACTIONS BETWEEN RELATIVES.
VII. SUBSEQUENT CREDITORS.
VIII. REMEDIES.

Of goods by chattel mortgage, see Chattel Mortgage.

I. In general.

(§ I—2)—VALIDITY AS TO PARTIES.

An agreement for an absolute sale of the property of a debtor given to a creditor as security for past indebtedness and a further advance is not void under the statute 13 Eliz. in the absence of an intent to defraud other creditors though it does in fact delay and hinder the other creditors and was so intended by the debtor. [Mulcahy v. Archibald, 28 Can. S.C.R. 523, applied.]

Beliveau v. Miller, 1 D.L.R. 819, 20 W.L.R. 96.

II. Consideration.

(§ II—8)—VOLUNTARY CONVEYANCE.

An agreement to support a grantor and his wife during their lives will not constitute as against the grantor's creditors, a consideration sufficient to uphold a conveyance of land.

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298.

III. Preferences; security.

(§ III—10)—PREFERENCE; SECURITY.

A pre-existing agreement, to give security for goods, supplied to a person who is about to engage in a hazardous business, even though somewhat vague in its terms, where the finding is in favour of the making of such agreement, is sufficient to support conveyances which would otherwise be treated as made with intent to give an unjust preference.

Power v. Munro, 5 D.L.R. 577.

Under sub-sec. 5 of sec. 3 of R.S.O. 1897, ch. 147 (now 10 Edw. VII. ch. 64, sec. 6) protecting the substitution in good faith of one security for another security for the same debt so far as the insolvent debtor's estate is not thereby lessened in value to the other creditors, the substitution itself, as well as the good faith must be established in order to sustain the transaction, and when the mortgage attacked treats in express words the one security as being in addition to the other and when the circumstances shew bad faith, no part of the transaction can, as against creditors, be sustained as a substitution. (Per Idington, J.)

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Where the plaintiff in a creditors' action attacks as fraudulent a chattel mortgage given by an insolvent debtor and it is set aside under the Assignments and Preferences Act (now 10 Edw. VII. (Ont.) ch. 64, sec. 5), the debtor's surety who was the party benefiting by the transaction, and who is found to have entered into it with intent to obtain an illegal preference, does not by reason thereof lose as against the insolvent estate the prior rights which he had against the insolvent at the time of the carrying into effect of the impeached transaction, the rights of the other creditors not extending beyond the removal of the fraudulent security. (Per Anglin, J.)

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Where a surety in paying off the guaranteed debt of an insolvent debtor as to which the guaranteed creditor holds a valid assignment of the debtor's book debts, chooses, instead of simply paying the debt and taking by subrogation a transfer of the book debts, to take in fraud of the other creditors, a chattel mortgage and transfer of book debts covering all of the assets of the insolvent debtor, as security, and where the book debts are thereupon, in a roundabout way, assigned to the surety and by him committed to the insolvent debtor who collects and appropriates the same, the surety cannot have equitable relief to collect their value in priority over the other creditors, out of the proceeds of the other property covered by the fraudulent chattel mortgage with which the sum so appropriated had become intermixed. [Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R. 503, varied; Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, varied; see annotation to this case.]

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Where a surety is entitled by subrogation upon the payment of the guaranteed debt to a transfer of the book debts of the debtor, and instead of taking the transfer purely and simply he enters into a scheme to take, under a fraudulent transfer to another, not only the book debts, but also in fraud of the other creditors all the rest of the debtor's assets as security, the transaction growing out of the scheme is void as against creditors under the Assignments and Preferences Act (now sec. 5 of 10 Edw. VII. (Ont.) ch. 64), but the prior and independent subrogation rights of the surety will be allowed except in so far as his own scheme has interfered therewith. [Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R. 503, varied; Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, varied; see annotation to this case.]

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Where a surety in paying off a guaranteed debt of an insolvent debtor devises a scheme under which, in a roundabout way, he takes in fraud of the other creditors, a chattel mortgage and transfer of book debts covering all the assets of the insolvent debtor, contrary to the Assignments and Preferences Act, R.S.O. 1897, now sec. 5 of 10 Edw. VII. (Ont.) ch. 64, and where prior to the fraudulent mortgage the book debts were held under a valid assignment by the guaranteed creditor, the transfer of the book debts to the surety will stand, not by virtue of the fraudulent mortgage but under the surety's equitable right of subrogation to stand in the shoes of the guaranteed creditor. [Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R. 503, varied; Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, varied; see annotation to this case.]

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

IV. Notice; rights and liabilities of purchaser.

(§ IV—16) — KNOWLEDGE OF TRANSFEROR'S FINANCIAL POSITION.

Where an insolvent firm sells its property, subject to a right of redemption, to a person who is aware of its insolvency, and uses the proceeds to pay certain creditors to the prejudice of the others, the sale will be annulled at the suit of the latter as being in fraud of their rights.

Landry v. McCall, 6 D.L.R. 793, 41 Que. K.B. 348.

(§ IV—17)—NOTICE OF TRANSFEREE'S FRAUD.

A fraudulent conveyance in contravention of art. 1035 Que. C.C. is made where a clerk buys the stock in trade of his employer when he knows that the latter is financially embarrassed and that he is selling to pay his debts.

Constantineau v. Buist et al., 18 Rev. de Jur. 40.

(§ IV—19) — RECOVERY BACK OF AMOUNT PAID OUT.

The purchaser as against whom a sale by an insolvent is set aside as fraudulent to

the purchaser's knowledge cannot demand that if the sale be annulled he should be refunded the purchase price from the estate, but as the purchaser's money has gone to pay certain creditors, the Court in annulling the sale will reserve to him any recourse which he may have after the affairs of the insolvent firm are wound up.

Landry v. McCall, 6 D.L.R. 793, 41 Que. K.B. 348.

V. Reservation of interest; change of possession.

(No cases.)

VI. Transactions between relatives.

(§ VI—30)—Transactions between relatives.

Where a newly incorporated company claimed title to goods which up to its incorporation were in the possession or control of one of its shareholders as their apparent owner, but a formal transfer to the company was made by a bill of sale from a brother of the person so in possession and the company set up title solely under such bill of sale as against a levy made on the goods at the instance of an execution creditor of such apparent owner, the Court will, in interpleader proceedings, on being satisfied that the transfer made by the bill of sale in the name of the brother to the company in exchange for shares was a part of a fraudulent attempt between the brothers and the company to put the goods out of the reach of creditors of the execution debtor, declare such goods to be still the property of the debtor and exigible under the execution.

Reindhardt Brewery, Ltd. v. Nipissing Coca Cola Bottling Works, 8 D.L.R. 261, 4 O.W.N. 366, 23 O.W.R. 377.

A. and his wife and three sons F., J., and R. lived on A.'s homestead farm. A. helped F. buy an adjoining farm. Both farms were worked by A. and the sons. Two years later, A., wishing to provide for his other sons, made an agreement with F., in pursuance of which, F. conveyed his farm to J. for a nominal monetary consideration, and A. for a like consideration conveyed the homestead to F., who had agreed to convey half thereof to R., and did so. There was a verbal understanding that F. should support A. and wife on the homestead. By this conveyance A. practically denuded himself of all his property except the crop then in the ground, the proceeds from which F. agreed should go to pay A.'s debts. The crop failed. No express intention was shewn to defeat, hinder or delay creditors. In a suit brought by a creditor of A. to set aside the deeds from A. to F. and F. to R. as void under statute 13 Eliz. ch. 5:—Held, that the deeds were voluntary and without valuable consideration, in whole or in part, and as their effect was to defeat, hinder and delay creditors, they were void. Even if the agreement to support was in such a condition that it could be enforced, it was not a consideration sufficient to support the deed against the plaintiff; nor was the fact that the sons worked at home a consideration. [In re Jackson, 20 Ch. D. 389, distinguished.]

Jack v. Kearney, 4 N.B. Eq. 415.

Services rendered by a child during minority do not constitute a consideration sufficient to support a voluntary conveyance of land by parent to the child as against the creditors of the former. [Re Maddever, L.R. 27 Ch. Div. 523, specially referred to.]

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298.

Where a parent, who, upon the purchase by his son of a heavily encumbered farm, assisted him in making a small payment thereon, and subsequently, in consideration of the son transferring it to another brother, conveyed to the former all of the land he owned, upon such son's conveying a half interest therein to a younger brother, to become effective upon the latter attaining his majority in the event that he should continue to remain at home until then, such conveyance is void as to the creditors of the parent, although made without actual intent to defraud, delay, or hinder them.

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298.

Where it appeared in a proceeding permitted by sec. 5 of the Collection Act, R.S.N.S. 1900, ch. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of a debtor, the debtor in this case being one against whom judgment had been rendered in an action for slander, that a deed from the debtor executed to his wife was proved and recorded after he had received a letter calling for redress for the slander and that the debtor, after the action for slander had been brought, withdrew from the bank a fund over $600 deposited in the joint names of himself and wife, in which he had an interest of his own, and replaced the fund on the same day in his wife's name alone, these transactions bring the debtor within sub-sec. 1 (e) of sec. 27 of the Collection Act, R.S.N.S. 1900, ch. 182, providing that if it appears to the officer conducting the examination of a judgment debtor that the latter has made a fraudulent disposition of his property, the officer may commit him to jail.

Henn v. Smith, 6 D.L.R. 48, 11 East. L.R. 1.

Where a surety, to increase his security, plans and carries out in fraud of the other creditors, a scheme in which his brother is used as his mere instrument in the transactions, equity will sheer the transaction of the brother's name and substitute that of the surety when necessary to shew the true nature of the transaction. [Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R.

503, varied; Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, varied; see annotation to this case.]

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

VII. Subsequent creditors.

(§ VII—35)—SUBSEQUENT CREDITORS.

A voluntary conveyance may be set aside at the instance of a creditor who became such after the date thereof, though it was made with intent to affect future creditors alone, and there are no creditors remaining whose debts arose before the date of the conveyance. [Jenkyn v. Vaughan, 3 Drew. 419, discussed; Mackay v. Douglas, L.R. 14 Eq. 106, followed.]

Ottawa Wine Vaults Co. v. McGuire, 8 D.L.R. 229, 4 O.W.N. 318.

VIII. Remedies.

(§ VIII—40)—REMEDIES.

Upon an application by a creditor, under the Assignments Act, R.S.N.S. ch. 145, to set aside a deed of conveyance of property made by the insolvent debtor in contravention of section 4 with intent to hinder and delay the creditor, the deed may be declared void as against the creditor without a finding of the precise amount of the creditor's claim, provided some amount is found to be due, an accounting to follow if necessary.

Whitford v. Brimmer, 7 D.L.R. 190.

(§ VIII—41)—TO WHOM AVAILABLE.

Under the Quebec Bulk Sales Act, 1 Geo. V. (Que.) ch. 39, only the unpaid creditor whose goods are included in the bulk sale to a third party has the right to attack the sale made without the formalities required by law, i.e., without the purchaser having obtained from the vendor an affidavit containing the names, addresses of, and amounts due to the unpaid creditors whose merchandise is being transferred by the bulk sale.

Ramsay and Son, Ltd. v. Turcotte, 7 D.L.R. 27, 42 Que. S.C. 459.

An ordinary unpaid creditor or one whose goods have not been disposed of by their debtor by means of a bulk sale have no interest in attacking a sale even though made without the due formalities, such creditors having their ordinary common law right guaranteed by C.C. (Que.) 1033 et seq., in case the sale is made in fraud of their rights.

Ramsay and Son, Ltd. v. Turcotte, 7 D.L.R. 27, 42 Que. S.C. 459.

One action to set aside as fraudulent as against creditors two successive conveyances of the same property may be brought against both grantees where it is alleged that both conveyances were part of the same fraudulent scheme and that both grantees were parties to the fraud.

Burns v. Matejka, 1 D.L.R. 837, 19 W.L.R. 863.

(§ VIII—42)—INJUNCTION.

Where a debtor has fraudulently transferred property a non-judgment creditor is entitled to have further transfers enjoined until he can obtain judgment in his action to impeach the conveyance. Per Beck, J.) [Fairchild v. Elmslie, 2 Alta. L.R. 115, followed.]

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

(§ VIII—43)—FOLLOWING PROFITS.

The fact that a debtor applied some of his own money to the purchase of property in his wife's name would not render the whole property liable for payment of the creditors' claims, but such liability should be restricted to the amount so applied, with a proportional share of increase if the property has increased in value. [See annotation to this case.]

Burns v. Matejka, 1 D.L.R. 837, 19 W.L.R. 863.

FREIGHT CARRIERS.

See Carriers, III.

FRIGHT.

Damages for mental anguish, see Damages, III.

FROGS.

Negligence in failing to block frogs in switches, see Master and Servant.

FUGITIVE FROM JUSTICE.

Extradition of, see Extradition.

Review of extradition proceedings for, see Habeas Corpus.

FUGITIVE OFFENDERS.

Deportation to other British territory, see Extradition, II.

From foreign country, extradition, see Extradition, I.

Alien criminals, refusal to admit into Canada, see Aliens.

GAME LAWS.

(§ I—5)—GAME AND FISHERIES LAWS.

The jurisdiction of the magistrate under the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, is not ousted unless the accused acted under a claim of right, which is reasonable as well as bona fide; it is not enough that the claim is honestly made, if it be in fact merely fanciful and imaginary. [Cornwall v. Sanders, 3 B. & S. 206, followed.]

Rex v. Harran, 3 D.L.R. 753, 3 O.W.N. 1107, 21 O.W.R. 951, 20 Can. Cr. Cas. 72.

GAMING.

(§ I—6) — BETTING-HOUSE OR GAMING-HOUSE.

Keeping a common gaming-house and keeping a common betting-house, either of which are declared to constitute the indictable offence of keeping a disorderly house by the same section of the Criminal Code (Cr. Code, 1906, sec. 228), are distinct offences.

The King v. Mah Sam, 19 Can. Cr. Cas. 1.

(§ I—7)—LOOKING ON.

Per Perdue and Richards, JJ.A. (Howell, C.J., contra, and Cameron, J.A., expressing no opinion). Playing and looking on in a gaming-house are separate and distinct offences under Cr. Code sec. 229, and a conviction in the alternative is not validated by sec. 725.

The King v. Toy Moon, 19 Can. Cr. Cas. 33, 19 W.L.R. 480.

GARNISHMENT.

I. WHEN GARNISHMENT LIES.
- A. In general, before recovery of judgment.
- B. Against whom.
- C. What subject to garnishment.
- D. Situs of debts.

II. EFFECT; RIGHTS, DUTIES, AND LIABILITIES OF GARNISHEE.
- A. In general.
- B. Duty as to exemptions; effect of failure to set up.
- C. Effect of judgment.
- D. Effect of payment.
- E. Priorities.

III. PROCEDURE.

I. When garnishment lies.

A. In general.

(§ I A—1)—IN GENERAL, BEFORE RECOVERY OF JUDGMENT.

Where the defendant in garnishee proceedings applied for an order to have the liability of the garnishee summarily determined, it appeared that the plaintiff had not recovered judgment against the defendant in the original action and had refused to proceed further against the garnishee. The rule provided that "the plaintiff or any other person interested" might apply for and obtain the order:—Held, per curiam, that the defendant's application was rightly refused. Per Newlands, J. (Sifton, C.J., Harvey and Stuart, JJ., concurring), that defendant has no right or status to apply for the order, he not being "any other person interested" within the meaning of the rule. Per Wetmore, J., that a defendant is "a person interested" within the rule, and may apply for the order, but that it is discretionary with the Judge to make the order when applied for by him, and that under the circumstances of the present case the order should be refused.

Woodley v. Harker & McRobert, garnishee, 7 Terr. L.R. 333.

A claim on a covenant to pay contained in a chattel mortgage given to secure an account, the amount of which had been unascertained, is a debt or liquidated demand authorizing the issue of a garnishee summons under rule 384 of the Judicature Ordinance, C.O. 1898, ch. 21.

Stimson v. Hamilton, 7 Terr. L.R. 281.

B. Against whom.

(§ I B—5)—AGAINST WHOM.

The test as to the liability of a fund to be attached in garnishment proceedings under rule 911 (Ont. Con. Rules of 1907), is the ability to serve the garnishee within Ontario or the ability to bring the case within Ontario Con. Rule 162, if service cannot be made in Ontario.

McMulkin v. Traders Bank of Canada, 6 D.L.R. 184, 3 O.W.N. 787, 21 O.W.R. 640, 26 O.L.R. 1.

(§ I B—7)—NON-RESIDENT.

When a company tierce-saisie has its head office at Montreal, the fact that the defendant works for it in another province under control of one of its branches does not withdraw the company from the jurisdiction of this Court. When it affects the salaries mentioned in pars. 11 and 12 of art. 599 C.P.Q., the seizure is declared tenante by the law itself; a motion to have it so declared is unnecessary and will be dismissed.

Brandies v. East, 13 Que. P.R. 183 (Sup. Ct.).

When it is proven, in an attachment before judgment, that the defendant, who is a labourer, has left the country, the garnishee may be condemned, by the judgment rendered on the saisie-arrêt itself, to pay not only the seizable portion of the defendant's salary, but the whole of it. No further proceedings are necessary to that effect.

Harry Cater v. James Belmont and the Grand Trunk R. Co., garnishee, 13 Que. P.R. 231.

C. What subject to garnishment.

(§ I C 1—15)—WHAT SUBJECT TO GARNISHMENT.

It is not essential to the binding effect of a garnishing order that the debt to be attached should be one for which action could be brought at the date of the order. [MacPherson v. Tisdale, 11 P.R. (Ont.) 263, followed.]

Empire Sash and Door Co. v. McGreevy; Canadian Pacific R. Co., 8 D.L.R. 27, 22 W.L.R. 372.

(§ I C 1—18)—INSURANCE MONEY.

Defendant company conveyed to a trust

company, in trust for bondholders, all rights accrued or thereafter to accrue to the company:—Held, that the conveyance covered a sum of money paid by an insurance company to their agent, and that the money in the hands of the agent was not subject to garnishee process at the instance of a judgment creditor of the company. Also that, as against an attaching creditor, the equitable title of the trust company was perfect without notice, and, therefore, there was no fund upon which the attachment could operate. Per Drysdale, J. The mere circumstance that insurers doing business outside the jurisdiction of the Court send money to their agent within the jurisdiction with instructions to pay it to the defendant company, imposes no liability on the part of the agent to the defendant, in the absence of assent on the part of the agent to pay the money in accordance with the instructions received. The plaintiff in such case is not within the provisions of Ordinance 43, rule 1, and has no right to the money in question.

Terrell v. The Port Hood Richmond Railway and Coal Company, Limited, 45 N.S.R. 360.

(§ I C—18b)—Future earnings.

Judgment creditors who have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act. 10 Edw. VII. ch. 73, sec. 3, which does not create any relation in the nature of a partnership, have no right to enter into an inquiry as to the organization of the garnishee's firm for the purpose of shewing that the judgment debtor is partner therein. [Donahue v. Hull, 24 Can. S.C.R. 683, specially referred to.]

Bartlett v. Bartlett Mines, Ltd., 3 D.L.R. 289, 3 O.W.N. 958.

(§ I C—19) — Claim for unliquidated damages.

An action for breach of warranty of quantity upon a sale of goods is a "claim for damages" within the meaning of section 146 of the Division Courts Act, 10 Edw. VII. (Ont.) ch. 32, and the plaintiff in such an action cannot garnish before judgment.

Re McCreary v. Brennan, 3 D.L.R. 318, 3 O.W.N. 1052.

(§ I C 1—20) — Money due contractor; building contract.

Moneys earned by a contractor under contracts for the erection of buildings, and payable by instalments as the work progresses on certificates of the engineer employed by the proprietor, should be deemed to be "accruing due" and therefore attachable by a garnishing order at the suit of a creditor, (a) in the case of a completed contract, at the date of completion, (b) in the case of a contract abandoned by the contractor before completion and subsequently completed by the proprietor, at the date of the abandonment; provided that, in both cases, the engineer has subsequently given his certificates shewing that the amounts were payable to the contractor, and the garnishee has paid the moneys into Court, unless it has been proved affirmatively that the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

Empire Sash and Door Co. v. McGreevy; Canadian Pacific R. Co., 8 D.L.R. 27, 22 W.L.R. 372.

(§ I C 1—22)—Unascertained legacy.

The claim of a residuary legatee against the executors is not a debt "due or owing" from the executors attachable under Con. Rule 911 (Ont. C.R. 1897). [Deeks v. Strutt, 5 T.R. 690; Jones v. Tanner, 7 B. & C. 542, applied.]

Gilroy v. Conn, 2 D.L.R. 131, 3 O.W.N. 732, 21 O.W.R. 526.

(§ I C—23)—Money of client in solicitor's hands.

Where a creditor seizes in the hands of solicitors moneys alleged to be due and owing to his debtor and the solicitors declare that such debtor is their client and owes them more than they owe him, the seizing creditor can have no more rights than his debtor, and in order to have such seizure maintained must bring certain and conclusive proof that the garnishees are really indebted to his debtor.

Bernard v. Pelissier et al., 8 D.L.R. 545.

D. Situs of debts.

(§ I D—30)—Situs of debt.

Moneys paid into Court in Manitoba by the garnishees could not be affected by any legal proceedings in the Courts of another Province.

Empire Sash and Door Co. v. McGreevy; Canadian Pacific R. Co., 8 D.L.R. 27, 22 W.L.R. 372.

Attachments of debts—Sale of goods on condition—Lien on goods—Onus of proof.

Plaintiffs served a garnishee summons to attach an alleged debt owing by the garnishee to defendant. The garnishee having disputed any liability to defendant, the matter was tried in a summary way, at which trial the only evidence tendered was that of the garnishee himself, who alleged that he had bought goods from defendant, but that such goods he had found on inquiry were not paid for by the defendant and were subject to liens. There was no evidence to establish any valid lien or claim. Held, per Scott, Prendergast, Harvey and Johnstone, JJ., affirming the judgment of the trial Judge, that the onus of proof as to the validity of any liens or claims against the

goods was on the garnishee. Held, per Stuart, J. (Sifton, C.J., concurring), that the evidence was sufficient to raise a bona fide doubt as to the right of the defendant to sell the goods, and that as the onus of proving his title and his right to sell would, in an action by the defendant for the price of the goods, lie on the defendant, the plaintiffs in the garnishee proceedings could stand in no better position and must prove the defendant's right to sell the goods to the garnishee.

Adolph v. Hilton and Stephens, 7 Terr. L.R. 407.

II. Effect; rights, duties, and liabilities of garnishee.

(No cases.)

III. Procedure.

(§ III—60)—PROCEDURE.

Where judgment creditors have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act, 10 Edw. VII. ch. 73, sec. 3, which statute further provides that such agreement shall give to the employee no right to examine into the accounts of or interfere in the management of the business and that any statement of the employer of the net profits of the business on which he declares and appropriates a share of profits payable under such agreement shall be final and conclusive between the parties and all persons claiming under them except in the case of fraud, such creditors have no right to go into the books of the firm and its business transaction with a view of establishing that there were greater earnings than the amount shewn by the statements exhibited by the garnishees and that there ought to have been more carried to the credit of the debtor as his share of the profits.

Bartlett v. Bartlett Mines, Ltd., 3 D.L.R. 289, 3 O.W.N. 958.

Step in the action—Small debt procedure—Jurisdiction as to costs or counsel fees.

Great West Life Assurance v. Whitchelow, 8 D.L.R. 1033.

(§ III—61)—AFFIDAVIT.

The affidavit upon which a garnishing summons before judgment can be issued may be sworn prior to the commencement of the action. [Rule 505 of Sask. Jud. Rules (1911), former Jud. Ord. Rule 384, construed.]

Stewart & Matthews Co. v. Ross, 7 D.L.R. 378.

It is not material whether the affidavit, upon which a garnishing summons is issued, when made before the action is commenced, is or is not entitled in the cause about to be commenced. [Rule 409 of Sask. Jud. Rules 1911, former Jud. Ord. Rule 294; and rule 747 of Sask. Jud. Rules 1911, former Jud. Ord. Rule 538, referred to.]

Stewart & Matthews Co. v. Ross, 7 D.L.R. 378.

(§ III—61)—AFFIDAVIT; INFORMATION AND BELIEF WITHOUT SETTING OUT GROUNDS.

An affidavit required to be filed under Sask. Rules (1911) as a basis for the issue of a garnishing summons before judgment is not an affidavit for use on an interlocutory motion, and therefore does not require to have set out therein the grounds of belief but may be made on information and belief simply. [Nohren v. Auten and Markham (1910), 15 W.L.R. 417; rule 505 of Sask. Jud. Rules (1911), former Jud. Ord. Rule 384, applied; Salander v. Jenson (1907), 6 W.L.R. 401; rule 410 of Sask. Jud. Rules (1911), former Jud. Ord. Rule 295, referred to.]

Stewart & Matthews Co. v. Ross, 7 D.L.R. 378.

Defendant moved to set aside a garnishee summons secured by plaintiff on the ground that the affidavit required to secure the issue of the summons was sworn before the issue of the writ, and that the allegation as to the indebtedness of the garnishee was upon information and belief, and no grounds were stated therefor. The application being dismissed, defendant appealed:—Held (following Marcy v. Pierce, 4 Terr. L.R. 186), that the affidavit to lead to the issue of a garnishee summons may be sworn before the actual issue of the writ of summons in the action. 2. That the rule providing as to the matters to be sworn to in such affidavit requires only that the deponent swear to the best of his information and belief as to the garnishee's indebtedness. An affidavit so framed is sufficient and need not shew the grounds of such information and belief.

Stewart & Matthews Co. v. Ross, 7 D.L.R. 378, 4 S.L.R. 409.

It is essential that the affidavit for a garnishee summons under Sask. Rule 505 should comply strictly with the rule so that it may appear whether the action is for a debt or liquidated demand so as to warrant the issue of the summons. [Mohr v. Parks, 15 W.L.R. 250, followed.]

Clokey v. Huffman, 1 D.L.R. 679.

(§ III—68)—FINDINGS; DEFINITE SUM.

Before an order for payment can be made in garnishment proceedings under Ont. C.R. 911 and 915, the Court must find some definite sum either as presently due, when it is to be paid forthwith, or as a debt payable at a future date.

Gilroy v. Conn, 2 D.R.L. 131, 3 O.W.N. 732, 21 O.W.R. 526.

Trial of a garnishee issue—Assignment of land contract—Rights of judgment creditors—Payment of claim of assignee—Right to attach surplus.

Bank of Montreal *v.* Rogers, 7 D.L.R. 778.

GAS.

I. In general.

II. Compulsory service.

III. Rates; meter.

IV. Injuries from; negligence as to.

A. In general.

B. Contributory negligence.

I. In general.

(§ I—3)—Waste; fraudulent use.

Claim for gas supplied by company to customers of another company—Failure of proof.

United Gas Companies v. Forks Road Gas Co., 2 D.L.R. 895, 3 O.W.N. 1079.

II. Compulsory service.

(No cases.)

III. Rates; meter.

(No cases.)

IV. Injuries from; negligence as to.

(No cases.)

GASOLINE.

I. In general.

(§ I—10)—Gasoline engine.

The seller of a gasoline engine is liable for injuries sustained by the purchaser as the result of the emission of dangerous fumes from the exhaust of the engine, which was installed by the former in a small building without conveying the exhaust pipe to the open air, the necessity of which must have been known to the seller, who did not warn the purchaser of the danger therefrom, notwithstanding it was explained in a book of instructions sent with the engine, which, however, the purchaser had not noticed or read. [Clarke v. Army and Navy Co-operative Society, [1903] 1 K.B. 155, followed; O'Neil v. James, 5 Am. & Eng. Ann. Cas. 177, referred to.]

Tollington & Co. v. Jones, 4 D.L.R. 648, 21 W.L.R. 168.

GIFT.

I. In general.

II. Causa mortis.

III. Delivery.

As to trusts generally, see Trusts.
By will, see Wills, III.

I. In general.

(§ I—1)—In general.

Money obtained by prostitution given to the defendant by the plaintiff, an infant, who lived with him as wife is a gift, and no trust arises in her favour as to entitle her to recovery of any of the proceeds thereof, or to any lien on any of the property acquired therewith.

Johnston v. Desaulniers, 46 Can. S.C.R. 620, Desaulniers v. Johnston, 20 Man. R. 64, reversed.

(§ I—4)—Of land.

The burden imposed on the donee by the deed of donation of maintaining the donor during his life guaranteed by hypothec of the immovables donated does not create a life tenancy but is an agreement for maintenance of a character purely movable. It therefore confers no right on the creditor to proceed by opposition a fin de charge to the seizure under execution of the immovable hypothecated in order to preserve the benefit of it. He is, however, entitled under his hypothec to be collocated on the proceeds for a sum, to be estimated, representing the value of future payments. The said hypothec is not extinguished by confusion when the donor resumes possession of the immovables pursuant to a judgment for resiliation of the deed of donation if the donee has charged them with other hypothecs while in possession and there is danger of eviction by the creditors.

Lebrun v. Sévigny, Q.R. 41 S.C. 140 (Sup. Ct.).

(§ I—5)—Substitution.

The event which causes the opening of a substitution, or the date on which it shall take place, are as provided and fixed by the deed creating it with no power in the grevé, by renunciation of his rights or otherwise, of causing it to be anticipated. Therefore, the substitution of property donated to the children of the donee living at his death cannot be opened before that takes place, and the deed by which he renounces his rights does not cause it to be opened and gives to his children only the continued enjoyment but no seizure of the substituted property which would entitle them to an action as appelés for possession.

Arbec v. Pepin, Q.R. 42 S.C. 222 (Sup. Ct.).

(§ I—6)—Of notes or cheques.

Cheque signed in blank by deceased—Alleged gift—Trust for creditors.

Munn v. Keyes, 6 D.L.R. 878, 4 O.W.N. 250.

(§ I—7)—Of bank deposits.

Where one who has a sum of money on deposit in the savings department of a bank, being ill in the hospital, signs a written memorandum instructing the bank to arrange her money in her daughter's name so that she can draw it, which she hands to her daughter to take to the bank, saying, "If anything should happen to me in the hospital, take my money

and my furniture and do the best you can with it," and requesting the daughter to pay her funeral expenses, and the bank thereupon changes the heading of the account so as to make it appear as a joint account in the name of the mother and daughter, and the deposit book remains in the mother's possession until her death, and there is no evidence of any intention of the mother to do more than make an arrangement by which, for convenience, the daughter could draw the money, the daughter has no right to the money at her mother's death, either by survivorship or otherwise. [Everly v. Dunkley, 5 D.L.R. 854, affirmed; Re Ryan, 32 O.R. 224, and Schwent v. Roetter, 21 O.L.R. 112, distinguished; Hill v. Hill, 8 O.L.R. 710, specially referred to.]

Everly v. Dunkley, 8 D.L.R. 839, 23 O. W.R. 415, 4 O.W.N. 406.

Where a deposit in the bank, upon the refusal of the bank to permit the wife of the depositor to withdraw the interest earned thereon when the husband was by illness prevented from going himself to the bank, was, at the suggestion of the bank officers and with the consent of the depositor, placed in the joint names of the depositor and his wife as a matter of convenience in withdrawing money for household expenses, the wife upon the death of the husband who had made a testamentary disposition of all his property did not become vested with the title to such deposit. [Marshall v. Crutwell, L.R. 20 Eq. 328, and Re Daly, 37 N.B.R. 483, Daly v. Brown, 39 Can. S.C.R. 122, followed.]

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

II. Causa mortis.

(§ II—12)—GIFTS CAUSA MORTIS AND INTER VIVOS DISTINGUISHED.

A clause in a deed for resiliation of a donation of immovables that if the donor, who retakes possession, should enjoy it until his death, they should then become the exclusive property of the donee (with the additional provision for a penalty in case of alienation) is not a donation in contemplation of death, but the consideration for the resiliation and, therefore, valid.

Plouffe v. Plouffe, Q.R. 21 K.B. 385.

III. Delivery.

(§ III—16) — NECESSITY AND SUFFICIENCY OF DELIVERY.

An interlocutory injunction to restrain the transfer of shares of stock will be granted where it appears that the defendant's husband transferred them to her after he had given a guaranty, on which a liability subsequently arose, where, on the trial, it would be a question whether the transaction was a gift, and whether there was a sufficient delivery of possession to effectuate the gift, as such circumstances justify the application of the rule that corroboration is necessary where such a transaction affects third parties.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

A claim made by the wife of the debtor as against her husband's execution creditors to an automobile bought with the husband's money but which she claims was verbally given to her by him, is not substantiated as against the seizure under execution if there was not a bill of sale or other written evidence of the transfer by the husband to the wife, nor proof either of actual delivery to her or of constructive delivery by words of present gift accompanied by change of possession. [Kilpin v. Ratley, [1892] 1 Q.B. 583, distinguished; see also annotation to this case.]

Huggard v. Bennetto, 1 D.L.R. 305, 20 W.L.R. 233, 20 Man. L.R. 44.

GOODS.

Sale of, see Sale.

Chattel mortgage of, see Chattel Mortgage.

Contracts generally as to, see Contracts.

GOOD WILL.

I. IN GENERAL.

II. EFFECT ON GOOD WILL OF TRANSFER OF BUSINESS OR DISSOLUTION OF FIRM.

III. EFFECT OF SALE OR TRANSFER OF GOOD WILL.

(No cases.)

GOVERNMENTAL CONTROL.

Of carriers, see Carriers, IV.

Of corporations, see Corporations and Companies.

GRAND JURY.

I. IN GENERAL.

II. NUMBER.

III. SUMMONING, IMPANELLING, AND DISCHARGE.

IV. QUALIFICATIONS AND EXEMPTIONS.

Indictment by, see Indictment, Information and Complaint.

IV. Qualifications and Exemptions.

(§ IV—26)—EXEMPTION.

Where the names of two persons drawn to serve upon the grand jury are dropped by the sheriff, on the ground that they are exempt from serving, but without requiring from them the affidavit prescribed by the act (R.S. 1900, ch. 162, sec. 43), and the names of two other persons, properly qualified to serve, are drawn upon a special panel to serve in the stead of those omitted, this is not an irregularity in connection with the constitution of the jury, or prejudicial

to prisoners, for which an indictment will be set aside.

The King v. Brown and Diggs, 45 N.S.R. 473, 19 Can. C.C. 237.

GUARANTY.

I. Validity; construction; effect.

II. Revocation; conditions; discharge.

As to Statute of Frauds, see Contracts, I E.

(§ I—1)—Validity; construction.

An agreement by defendant company for the purchase of a quantity of salt, f.o.b., at San Francisco, to be delivered at Nanaimo, in British Columbia, was signed by the president and secretary-treasurer. Under their signatures was added: "We, the undersigned, guarantee payment of the obligation as noted above, Imperial Fisheries, Ltd., J. O. Hearn, president; Saml. J. Levy, secretary-treasurer; William Kilroy, vice-president":—Held, affirming the order of Murphy, J., on an application for summary judgment (Martin, J.A., dissenting), that the three officers signing the guarantee following the execution of the agreement, were personally liable, and that judgment under Order XIV. was properly allowed.

Johnson, Lieber & Van Bokkelen, Ltd. v. Imperial Fisheries, Ltd., Hearn, Levy & Kilroy, 16 B.C.R. 445.

(§ I—6)—Duration of liability.

Debt of insolvent company—Duration of liability—Bank Act—Securities—Payment for timber.

Quebec Bank v. Sovereign Bank of Canada (No. 1), 5 D.L.R. 879, 4 O.W.N. 22, 22 O.W.R. 966.

Nature, extent and duration of liability—Indivisibility of admission—Sale—Deceit—Concealment—C.C. 1530.

Thibodeau v. Viau, 18 Rev. de Jur. 299.

(§ I—7)—Continuing liability.

As a contract of guaranty creates a continuing liability from its inception a subsequent voluntary transfer of the guarantor's property without consideration will be set aside where a liability afterwards arose on such guaranty. [Re Ridler, 22 Ch. D. 74, and May on Fraud. Conv., 3rd ed., 36, specially referred to.]

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

(§ I—9)—Land sales.

Where a sub-purchaser of one lot of a block of land sold by the owner to the original purchaser has been directed by his vendor to pay his purchase money to the owner and get title from him direct, but the owner declines to accept payment or to convey unless paid a bonus in addition, the original purchaser may be ordered to indemnify his sub-purchaser in respect of a reasonable bonus paid to the owner in order to obtain title. [Rankin v. Wadleigh, 2 Alta. L.R. 469, discussed.]

Duggan v. Wadleigh and Rankin, 1 D.L.R. 871, 20 W.L.R. 102.

II. Revocation; conditions; discharge.

(No cases.)

GUARDIAN AND WARD.

I. Appointment; removal; discharge.

II. Powers, rights, duties, and liabilities of guardian.

III. Bonds and liability thereon.

IV. Rights of ward.

I. Appointment; removal; discharge.

(No cases.)

II. Powers; Rights; duties and liabilities of guardian.

(§ II—11a)—Investments.

It is the duty of a guardian (or tutor) of a minor, having charge of the latter's money awaiting investment, to deposit it in a chartered bank in an interest bearing account, instead of merely on safe deposit where it would earn no interest but would remain the property of the minor unaffected by the failure of the bank or other depository, and the tutor depositing in the savings department of a chartered bank is not liable for the loss occasioned by the failure of the bank.

Gervais v. Boudreau, 8 D.L.R. 802, 18 Rev. de Jur. 433.

A guardian who, in good faith and during the period by law allowed him to arrange for the investment of the funds of his ward, deposits thereof the sum of $225 in a bank, reputed solvent, will not for that reason be held responsible for the loss of such sum, if, after the deposit, such bank becomes insolvent.

Gervais v. Boudreau, 8 D.L.R. 802, 18 Rev. de Jur. 433.

HABEAS CORPUS.

I. In Provincial Court.

A. In general.

B. Power to issue; who may demand.

C. Scope of writ; questions considered; right to discharge.

D. Procedure; judgment.

II. In Supreme Court of Canada.

Scope of review of proceedings on appeal, see Appeal.

In extradition, see Extradition.

I. In Provincial Courts.

A. In general.

(§ I A—4)—Certiorari in aid.

The regularity of a summary conviction for a vagrancy offence (Criminal Code 1906,

sec. 238) is properly enquired into upon habeas corpus when the proceedings before the magistrate are brought up upon a writ of certiorari in aid of the habeas corpus writ. [The King v. Pepper, 15 Can. Cr. Cas. 314, and The King v. Leschinski, 17 Can. Cr. Cas. 199, specially referred to.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203.

Neither a proceeding to quash a summary conviction by way of certiorari, nor a motion to discharge on habeas corpus with certiorari in aid constitutes an "appeal," and where the powers of amendment of a conviction under a Provincial statute are limited to "appeals" from convictions and orders, a conviction which illegally imposed hard labour for an offence against the Provincial liquor laws cannot be amended on the habeas corpus motion and the prisoner is entitled to be discharged. [The King v. Plante, 40 C.L.J. 125, applied.]

Re Ching How, 1 D.L.R. 275, 19 W.L.R. 891, 19 Can. Cr. Cas. 176.

B. Power to issue; who may demand.

(§ I B—6)—Power to issue.

Subject to any statutory restriction of the right, an application for a writ of habeas corpus for the discharge of a prisoner from custody may be renewed before another Judge of co-ordinate jurisdiction, notwithstanding that a similar application upon the same grounds had been refused by the Judge to whom the application was first made. [See also to the same effect, R. v. Carter, 5 Can. Cr. Cas. 401; Re McKenzie, 14 N.S.R. 481; Re J. W. Black, Cong. Dig. 614; but as to the effect of a statutory right of appeal, see Re Hall, 8 A.R. (Ont.) 135; Re Harper, 23 O.R. 63; Taylor v. Scott, 30 O.R. 475.]

Re Baptiste Paul (No. 2), 7 D.L.R. 25.

(§ I B—7)—When proper remedy.

Habeas corpus, and not an application to a magistrate for the release of a person remanded by him to custody, is the proper mode of inquiry as to whether his detention was illegal.

Rex v. Bouchard, 4 D.L.R. 317, 20 Can. Cr. Cas. 95.

(I B—8)—Common law writ.

As regards summary convictions the jurisdiction to review commitments thereunder on habeas corpus is not limited to the statutory powers founded on Imperial Statute 31 Car. II., ch. 2, and the writ may be supported also upon the jurisdiction at common law. [R. v. McEwen, 13 Can. Cr. Cas. 346, 17 Man. R. 477, distinguished.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203.

C. Scope of writ; questions considered; right to discharge.

(§ I C—10)—Scope of writ.

A conviction for selling liquor or keeping liquor for sale in contravention of a local option municipal by-law prohibiting the issue of liquor licenses is a conviction under the Liquor License Act for selling or keeping for sale "without a license," and is subject to the same limitations as to review on certiorari and habeas corpus as a conviction against a non-licensee in a district in which licenses are issued.

Re Leach and Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

(§ I C—12)—Lack of jurisdiction.

An application for the discharge of defendant from gaol, under an order in the nature of a habeas corpus, based upon the one ground that the committing magistrate, in sentencing defendant for a second offence against the provisions of the Nova Scotia Temperance Act, 1910, as amended by Acts of 1911, ch. 33, sec. 8, was under a misapprehension as to his powers and sentenced the defendant for a longer term (three months) than he would have done if he had any discretion in the matter as shewn by an affidavit of the magistrate, will not be entertained as it was not competent for the magistrate to make such an affidavit, or for the Court to consider such a question, the only question being whether or not the defendant was legally detained in custody.

The King v. Fraser, 7 D.L.R. 496.

An accused person in an application on the return of a summons for a habeas corpus, may avail himself of an objection to the jurisdiction of a police magistrate to try him for an offence against the Liquor License Ordinance, on the ground that no sworn information had been lodged against him and that he was, therefore, improperly brought before the magistrate, under a warrant of arrest, where his objection before the magistrate was overruled, the trial proceeded with, and the accused found guilty. [Re Baptiste Paul (No. 2), 7 D.L.R. 25, followed; Regina v. McNutt, 3 Can. Crim. Cas. 184, 186, referred to.]

Rex v. Davis, 7 D.L.R. 608.

(§ I C—12a)—Arrest; commitment.

A prisoner whose attendance for trial by a magistrate in a summary conviction matter has been compelled by arrest without warrant in a case where a warrant is required by law, will be discharged upon habeas corpus from the commitment following conviction, if he protested before the magistrate against the illegal procedure. [See contra, Re Paul (No. 1), 7 D.L.R. 24.]

Re Baptiste Paul (No. 2), 7 D.L.R. 25.

The fact that a person charged before a magistrate with an offence punishable on summary conviction had been brought before the magistrate under arrest without warrant, although a warrant was required by law, does not go to the jurisdiction of the magistrate, nor affect the validity of a conviction and commitment made at the hearing. [Reg. v. Hughes, 4 Q.B.D. 614,

48 L.J.M.C. 151, applied; McGuiness v. Dafoe, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see contra, Re Paul (No. 2), 7 D.L.R. 25.]

Re Baptiste Paul (No. 1), 7 D.L.R. 24.

A prisoner is legally detained where a gaoler has returned a good warrant, based upon a conviction which was not attacked, and which was apparently regular, the law justifying the sentence imposed.

The King v. Fraser, 7 D.L.R. 496.

The Court cannot on an application for the discharge of a prisoner from custody by way of habeas corpus review the action of the magistrate on the merits, or send the prisoner back to the magistrate to impose a lighter sentence where the sentence actually imposed was not in excess of what the law authorized.

The King v. Fraser, 7 D.L.R. 496.

A warrant of commitment is invalid which does not contain even a summary of the nature and gravity of the offence charged against a prisoner, nor give the name of the presiding magistrate who committed him.

Lafleur v. Vallee, 5 D.L.R. 57.

Where the Court has power upon habeas corpus, instead of discharging a prisoner from custody under an invalid commitment, to remit the case to the magistrate under sec. 1120 of the Criminal Code 1906, consideration will be given to the imprisonment already suffered and to the costs to which the accused has been put in moving against the illegal warrant of commitment.

Rex v. Roger Hicks, 7 D.L.R. 171, 22 W.L.R. 236.

An order for discharge on habeas corpus will not be made if a valid cause of detention is shewn at the time of the return to the writ, although it did not exist when the imprisonment commenced. [R. v. Graf, 15 Can. Cr. Cas. 193, 19 O.L.R. 238, and R. v. Morgan (No. 2), 5 Can. Cr. Cas. 272, 3 O.L.R. 356, specially referred to.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

That the magistrate proceeded with the hearing of the evidence on preliminary enquiries for two offences at the same time, against the same accused, is not a ground for habeas corpus in respect of his committal for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

The fact that a warrant of committal for trial was illegally issued on a charge of assault and occasioning actual bodily harm after the Justices before whom the accused had been brought to answer the charge had with his consent entered upon a summary trial thereof, which trial had proceeded to the close of the evidence for the defence, is a ground for discharge upon habeas corpus.

Rex v. Roger Hicks, 7 D.L.R. 171, 22 W.L.R. 236.

(§ I C—12b)—EXTRADITION; REVIEW OF ON HABEAS CORPUS.

It is without the province of a Court, to whom an application is made for writ of habeas corpus directing the discharge of a person to be extradited to a foreign country, to review on such proceedings the decision of the extradition commissioner if there is evidence justifying the issue of the warrant of extradition, the only duty of such Court in that regard being to decide if any such evidence exists.

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123.

The function of a Judge upon the return of a writ of habeas corpus in the case of one who has been committed for extradition is not to sit in appeal from the extradition commissioner, but simply to decide whether he had jurisdiction to order the committal, and evidence offering reasonable grounds of suspicion against the accused will be sufficient for a refusal of his discharge.

United States v. Webber (No. 2), 5 D.L.R. 866, 20 Can. Cr. Cas. 6.

(§ I C—13a)—TRIAL; SENTENCE.

A summary conviction by a city police magistrate under the vagrancy clauses, Criminal Code R.S.C. 1906, ch. 146, secs. 238 and 239, may be quashed for irregularity on proceedings in habeas corpus and certiorari in aid taken on behalf of the defendant committed under such summary conviction, and is, in that respect, distinguishable from convictions made by city police magistrates for indictable offences under their extended jurisdiction under Criminal Code, sec. 777. [Rex v. McEwen, 13 Can. Cr. Cas. 346, 7 Man. L.R. 477, distinguished.]

Rex v. Johnson, 5 D.L.R. 523, 21 W.L.R. 900, 20 Can. Cr. Cas. 8.

A formal commitment of a person under article 459 of the Criminal Code 1906 for house-breaking, on a trial and conviction under article 464 of the Code with having a house-breaking instrument in his possession, is illegal as being upon a charge different than that which was tried, and the prisoner will be discharged on habeas corpus.

Hoolahan v. Malepart, 5 D.L.R. 479.

(§ I C—14)—PROCEEDINGS FOR CUSTODY OF CHILD.

A child which had been placed by its grandparents in the care of B. and his wife was handed over by the latter, who had separated from her husband and was about to leave the Province, to defendant. B. obtained an order from the Court for the adoption of the child and went to defendant and demanded the possession of it, but, before such demand, and without notice of the application made by B. or the granting of the order, defendant, at the request of B.'s wife, had sent the child to her. B. thereupon applied for and obtained an order for a writ of habeas corpus, and upon

a return being made setting out the facts, moved to quash the return and to commit defendant for contempt, or in the alternative, to have the return amended:—Held, following Barnardo v. Ford, [1892] A.C. 326, that the return was good, that there was no contempt and that the application must be dismissed. [R. v. Stirling, 22 N.S.R. 527, and 23 N.S.R. 195, considered.]

Rex v. Parsons, ex parte Boomhauer, 45 N.S.R. 210.

A signed and sealed agreement by a father giving the custody of his infant daughter to her maternal grandparents until she reaches her majority or marries under that age and covenanting that the father would not revoke the instrument, is not a bar to the father's application for a writ of habeas corpus to obtain the custody of his child. [Re Hutchinson, 26 O.L.R. 113, reversed on appeal.]

Re Hutchinson, 5 D.L.R. 791, 3 O.W.N. 1552, 22 O.W.R. 390, 26 O.L.R. 113 and 601.

(§ I C—15)—Powers of amendment.

A conviction under the summary trials clauses (Criminal Code, secs. 771-779) is not subject to amendment on a habeas corpus application as a summary conviction would be.

The King v. Stark, 19 Can. Cr. Cas. 67, 18 W.L.R. 419.

A prisoner confined under an informal warrant of commitment may be held in custody upon a proper warrant being subsequently issued.

Lafleur v. Vallee, 5 D.L.R. 57.

(§ I C—18)—Extradition proceedings; deportation.

The Superior Court of the Province of Quebec has no jurisdiction to revise, annul or modify an order made by the Minister of Agriculture or by a public officer pursuant to the provisions of the Immigration Act (Can.) respecting the deportation of an immigrant; and a writ of habeas corpus asked for that purpose will be refused.

Robinson v. Regimal, 18 Can. Cr. Cas. 478, 13 Que. P.R. 41.

Upon an application on habeas corpus for the discharge of a prisoner from custody, where it appears that in extradition proceedings he was committed upon the charge that he did "on or about the 8th day of February, 1912," obtain a promissory note from a certain party by false pretences with intention to cheat and defraud, and where the proceedings were begun by an information which stated that the offence had been committed on "the 8th day of February, 1911," and where throughout all the documents forwarded from the foreign jurisdiction up to the date of the present application the offence is alleged as of "the 8th day of February, 1911"; the warrant of commitment is invalid. [Extradition Act, R.S.C. 1906, ch. 155. See also United States v. Webber (No. 1), 5 D.L.R. 863; Re Webber et al., 6 D.L.R. 805.]

Re Wm. Staggs (No. 1), 7 D.L.R. 738.

On an application for a writ of habeas corpus for the discharge from custody of a person who was remanded by an extradition commissioner for extradition to France, the only question for examination is whether the extradition proceedings are in strict conformity with the requirements of the treaty of August 14th, 1876, between England and France, of the Imperial Extradition Act 1870, and of the Canadian Extradition Act, R.S.C. 1906, ch. 155.

Re Darracq, 5 D.L.R. 771, 19 Can. Cr. Cas. 483.

On an application for a writ of habeas corpus for the discharge from custody of a prisoner remanded by an extradition commissioner for extradition to a foreign country the justice or the propriety of the order of the commissioner in that regard cannot be inquired into. [United States of America v. Gaynor and Green, 9 Can. Crim. Cas. 205; United States v. Gaynor, [1905] A.C. 128, followed.]

Re Darracq, 5 D.L.R. 771, 19 Can. Cr. Cas. 483.

D. Procedure; judgment.

(§ I D—21)—Sufficiency of petition or application.

An application for a writ of habeas corpus in a criminal matter will not be entertained without the production of the warrant of commitment, or a copy thereof, or proof that a copy could not be obtained for the prisoner.

Ex parte Aubin, 19 Can. Cr. Cas. 94, 13 Que. P.R. 27.

The grounds upon which a motion for a habeas corpus and certiorari in aid is founded must be stated in definite terms and a mere statement that the magistrate "exceeded his jurisdiction in convicting and sentencing said prisoner" is too vague and general to be dealt with, and may be ignored.

The King v. Mali (No. 1), 1 D.L.R. 256, 20 W.L.R. 217, 48 C.L.J. 157, 22 Man. L.R. 29.

Affidavits entitled in the Supreme Court of Saskatchewan and in the matter of the conviction, specifying the particulars of same, sufficiently set out a style of cause for the purpose of a habeas corpus application under Saskatchewan Crown Practice Rule 39. [Rex v. Harris, 6 Terr. L.R. 376, followed.]

Re Ching How, 1 D.L.R. 275, 19 W.L.R. 891, 19 Can. Cr. Cas. 176.

On an application for a writ of habeas corpus with certiorari in aid, it is primâ facie sufficient that the warrant be proved by an affidavit of the gaoler, and that the fact that the applicant is not detained for any other cause be proved by an affidavit of the applicant instead of proving both

by the affidavit of the prisoner. [Compare R. v. Skinner, 9 Can. Cr. Cas. 558; see also Tremeear's Criminal Law and Evidence, 2nd ed., pp. 822, 823.]

Re Ching How, 1 D.L.R. 275, 19 W.L.R. 891, 19 Can. Cr. Cas. 176.

(§ I D—23)—BURDEN OF PROOF.

The onus is upon the defendant on a habeas corpus application to disprove a recital of his consent to summary trial contained in a conviction following Code form 55 (Criminal Code 1906, sec. 799).

The King v. Mali, 1 D.L.R. 484, 20 W.L.R. 601, 19 Can. Cr. Cas. 188.

II. In Supreme Court of Canada.

(No cases.)

HABITUAL DRUNKARD.

As to drunkenness generally, see Drunkenness.

As to interdiction, see Interdiction.

HANDWRITING.

Opinion evidence as to, see Evidence, VII.

HARBOURS.

(§ I—5)—PUBLIC HARBOUR; WHAT CONSTITUTES.

A place does not necessarily become a "public harbour," within the meaning of sec. 108 of the B.N.A. Act, 1867, because public moneys had been expended by the Federal Government at that place and several government wharves are situated there. [Fisheries Case, [1898] A.C. 700, applied.]

Pickels v. The King, 7 D.L.R. 798.

HEALTH.

I. BOARDS OF HEALTH.

II. EPIDEMICS.

III. REGULATIONS TO PROTECT HEALTH.

IV. DESTRUCTION OF PROPERTY TO PROTECT.

V. LIABILITY OF OFFICERS.

Destroying injurious articles, see Destruction of property.

Representations as to, application for insurance, see Insurance.

Municipal liability as to contagious disease, see Municipal Corporations.

Nuisance as to health, see Nuisance.

I. Boards of health.

(§ I—1)—BOARDS OF HEALTH.

Where a building is used or established as a hospital for all contagious diseases, its establishment and user as such must be in compliance with and governed by sec. 43 (w) of the by-laws of the Board of Health of the Province of Quebec.

MacIntosh v. City of Westmount, 8 D.L.R. 820.

II. Epidemics.

(No cases.)

III. Regulations to protect health.

(§ III A—10)—REGULATION TO PROTECT HEALTH.

Municipal by-law fixing percentage of butter fat in milk ultra vires—Dominion Adulteration Act.

City of Regina v. Sharley, 5 D.L.R. 877.

IV. Destruction of property to protect.

(§ IV—20)—DESTRUCTION OF PROPERTY TO PROTECT.

The Public Health Act of the Province of Quebec does not justify the destruction of goods seized as deleterious to the public health; and the power to destroy will not be inferred from a statute authorizing health officers "to dispose of them (the articles seized) so that they shall not be offered for sale or served as food for man."

City of Montreal v. John Layton & Co., Ltd., 1 D.L.R. 160.

V. Liability of officers.

(No cases.)

HEARSAY.

As to hearsay evidence, see Evidence.

HEIR.

As to descent and distribution to, see Descent and Distribution.

Distribution to, see Executors and Administrators, IV.

Devise in favour of, see Wills.

HIGHWAYS.

I. ESTABLISHMENT; WIDTH.
- A. Establishment.
- B. Width.

II. TITLE; USE; OBSTRUCTION.
- A. In general; title and property rights.
- B. Uses; what allowed in street generally.
- C. Obstruction generally.
- D. Use and obstruction by railroads.
- E. Rights as to trees or materials in street.

III. IMPROVEMENTS; REPAIRS; FIXING AND CHANGING GRADE.

IV. DEFECTS; LIABILITY FOR INJURIES TO TRAVELLERS.
- A. Liability of municipality.
- B. Liability of others.
- C. Contributory negligence.
- D. Notice.

V. DISCONTINUANCE; ALTERATION; ABANDONMENT.
- A. Discontinuance.
- B. Alteration.
- C. Abandonment.

VI. HIGHWAY OFFICERS.

Municipal by-laws regulating use of highways, see Municipal Corporations, III.

Use and obstruction of streets by street railways, see Street Railways.

Use of automobiles on, see Automobiles.

As to bridges, see Bridges.

Negligence on, generally, see Negligence, I.

I. Establishment; width.

A. Establishment.

(§ I A—7)—DEDICATION,

In order to establish the dedication of land as a public highway, an intention to dedicate must be shewn, and, though there may be facts indicating a dedication, yet, if, in the light of all the circumstances, there appears to have been an absence of any intention to dedicate, dedication is not established. [Sinclair v. Peters, 3 D. L.R. 664, affirmed.]

Sinclair v. Peters, 8 D.L.R. 575, 4 O. W.N. 338, 23 O.W.R. 441.

II. Title; use; obstruction.

A. In general; title and property rights.

(§ II A—21)—RIGHTS AND TITLE OF PUBLIC.

Every municipal road or every part of the municipal road, wholly situate in one local municipality, is by law (755 C.M.) a local road and preserves its character until the County Council or the board of delegates do not take advantage of the prerogatives conferred upon them by arts. 758 and 759 of the Municipal Code.

Brunet et Hainault v. Corp. du Comte de Beauharnois, 18 Rev. de Jur. 141.

(§ II A—23)—RIGHTS AND TITLE OF ABUTTING OWNER.

Where the facts do not establish an immediate necessity for opening and grading a public street, a municipal corporation will not be required to do so under the terms of an agreement between the municipal corporation and the dedicators of the right of way, whereby the municipality was to open and grade, "when necessary," certain streets in a sub-division in which the plaintiff was an owner under conveyance from the dedicators of lots abutting a new street so contracted for.

Hutchison v. City of Westmount, 3 D. L.R. 333.

B. Uses; what allowed in street generally.

(§ II B—34)—BRIDGES OVER.

A bridge crossing a river, connecting the separated parts of a public highway is part of the highway itself and is also a public place and is within the operation of sec. 248, sub-sec. 2 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

County of Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 3 O.W.N. 607, 21 O.W.R. 194, 25 O.L.R. 467.

(§ II B—35)—DRIVERS OF AUTOMOBILES AND OF HORSES.

Both drivers of automobiles and drivers of horses have a perfect right to use the highway, but the right of each is subject to the qualification that he must use it in conformity with any statutory requirements, and not so as to make its use dangerous to others. [Marshall v. Gowans, 24 O.L.R. 522, referred to.]

Stewart v. Steele, 6 D.L.R. 1, 22 W. L.R. 6.

(§ II B—47)—ELECTRIC LIGHT WIRES, POLES AND CONDUITS.

The powers conferred upon the Toronto and Niagara Power Co. by secs. 12 and 13 of its Act of incorporation of 1902, remain intact notwithstanding the provisions of the Railway Act, R.S.C. 1906, ch. 37, and that company is entitled to erect poles for the purpose of stringing power of transmission lines along the streets of a municipality, without the consent of the municipality. [Toronto and Niagara Power Co. v. Town of North Toronto, 2 D.L.R. 120, reversed on appeal.]

Toronto and Niagara Power Co. v. Town of North Toronto, 5 D.L.R. 43, 32 C.L.T. 826, 28 Times L.R. 563, 23 O.W.R. 85.

All doubt as to the power of a company to erect poles to carry electric wires through the streets and public places of a city is concluded by the fact that the city agreed to grant the company permits, under certain conditions, to erect poles therein, and requiring that it should permit the use thereof by other companies, and also by the city for wires of its fire alarm system, or for heat and light.

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

A city that has, under a general by-law, granted permits to a company to erect poles in its streets and public places cannot, after such permits have been acted upon, require the removal of such poles on the ground that the permits were void because issued without the adoption of a by-law in each instance. [Winnipeg v. Winnipeg Electric R. Co., 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

Powers conferred by a special Act of Parliament incorporating an electric light and power company whose powers include the erection of poles and the doing of all things necessary for the transmission of light, heat and power, provided that the same is done so as not to "incommode" the public use of streets are not in conflict with the provisions of an amended section of a general Act, which is made applicable to the corporation by its Act of incorporation, and which makes it a condition precedent to the erection of poles that the consent of the municipal council shall be first obtained.

Toronto and Niagara Power Co. v. Town of North Toronto, 2 D.L.R. 120, 3 O.W.N. 609, 21 O.W.R. 175, 25 O.L.R. 475.

(§ II B—49)—TELEGRAPH AND TELEPHONE LINES.

The powers conferred on the Bell Telephone Company of Canada by its Act of incorporation authorizing it to erect its lines along the side and across or under any public highway, bridges, etc., are controlled by the Railway Act, R.S.C. 1906, ch. 37, sec. 248, which imposes certain conditions precedent to the construction by any telephone company of its lines, and this notwithstanding that the word "bridges" is specially mentioned in the incorporating Act and omitted from the Railway Act. [43 Vict. (Canada) ch. 67, sec. 3; R.S.C. 1906, ch. 37, sec. 248, subsec. 2; Toronto v. Bell Telephone Co. of Canada, [1905] A.C. 52, referred to.]

County of Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 3 O.W.N. 607, 21 O.W.R. 194, 25 O.L.R. 467.

C. Obstruction generally.

(§ II C—67)—OF SIDEWALK.

A building contractor who in the course of building operations obstructs part of streets and sidewalks after he has obtained a municipal permit so to do is not liable in damages for the inconvenience and annoyance and even losses caused thereby to the public and neighbouring proprietors provided every precaution be taken to prevent the aggravation of this servitude, and the public and neighbouring occupants are bound to suffer such temporary interference with their rights.

Cochenthaler v. Pauzé, 2 D.L.R. 234.

D. Use and obstruction by railroads.

(§ II D—70)—USE AND OBSTRUCTION BY RAILROADS.

Application for leave to carry Inkerman street across the lands of the respondent. Inkerman street was not opened up to the right of way of the respondent on the south side and there was a block of land owned by the respondent between its terminus and the said right-of-way:—Held, 1. That under sec. 237 of the Railway Act, the Board had jurisdiction to give leave to construct a highway across "any railway." 2. That under sec. 2 (21) of the Railway Act, the word "railway" included real property such as the said block of land. 3. That the application should be refused as not being in the public interest because the crossing would be dangerous and would almost at once require protection. Mr. Commissioner McLean questioned whether "railway," as used in sec. 237, would include more than the full width of the right of way and not "property, real or personal and works connected therewith."

City of St. Thomas v. Grand Trunk Ry. Co. (File No. 18804), 13 Can. Ry. Cas. 134, 22 O.W.R. 257.

(§ II D—71)—RIGHT TO CROSS STREET.

Where it appeared that a testator had for years used as a private road a strip of his lands and in his will reserved the same as a public road by words insufficient to amount to a dedication of such strip for such purpose, the reservation apparently being made for the purpose of widening a public road which was established many years after he had made his private road on a strip of land adjoining his by the owner thereof, and where an order of the Dominion Board of Railway Commissioners granted the application of a railway company for permission to cross the public road which was described in the plan accompanying the application somewhat inaccurately as the road between the testator's land and the adjoining land above mentioned which order was made after a contest which was confined to the terms upon which the railway company should be permitted to cross the public road, nothing being said about the private road and no question being raised as to whether it was or was not part of the public road, such order did not give the railway company any permission to cross the private road.

Canadian Northern R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

(§ II D—72)—RIGHT TO USE OR OCCUPY STREET GENERALLY.

A roadway running alongside a railway track used by vehicles and pedestrians is a highway within the meaning of the Railway Act of Canada.

Grand Trunk R. Co. v. McSween, 2 D. L.R. 874.

III. Improvements: repairs; fixing and changing grade.

(§ III—100) — IMPROVEMENTS; REPAIRS; FIXING AND CHANGING GRADE.

The fact that a special superintendent testified in the office of the counsel to an information which he had to make, two days after the expiration of the delay fixed for so doing, will not render the proceedings an absolute nullity if it does not result in any substantial injustice. The costs of opening and maintaining a road, which does not lead from one range to another, or which does not lead exclusively to a ferry or to a toll bridge, must fall on the corporation.

Frechette v. Corp. du Comte de St. Maurice, 18 Rev. de Jur. 49.

(§ III—104)—FIXING AND CHANGING GRADE OF STREET.

In a complaint lodged before the Quebec Public Utilities Commission it is sufficient to allege an interference with the public right of travel or an obstruction to free access to a building in order to

give such commission jurisdiction to proceed to the merits of the complaint, and an exception to such jurisdiction on the ground that the municipal corporation has alone jurisdiction to deal with the road complained of will be dismissed. (R.S.Q. 741 et seq.)

Canadian Light and Power Co. v. Julien, 2 D.L.R. 496, 21 Que. K.B. 476.

Changing grade of street.

Bergeron v. City of Hull, 2 D.L.R. 923.

In the matter of the local road, no taxpayer of a local municipality can be held to work on a road situated in a neighbouring local municipality, unless such road is a county road, and the only county roads which may exist, under the Municipal Code, are those by nature, by virtue of art. 755, and those by will of the County Council, by virtue of arts. 758, 761 and 762.

Brunet et Hainault v. Corp. du Comte de Beauharnois, 18 Rev. de Jur. 141.

(§ III—113) — DIVERTING; MUNICIPAL BY-LAW.

A municipal by-law, for the diversion and closing of certain highways and the transfer of the land to a railway company, provided that it should "come into force and effect" on the execution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council"; it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The statute 3 and 4 Edw. VII., ch. 64, sec. 708, sub-sec. c (1), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a Judge "within ten days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a Judge, under the section of the statute above referred to, within ten days after the enactment of the second by-law:—Held, that the words "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective; that the first by-law did not come into force and effect in such a manner as injuriously to affect the defendants until it was ratified and confirmed by the subsequent by-law; and, consequently, the defendants' appeal came within the time limited by the statute. [Judgment of the Court of Appeal for Manitoba, 20 Man. L.R. 669, 18 W.L.R. 28, affirmed.]

City of Winnipeg v. Brock, 20 W.L.R. 243.

Re Seguin v. Village of Hawkesbury, 6 D.L.R. 903, 4 O.W.N. 239.

(§ III—114)—WIDENING.

A statutory provision, authorizing municipal corporations "to fix the location or width of roads or highways and to establish boundary lines the positions of which (owing to obliteration of the original monuments defining the same on the ground) have become doubtful or difficult of being ascertained," is not in its terms or by implication wide enough to authorize the expropriation of land for the purpose of widening a road. [Sec. 3, Special Survey Act, R.S.M. 1902, ch. 158, as amended by sec. 1, 10 Edw. VII. (Man.), ch. 62, construed.]

Peterson v. Bitulithic and Contracting Co., 7 D.L.R. 586, 22 W.L.R. 398.

IV. Defects; liability for injuries to travellers.

A. Liability of municipality.

(§ IV A 4—147f)—POLE IN STREET.

The negligent failure of a township to remove a pole erected in the highway by stranger is a non-feasance not a misfeasance.

Howse v. Township of Southwold, 5 D. L.R. 709, 3 O.W.N. 1295 and 1592, 22 O. W.R. 797, 27 O.L.R. 29.

An action against a township for injuries received by a person colliding with a pole erected upon the highway by a telephone company who had no statutory or other right to do so falls within sub-sec. 1 of sec. 606, of the Municipal Act, R.S.O. 1897, ch. 223, and must be brought within three months after the damage has been sustained as required by such section.

Howse v. Township of Southwold, 5 D. L.R. 709, 3 O.W.N. 1295 and 1592, 22 O. W.R. 797, 27 O.L.R. 29.

(§ IV A 5—154)—ICE AND SNOW.

The neglect of a municipality to take any steps to make its sidewalks safe for travel in the winter season when ice and frozen snow accumulated thereon in such a manner as to make the sidewalks dangerous for pedestrians is a breach of a statutory duty to keep the sidewalks "in repair." [Taylor v. City of Winnipeg, 12 Man. L.R. 481; Ringland v. Toronto, 23 U.C.C.P. 93; Walker v. City of Halifax, 16 N.S.R. 371; Gordon v. Belleville, 15 O.R. 29, considered; City of Kingston v. Drennan, 27 Can. S.C.R. 46, distinguished.]

Touhey v. City of Medicine Hat, 7 D. L.R. 759.

Snow and ice—Injury to pedestrian—Gross negligence—Damages.

Yates v. City of Windsor, 3 D.L.R. 891, 3 O.W.N. 1513, 22 O.W.R. 608.

(§ IV A 5—154a)—DEPRESSION OR HOLE IN PAVEMENT.

Where personal injury results from negligent protection of a drain in a muni-

cipal corporation highway, opened by a gas company, the municipality is not relieved from liability for the injury resulting from breach of a statutory obligation to maintain them in a safe condition, by setting up that the authority to open the streets was given to the gas or water company by the Legislature, since that authority was subject to the consent of the municipality, nor by setting up that the municipality did not consent to the making of the excavation. [Cummings v. City of Vancouver, 19 W.L.R. 322, affirmed on appeal.]

City of Vancouver v. Cummings, 2 D. L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194.

(§ IV A 6—155)—DEFECT IN SIDEWALKS.

Where a person is injured by a fall as the result of a defective sidewalk bordering on a road managed by road commissioners in Quebec, no liability whatsoever attaches to such trustees, and if action be taken against them the plaintiff will be nonsuited, as the duties of the road commissioners extend to the roadbed only, and the municipal corporation has control of the sidewalks.

Raby v. Road Commissioners v. Town of St. Paul and City of Montreal, 2 D.L.R. 511, 42 Que. S.C. 26.

(§ IV A 6—156)—LACK OF REPAIR.

The owner of a house in a municipality whose by-laws oblige him to maintain the street and sidewalk opposite it in a specified manner is liable in damages for injury to a passer-by who breaks a limb owing to the defective condition of such street or sidewalk. When the by-law states what means shall be used to obviate danger to passers-by it is not sufficient to conform to its letter; it is necessary, in addition, to use the usual means for safety, e.g., if there is glare ice to cover it with salt, ashes or sawdust or other proper material.

Vidal v. The John D. Ivey Co., 4 Que. S.C. 509 (Ct. Rev.).

Municipal corporations are obliged to maintain their streets and sidewalks in a safe state of repair, so as to allow their use without danger; default in so doing makes them liable for damages which result of such neglect.

Leblanc v. Fraserville, City of, 42 Que. S.C. 539 (Ct. Rev.).

Non-repair—Fall on sidewalk—Findings of fact—Liability of municipal corporation.

Deutschmann v. Village of Hanover, 6 D.L.R. 860, 4 O.W.N. 134.

It is actionable negligence for a municipal corporation, in rebuilding a sidewalk, to cover an opening therein with an old, defective grating, through which a person fell and was injured. [Cooksley v. New Westminster, 14 B.C.R. 330, referred to.]

MacPherson v. City of Vancouver, 2 D. L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926.

(§ IV A 6—157)—STEP IN; NON-REPAIR; INJURY TO PEDESTRIAN.

Armstrong v. Town of Barrie, 6 D.L.R. 851, 4 O.W.N. 64, 23 O.W.R. 243.

B. Liability of others.

(§ IV B 3—176)—DEFECTS IN SIDEWALKS.

If sub-sec. 20 of art. 5641 of the Cities and Towns Act, R.S.Q. 1909, providing that every owner of land situated on any street, public way, etc., established in a municipality (which owner of land is obliged by the municipal council under the authority of sub-sec. 3 of said art. 5641 to make and maintain a sidewalk in front of his property) shall be responsible towards the municipality for the damages resulting from his neglect and may be called in warranty by the municipality in all cases brought against it for damages, renders such owner not only liable in warranty to the municipality but also to the public, he can be so only jointly and severally with the corporation, and therefore no action for injury to a person resulting from a defective sidewalk can be maintained against the abutting owner alone.

Batsford v. Laurentian Paper Co., 5 D. L.R. 306, 41 Que. S.C. 367, 18 La Rev. de Jur. 70.

An adjoining property owner is exempt, under sub-sec. 149-154 of Vancouver Incorporation Act (1900), ch. 54, from liability over on a judgment against a municipal corporation for personal injuries sustained by a defect in a sidewalk due to the negligence of the agents or servants thereof. [Sombra v. Township of Moore, 19 Ont. A.R. 144 at p. 150, specially referred to.]

MacPherson v. City of Vancouver, 2 D. L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926.

A property owner does not "leave" or "maintain" an excavation under an adjoining sidewalk, within the meaning of sub-sec. 149-154 of Vancouver Incorporation Act (1900), ch. 54, so as to render him liable over on a judgment against a municipal corporation for injuries sustained by falling through an old, defective grating, placed in the sidewalk by the servants or agents of the city over an opening therein, notwithstanding such excavation was for the use and convenience of the adjoining owner.

MacPherson v. City of Vancouver, 2 D. L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926.

(§ IV B 3—182)—ACTS OF INDEPENDENT CONTRACTOR.

One who, as an independent contractor and for his own profit, agrees with a municipal corporation to do work upon a highway within the municipality, is liable in damages to persons who, without fault on their part, are injured by reason of any obstruction to the highway caused by him. [Tilling v. Dick, [1905] 1 K.B. 562,

at p. 571, and City of Birmingham v. Law, [1910] 2 K.B. 965, referred to.]

Hawkins v. McGuigan, 3 D.L.R. 307, 3 O.W.N. 564.

C. Contributory negligence.

(§ IV C—222)—ALTERNATIVE HIGHWAY.

Where an obstruction has been placed upon a highway, failure on the part of one using the highway to avail himself of an alternative road provided by the person responsible for the obstruction does not of itself disentitle him to recover damages for injuries sustained by reason of the obstruction, but the question of contributory negligence may still be left to the jury.

Hawkins v. McGuigan, 3 D.L.R. 307, 3 O.W.N. 564.

D. Notice.

(§ IV D 1—231)—NECESSITY OF.

Lack of notice of the existence of a defect in a sidewalk will not avail a municipal corporation as a defence to an action for injuries thereby sustained, where the defect was caused by a contractor employed by the year by the city to build, under the direction of the city officials, all sidewalks required. [Rice v. Whitby, 25 Ont. A.R. 191, and McGregor v. Harwich (1899), 29 Can. S.C.R. 443, referred to.]

MacPherson v. City of Vancouver, 2 D. L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926.

(§ IV D 1—232)—IMPLIED.

Where a hole has been opened in a municipal street, a Court may infer that it would attract the attention or notice of municipal officials entrusted with the oversight or guarding of the street, and further, that the failure of such an official to report the existence of the hole, was in itself a breach of duty by said official for which the municipal corporation is liable. [McClelland v. Manchester, [1912] 1 K.B. 118, followed.]

City of Vancouver v. Cummings, 2 D. L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194.

(§ IV D 2—235)—OF INJURIES.

The failure to give notice to the clerk of a municipality within sixty days of an injury sustained on a defective sidewalk without an explanation sufficient to justify the Court to permit the maintenance of the action after the expiration of such period, or the failure to begin action for injury against the municipality within six months of the date of the accident as required by art. 5864 of the Cities and Towns Act, R.S.Q. 1909, will bar an action not only against the municipality but also against the property owner who is answerable to the municipality under secs. 20 of art. 5641 of said Cities and Towns Act for failure to maintain such sidewalk in a safe condition as required by a municipal by-law, whether the liability created by such sub-sec. 20 rendered the property holder liable to the public as well as to the municipality or only gave a right to the municipality to call him in as warrantor.

Batsford v. Laurentian Paper Co., 5 D. L.R. 306, 41 Que. S.C. 367, 18 La Rev. de Jur. 70.

V. Discontinuance; alteration; abandonment.

A. Discontinuance.

(§ V A 1—245)—DISCONTINUANCE.

A municipal by-law to close a public highway, the passage of which is authorized by statute, is ultra vires, unless passed in compliance with the provisions of the statute, including such requirements as notice to the owners of lands abutting on the highway in question and public notice by advertisement. [The Town Act, 2-3 Geo. V. (Alta.), ch. 2, sec. 163, subsec. 17, construed.]

Re Bassano, 7 D.L.R. 601.

B. Alteration; diversion of street.

(§ V B—255)—ALTERATION; DIVERSION OF STREET.

An abutting owner cannot claim a right to possession of an original road allowance unless he can establish that he or his predecessors in title had laid out and opened a new public road in lieu of the original road allowance, without having received compensation therefor. [3 Edw. VII. (Ont.), ch. 19, sec. 641, referred to.]

Mills v. Freel (No. 2), 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45, affirming Mills v. Freel, 2 D.L.R. 923, 3 O.W.N. 1240.

Where it was impracticable because of physical obstacles therein to open a part of a road allowance between two townships, and, to take its place, another road running parallel thereto, but wholly within one township, was opened through private lands and dedicated by their owner to public use and his dedication was accepted by the council of the county in which the townships were located, and, in lieu thereof, the old unopened part of the boundary line allowance was conveyed to him by the council, and the public for more than fifty years used the new road to reach points which would have been reached over the original allowance if it had been opened, such road was, and is, a deviation of a town line road within the meaning of sec. 622 of the Ontario Municipal Act, 1903, giving jurisdiction to adjoining townships over a road lying wholly or partly between them, "although the road may so deviate as in some places to be wholly or in part within either of them," notwithstanding the fact that the new road did not actually terminate in the old line, if by means of some other public road, the old original line might be conveniently reached and its main purpose—a way into a certain city—accom-

plished. [Township of Fitzroy v. County of Carleton, 9 O.L.R. 686, distinguished.]

County of Wentworth v. Township of West Flamborough, 3 D.L.R. 479, 3 O.W.N. 1024, 21 O.W.R. 876, 26 O.L.R. 199.

(§ V B—256)—PUBLIC SERVICE CORPORATION CROSSING; SUBSTITUTION.

Where in the exercise of a right conferred by statute upon a public service corporation, a public highway is interrupted by the work which the public service corporation is authorized to construct, there is an implied obligation that the public service corporation shall maintain an adequate substitute for the highway by a bridge or other means. [The King v. Alberta R. and Irrigation Co., 3 Alta. L.R. 70, affirmed on appeal; Alberta R. and Irrigation Co. v. The King, 44 Can. S.C.R. 505, reversed on appeal. See also The Queen v. Inhabitants of the Isle of Ely, 117 Eng. Reports 671, 15 Q.B. 827, 19 L.J.M.C. 223, 14 Jur. 956; R. v. Southampton, 17 Q.B.D. 435; Hertfordshire County Council v. New River Co., [1904] 2 Ch. 520.]

Rex v. Alberta Railway and Irrigation Co., 7 D.L.R. 513.

C. Abandonment.

(§ V C—260)—ABANDONMENT.

Where an original road allowance was opened up and actually used by the public throughout its entire length, the fact that, for a short distance, it is only travelled occasionally does not amount to an abandonment; the road opened up by an abutting owner across his land not "in lieu" or "in place" of the original road allowance is in addition to and not in substitution thereof, and the abutting owner cannot claim the benefit of the provisions of 3 Edw. VII. (Ont.), ch. 19, sec. 642, by which an abutting owner who encloses an unopened road allowance with a lawful fence where he has provided a substituted road, is legally possessed thereof against any private person. [Mills v. Freel, 2 D.L.R. 923, 3 O.W.N. 1240, affirmed on appeal.]

Mills v. Freel (No. 2), 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45.

Where in pursuance of a municipal by-law a portion of a public road was diverted to run a different course and the use to the former piece of road was granted to certain mill-owners, but on which public traffic continued, does not operate as an abandonment or as a change of the public character thereof so as to entitle one through whose land it traversed to fence it in or to erect any barriers thereon.

Nolin v. Gosselin, 18 Rev. de Jur. 306.

VI. Highway officers.

(§ VI—265)—HIGHWAY OFFICERS.

Road commissioners in the Province of Quebec are entrusted with the management, making and repairing of roads; but this trust comprises the roadbed only and does not extend to the construction and maintenance of sidewalks, which fall exclusively under the jurisdiction of the municipal corporations within which they are situate. [Lalonge v. St. Vincent de Paul, 27 Que. S.C. 218, specially referred to.]

Raby v. Road Commissioners v. Town of St. Paul and City of Montreal, 2 D.L.R. 511, 42 Que. S.C. 26.

(§ VI—266)—PATHMASTERS.

A pathmaster acting within the scope of his instructions from a municipality is not liable to an abutting owner for the removal of a fence erected by the latter enclosing a portion of a road allowance. [Mills v. Freel, 2 D.L.R. 923, 3 O.W.N. 1240, affirmed on appeal.]

Mills v. Freel (No. 2), 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45.

HOLIDAYS.

Effect of on computation of time, see Time.

For taking appeal, see Appeal.

Trial on, of one accused of crime, see Criminal Law.

See also Sunday.

HOMESTEAD.

I. THE EXEMPTION GENERALLY.
- A. In general; who may claim.
- B. In what property.
- C. Establishment by occupancy.

II. CREDITORS' RIGHTS.

III. LOSS; ABANDONMENT.

IV. ALIENATION; ENCUMBRANCE AND TRANSMISSION OF EXEMPT PROPERTY.
- A. Sale, lease or mortgage.
- B. Transmission in case of death.

V. ALLOTMENT AND SETTING APART.

As to exemptions, generally, see Exemptions.

I. The exemption generally.

A. In general; who may claim.

(§ I A—1)—IN GENERAL.

Land acquired as a homestead under the Dominion Lands Act and exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), will become liable to execution immediately upon the land ceasing to be a "homestead."

Trottier v. National Manufacturing Co., Ltd., 8 D.L.R. 138, 22 W.L.R. 615.

Though an execution is registered against land which is really a homestead acquired under the Dominion Lands Act, and hence exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), such registration does not constitute a cloud upon title, but is merely an "apparent charge," since the land may at any time

cease to be a "homestead" by the act of the debtor and it would then immediately become liable to the execution.

Trottier v. National Manufacturing Co., Ltd., 8 D.L.R. 138, 22 W.L.R. 615.

Whether a piece of land is a homestead under the Dominion Lands Act, and hence exempt from execution under the Exemptions Act (ch. 47, R.S.S. 1909), is a question for the Court and not for the registrar to decide. [Re Exemptions Ordinance, Love v. Bilodeau, 7 D.L.R. 175, referred to.]

Trottier v. National Manufacturing Co., Ltd., 8 D.L.R. 138, 22 W.L.R. 615.

II. Creditors' rights.

(No cases.)

III. Loss; abandonment.

(§ III—23)—WAIVER.

The right of exemption of a homestead from seizure under execution under Alberta law, Revised Ord., 1911 (Alta.), ch. 27, although once complete, may cease by reason of some act or conduct on the part of the owner forfeiting his claim to exemption.

Love v. Bilodeau, 7 D.L.R. 175.

IV. Alienation; encumbrance and transmission of exempt property.

(§ IV—25)—ALIENATION.

Whether land on which an execution was levied was a homestead, or whether a sale thereof to another rendered it liable to an execution registered in the land titles office prior to such sale, are mixed questions of law and fact.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

A. Sale, lease or mortgage.

(§ IV A—30)—LEASE.

An administrator of a deceased's estate cannot be compelled to perform, nor is he liable on, an agreement entered into by him prior to the grant of letters of administration, and sec. 89, sub-sec. 4 of the Land Titles Act, 1894, is merely declaratory of the common law and causes the title of an administrator to relate back to the date of deceased's death for administration purposes solely, and in the interests of the estate. A lease of homestead land prior to the issue of recommendation for patent is void, under 60-61 Vict. ch. 29, sec. 5. [Flannagan v. Healey, 4 Terr. L.R. 391, approved.]

Larry, Administratrix v. Baker et al., 7 Terr. L.R. 145.

V. Allotment and setting apart.

(No cases.)

HOMICIDE.

I. IN GENERAL.
II. WHAT REDUCES CRIME TO MANSLAUGHTER.
III. EXCUSABLE OR JUSTIFIABLE HOMICIDE.
A. In general.
B. Self-defence.

Accused as a witness; cross-examination, see Criminal Law, II.

Review of discretion as to admission of evidence, see Appeal.

Error in exclusion of evidence on prosecution for, see Appeal.

Prejudicial error in conduct of trial, see Appeal.

Liability of insane person committing, see Criminal Law.

Attempt to commit, see Criminal Law.

Stay of execution of death sentence, see Criminal Law.

Burden of proof as to insanity, see Evidence.

Evidence of confessions on trial for, see Evidence, VIII.

Admissibility of dying declarations, see Evidence, X.

Sufficiency of indictment for, see Indictment.

Instructions on trial for, see Trial.

Change of venue in prosecution for, see Venue.

Cross-examination of accused, see Witnesses.

Contradicting or discrediting witnesses on trial for, see Witnesses.

I. In general.

(No cases.)

II. What reduces crime to manslaughter.

(No cases.)

III. Excusable or justifiable homicide.

(No cases.)

HORSE RACE.

Statute prohibiting bookmaking and pool selling, see Gaming.

(§ I—1b)—BOOK-MAKING.

Action, cause of—Conspiracy—Bookmaker—Exclusion of, from race track—Interference with business.

Scully v. Madigan, 4 O.W.N. 394, 23 O.W.R. 876.

HORSES.

Generally, see Animals.

Injury to, while in hands of bailee, see Bailment.

Negligence in fast driving, see Highways.

Negligence in driving vicious horse, see Negligence.

Permitting to run at large, see Proximate Cause.

Injury to, by railroad train, see Railways, II.

Breach of warranty on sale of, see Sale.

HOSPITALS.

(§ I—6) — ESTABLISHMENT BY PUBLIC AUTHORITY.

The obtaining of the consent of the municipality within which certain lands lie, to the use of said lands by another municipality for an isolation hospital required under sec. 104 of the Public Health Act, R.S.O. 1897, ch. 248, is not a condition precedent to the acquiring municipality's power to make the purchase.

Verner v. City of Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

HOTELS.

Liability of innkeepers, see Innkeepers.

License to sell intoxicating liquors in, see Intoxicating Liquors.

See also Innkeepers.

HOUSE OF ILL-FAME.

See Disorderly Houses.

HUSBAND AND WIFE.

I. RIGHTS, LIABILITIES AND DISABILITIES GENERALLY.
- A. Of husband.
- B. Of wife.
- C. Joint liabilities.

II. PROPERTY RIGHTS; TRANSACTIONS BETWEEN.
- A. In general.
- B. Estate by entireties.
- C. Community property.
- D. Wife's separate estate or business.
- E. Contracts with or conveyances to each other.
- F. Conveyances or mortgages to third persons.
- G. Trusts.
- H. Partnership.
- I. Antenuptial contract.
- J. Fraud on marital rights.
- K. Rights of husband's creditors.

III. ACTIONS.
- A. By husband.
- B. By wife.
- C. By both husband and wife.
- D. Between husband and wife.

IV. ABANDONMENT OF WIFE.

V. WIFE'S AUTHORITY TO SUE OR DEFEND.

As to bigamy, see Bigamy.

As to breach of promise, see Breach of Promise.

As to curtesy, see Curtesy.

Divorce and separation, see Divorce and Separation.

As to dower, see Dower.

Admissibility of statements of deceased husband to wife, see Evidence.

Gift by husband to wife, see Gift.

As to marriage, see Marriage.

Competency of, as witnesses, see Witnesses, I.

Custody of children, see Divorce and Separation; Infants.

I. Rights, liabilities, and disabilities generally.

A. Of husband.

(§ I A 2—15)—LIABILITIES.

The father of a woman voluntarily living away from her husband cannot recover from his son-in-law the moneys he disbursed for the board and lodging, travels and medical attendance of his daughter, even though the husband knew thereof and had even visited his wife at her father's residence.

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

Creditors of the wife cannot urge against the husband any greater rights than the wife herself could have brought forward.

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

(§ I A 2—16)—ON CONTRACTS BY, OR FOR SUPPORT OF, OR NECESSARIES FURNISHED TO, WIFE; TO WIFE BY ESTOPPEL.

Where a man represents a woman to be his wife, and a third party acts upon that representation to the extent of selling necessaries to the alleged wife, the man is estopped from saying that she is not his wife, in an action to recover the purchase price of the goods. [Munro v. De Chemant (1815), 4 Camp. 215, 216; Hawley v. Ham (1826), Tay. 386, followed; Bowstead on Agency, 4th ed., p. 38, and 21 Cyc. 1233, cl. 12, referred to.]

Redferns Limited v. Inwood, 8 D.L.R. 618, 4 O.W.N. 75, 27 O.L.R. 213.

Where a deed of separation entered into by a husband and wife contains no covenant on the part of the wife to maintain herself and no covenant not to institute alimony proceedings against the husband, the wife not having released her right to be maintained, the mere agreement to live separate, and the payment of the sum of $250 by the husband to the wife, together with several debts referred to in the deed, does not relieve the husband from his liability to support and maintain the wife, even though the deed stipulated that each party should not take any proceedings against the other for the restoration of conjugal rights and each agreed not to annoy or interfere with the other in any manner whatsoever, the wife further agreeing to pay her own debts and support the two children.

Frémont v. Frémont, 6 D.L.R. 465, 3 O.W.N. 789, 21 O.W.R. 644, 26 O.L.R. 6.

A husband by the act of marriage undertakes to support and maintain his wife so long as she remains faithful to him, and where the wife is living separate from the husband under circumstances which justify her so doing, the husband is bound to support her unless

she has expressly renounced her rights to such support and maintenance or has means of her own which renders it unnecessary for the husband to maintain her.

Frémont v. Frémont, 6 D.L.R. 465, 3 O. W.N. 789, 21 O.W.R. 644, 26 O.L.R. 6.

(§ I A 2—18)—AGENCY OF WIFE.

Where a wife is living apart from her husband, by mutual consent or in any case other than that of separation duly pronounced by the Court, she will not be presumed to have her husband's authority to pledge his credit, and no consent can be inferred on the husband's part to pay for his wife's expenses. [Johnson v. Summer, 27 L.J. Exch. 341, followed.]

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

It is a presumption of law that a wife living with her husband has his implied authority to pledge his credit for such things as fall within the domestic department ordinarily confided to her management and as are necessary to the style in which her husband chooses to live, though the presumption may be rebutted by shewing that she had no such authority. [Eversley on Domestic Relations, 3rd ed., pp. 312, 313, specially referred to. See also Jolly v. Rees, 15 C.B.N.S. 628, 33 L.J.C.P. 177; Debenham v. Mellon, 5 Q. B.D. 394, affirmed 6 A.C. 24.]

Scott v. Allen, 5 D.L.R. 767, 3 O.W.N. 1484, 22 O.W.R. 597, 26 O.L.R. 571.

(§ I A 2—19)—CRIMINAL LIABILITY OF HUSBAND FOR FAILURE TO PROVIDE "NECESSARIES."

It must be established, in order to convict a husband under sec. 242 of the Criminal Code, for failing to provide necessaries for his wife or children, whereby their death resulted, that the articles or things which, without lawful excuse, he omitted to furnish were "necessaries" within the meaning of such section of the Code, and also that the death of his wife or children followed as a result of his omission to provide them. [The King v. Wilkes, 11 Can. Cr. Cas. 226, and The King v. Yuman, 17 Can. Cr. Cas. 474, referred to.]

The King v. Sidney, 5 D.L.R. 256, 21 W.L.R. 853.

A husband's failure to follow his wife and bring her back to his house, which she left in anger, on a bitterly cold night, and, being thinly clad, was frozen to death, does not render him criminally liable under sec. 242 of the Criminal Code, for failure to furnish her with "necessaries," where he provided a home according to his station in life and supplied his wife, who was in possession of all her faculties, with plenty of warm clothing, and, when she left his home, he had reason to believe that she had gone to a neighbour's but instead she got lost on the way.

The King v. Sidney, 5 D.L.R. 256, 21 W.L.R. 853.

B. Of wife.

(§ I B 1—20)—IN GENERAL.

The wife under control of her husband is subjected to the preliminary proceedings of conciliation under the provisions of art. 7613 R.S.Q. 1909.

Morrissette v. Auger, 14 Que. P.R. 65 (Cir. Ct.).

(§ I B—40)—AGENCY OF HUSBAND.

Where, in a verbal agreement for the purchase of land between plaintiff and the husband of the owner, loose and general language of the owner is relied upon by plaintiff to shew the agency of the husband and his power to make and enter into a contract for his wife, these general terms must be restricted by the positive and definite statement of the wife that she never gave her husband power to sell, but only to lease; and under such facts the husband is not the agent of the wife to sell.

Beck v. Duncan et al., 8 D.L.R. 648, 22 W.L.R. 878.

II. Property rights; transactions between.

A. In general.

(§ II A—50)—IN GENERAL.

Whether or not a purchase of property by a husband in the name of his wife is a gift is a question of the husband's intention at time of the purchase. Prima facie it will be considered a gift, but this presumption may be rebutted. The evidence, however, for such purpose must be clear, but quære, whether when the party seeking to rebut the presumption gives evidence, he must swear positively to an intention to create a trust.

Re Hobson Estate, 7 Terr. L.R. 182.

(§ II A—52)—JOINT BANK DEPOSIT.

Where a deposit in a bank, upon the refusal of the bank to pay the wife of the depositor the interest earned thereon when the husband was prevented by illness from going himself to the bank, was at the suggestion of the bank officers and with the consent of the husband, placed in the joint names of himself and wife to be withdrawable by either of them or the survivor of them, as a matter of convenience for obtaining money for household expenses, the wife upon the death of the husband who made a testamentary disposition of all his property did not become vested with the title to such deposit.

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

C. Community property.

(§ II C—65)—COMMUNITY PROPERTY.

A universal donation by the husband alone of the property of the community which puts in jeopardy the matrimonial rights and advantages of his wife gives

to the latter a right to demand for séparation de biens.

Bolduc v. Bouchard, Q.R. 21 K.B. 6.

As a matter of form there is nothing to prevent a married woman, even if in community as to property with her husband, from taking judicial proceedings with his authority. It is by demurrer (exception de fond) and not by exception to the form that the defendant should object that the claim set up by the plaintiff belongs to the community. Notice must be given to the adverse party of the deposit made when an exception to the form is filed. If such notice is given after the expiration of the delay for filing the exception it is too late.

Bellefeuille v. Billard, 13 Que. P.R. 331 (Sup. Ct.).

D. Wife's separate estate or business.

(§ II D—70)—WIFE'S SEPARATE ESTATE.

Whether grain crops grown and harvested by a husband on his wife's land is the property of the husband or of the wife is always a question of fact, and the test to be applied is, was it or was it not the intention of the wife to part with the control and disposition of the land to her husband for the purpose of enabling him to maintain himself and family? If such was her intention, the crops are the property of the husband. In passing an administrator's accounts the parties interested have, as a rule, the right to a strict examination of the same and also to have witnesses examined viva voce if desired, and as a rule the costs of all parties attending the passing should be paid out of the estate.

Re Winters Estate, 7 Terr. L.R. 250.

(§ II D—72)—RIGHTS OF HUSBAND AS TO.

There is no obligation on a wife to pay her husband any salary for his services given by him in relation to her separate business as a contracting carpenter for which there was no agreement to pay, and no execution proceedings can issue at the instance of a judgment creditor to seize any salary or wages purporting to be due by the wife of the judgment debtor to him under such circumstances.

Pion v. Fortier and DeReinillard, 6 D. L.R. 136, 14 Que. P.R. 74, 42 Que. S.C. 407.

(§ II D—73)—LOAN OF, TO HUSBAND.

Leave to adduce further evidence as to the circumstances under which a married woman executed a mortgage upon her separate property to secure a debt of her husband so as to shew that she acted without independent advice, was properly denied where it appeared that the money secured by such mortgage was applied largely to building a number of houses upon the wife's property, and that she had knowledge as to the condition of such indebtedness, and that, on account of the husband's ill-health, she took an unusually active part in looking after his business while the account secured by such mortgage was current. [Stuart v. Bank of Montreal, 41 Can. S.C.R. 516, and Bank of Montreal v. Stuart, [1911] A.C. 120, distinguished.]

Union Bank v. Crate, 3 D.L.R. 686, 21 O.W.R. 871, 3 O.W.N. 1018.

(§ II D—74)—LIABILITY FOR HUSBAND'S DEBT.

Where there is no contradiction of the defendant's evidence that shares of stock which were transferred to her by her husband after a judgment had been rendered against him, were purchased by the latter in his own name with the proceeds of lands owned by her, in an action against her by the judgment creditor to set aside such transfer, an interlocutory injunction restraining the disposal of such shares will be denied.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 21 W.L.R. 304, 22 Man. L.R. 294.

(§ II D—75)—LIABILITY FOR WIFE'S DEBT.

Under art. 1301 C.C. (Que.), as amended 1904 in order to be able to recover upon a security given by a wife upon her separate estate, a creditor must have contracted in good faith and such good faith can only exist in case the amount of the loan is paid directly to the wife and the lender has no suspicion that the money will be used for the benefit of any one but the wife; if these two conditions exist then the lender is not obliged to verify the use made by the wife of the money loaned to her.

Lebel v. Bradin, 7 D.L.R. 470.

E. Contracts with or conveyances to each other.

(§ II E—80)—CONTRACTS WITH OR CONVEYANCES WITH EACH OTHER.

Where a marriage contract provides that the community property of the proposed husband and wife shall during the marriage be used for their joint benefit, and that upon the death of either, the use and benefit shall go to the survivor for life, and that after the survivor's death the property goes in moieties to the two families of the proposed husband and wife; such a marriage contract creates a substitution in moieties in favour of the heirs of the two families of the contracting parties as to the community property.

Houde v. Marchand, 8 D.L.R. 431

Where a marriage contract creates a substitution, as to the community property of the proposed husband and wife, under which such property goes to the heirs of the two families of the husband and wife, upon the death of the survivor of them, such substitution prevents either the husband or wife from disposing of any of such property by will in derogation of the rights of the heirs of the two

families, and any such testamentary disposition will be declared null and void.

Houde v. Marchand, 8 D.L.R. 431.

(§ II E—83)—CONVEYANCE TO WIFE.

An action was brought by a husband against his wife to compel her to convey to him certain land and a house thereon. He also asked for an accounting of money amounting to the sum of $900, which he claimed his wife held for him as trustee or agent. He alleged that the moneys in question represented his earnings that he had handed over to his wife. It was shewn that the deed for the land was, with the consent of the husband, made direct to the wife; and that while the contract for the building of the house was in the husband's name, the money was paid, from time to time, to the contractor, by the wife in the presence of the husband, and the receipts taken in the wife's name. In her defence the wife maintained that the land was bought and the house built with her own money, and that the $900, for which her husband sought an accounting, was money loaned to her by a third person. There was nothing sufficient to discredit the husband's evidence as to the transactions between himself and his wife except certain statements in a letter from the wife's mother, since deceased, to the wife. This letter was admitted by the Judge at the trial, but, on considering his judgment, he ruled it out because no sufficient foundation had been laid to entitle it to be admitted:—Held, that the house and property belonged to the husband and should be conveyed to him by the wife; and that she must also account to him for the $900 in question in the action.

Palmer v. Palmer, 11 E.L.R. 145.

F. Conveyances or mortgages to third persons.

(§ II F 2—99)—MORTGAGE OF.

Where, in connection with a loan to her from a loan company, a married woman executes a mortgage, a statutory declaration, an assignment, an authority to a local agent of the company to receive the money, and an extension agreement, but swears that she was not aware of the nature of these documents, and was misled by her husband as to their contents, she may be relieved from liability to the loan company for deceit in respect of fraudulent mis-statements in the application for the loan, which was signed by her husband in her name, but the husband will be held liable.

Dominion Permanent v. Morgan, 4 D. L.R. 331, 21 W.L.R. 748.

I. Antenuptial contract.

(§ II I—110)—ANTENUPTIAL CONTRACT.

The clause in a marriage contract whereby the parties mutually make donation of the usufruct of their property "to the survivor . . . to enjoy it as a good tenant for life and careful owner . . . in order that the said property . . . may return in good condition to the heirs of the two families after the death of the survivor . . . and this in equal proportions" is a donation, in contemplation of death, of the property of the one dying first to the survivor with substitution to the heirs of the latter. Therefore, the subsequent disposal of the same property by will is void. The heir of a part of the succession has a right of action against the party in possession to have his right to the succession recognized without concluding for a partition and an account. He may also demand payment of the value of his part if the succession is composed of debts, money, securities, or other things essentially divisible in their nature.

Houde v. Marchand, Q.R. 21 K.B. 184.

K. Rights of husband's creditors.

(§ II K—130)—RIGHTS OF HUSBAND'S CREDITORS.

The wife of a debtor may purchase property in her own name and the debtor may assist her in the transaction if he does not thereby withdraw from the reach of his creditors any portion of his estate which should be applied in payment of their claims.

Burns v. Matejka, 1 D.L.R. 837, 19 W. L.R. 863.

III. Actions.

A. By husband.

(§ III A—143)—FOR INDUCING WIFE TO ABANDON HUSBAND.

A married man has a right of action against his wife's parents, who receive and harbour her in their house and encourage her to disregard the duty of cohabitation, to recover the damages thereby suffered. The Court on such an action may order the defendants to return their daughter to her husband within a fixed period, reserving, for the interval, the adjudication as to damages.

Lafontaine v. Poulin, 42 Que. S.C. 292 (Sup. Ct.).

(§ III A—144)—CRIM. CON.

Husband's right of action for criminal conversation—Measure of compensation—Defendant's failure to testify—Presumption of admission.

Herve v. Dominique, 7 D.L.R. 787.

In a criminal conversation action there need not be evidence of the validity of the marriage ceremony, but there must be strong evidence of the marriage itself going beyond mere evidence of cohabitation and reputation, and the best proof that could be given of an actual marriage is by some person actually present at the solemnity. [Morris v. Miller, 4 Burr.

2057; Birt v. Barlow, 1 Doug. 171, 174; Wigmore on Evidence, sec. 2084; Catherwood v. Caslon (1844), 13 M. & W. 261, 13 L.J. Ex. 334; R. v. Millis, 10 Cl. & F. 534; Beamish v. Beamish, 9 H.L.C. 274, 337; Mainwaring's Case, 1 Dear. & B. 139; R. v. Griffin, 4 L.R. Irish 497, 503, 14 Cox C.C. 308; Morris v. Miller, 1 W. Bl. 632, referred to.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336.

IV. Abandonment of wife.

(§ IV—160) — ABANDONMENT OF WIFE (CRIMINAL).

Where the deserted wife had been compelled to work continuously at menial labour to support herself and child and required rest and surgical treatment for organic disease to stop the breaking down of her health, but was unable to obtain such surgical treatment and rest without being dependent on charity, such facts will support a special finding by the jury that the wife's health is likely to be permanently injured from the husband's neglect to provide necessaries for her which neglect in such event is an indictable offence under Criminal Code (1906), sec. 242.

The King v. Wood, 19 Can. Cr. Cas. 15, 20 O.W.R. 576.

V. Wife's authority to sue or defend.

(No cases.)

HYPOTHEC (Que.).

I. IN GENERAL.
II. RIGHTS AND LIABILITIES.
III. CLASS OF PROPERTY.
IV. DISCHARGE.
V. HYPOTHECARY ACTION.

I. In general.

(§ I—10)—IN GENERAL.

In certain circumstances the hypothecation of a property is tantamount to an alienation thereof and under art. 1092 C.C. would give the creditor the right to demand the immediate return of his money, as being in diminishment of his security.

Frank v. Forman, 13 Que. P.R. 29 (Sup. Ct.).

II. Rights and liabilities.

(§ II—20)—RIGHTS AND LIABILITIES.

That, though as between the creditor and the debtor the former may reserve the privilege which attached to an ancient debt so as to make the same attach to a new debt substituted by novation to the old one, nevertheless if the immovable affected has passed into the hands of a third holder, the hypothec cannot be so reserved and attached to a new debt without the consent of such third holder.

Marcoux v. Guay, 18 Rev. de Jur. 133.

III. Class of property.

(§ III—30)—CLASS OF PROPERTY.

The hypothec upon an undivided part of an immovable is valid and the creditor may maintain an action en déclaration d'hypothèque against the party in possession thereof without first having recourse to partition and sale. If the defendant is in possession of the whole of the immovable the action may be brought in respect to an undivided part. If the plaintiff is himself in possession of one undivided part he may maintain an action en déclaration d'hypothèque against the other without abandoning his portion under the provisions of art. 2069 C.C.

Cartier v. Boudreault, Q.R. 41 S.C. 127 (Ct. Rev.).

The vendor of an immovable, part of the price of which is secured by a hypothec on another immovable of the purchaser, who agrees to discharge the hypothec on receipt of a reconveyance of the immovable sold, can validly stipulate in the deed of reconveyance for retention of the hypothec by way of damages only if the immovable which had been hypothecated remains the property of the purchaser. Therefore, in an action en déclaration d'hypothèque against a third party in possession of this immovable, he is obliged to prove that fact. The provision in art. 1176 C.C. that privileges and hypothecs attached to a debt pass to another debt substituted for it does not apply in such a case.

Marcoux v. Guay, Q.R. 21 K.B. 162.

IV. Discharge.

(No cases.)

V. Hypothecary action.

(§ V—50)—HYPOTHECARY ACTION.

The exception resulting from a privileged claim or prior hypothec provided for by article 1073, Criminal Code, for the benefit of a third party holder of the hypothecated immovable can only be invoked by the latter to compel the party suing to give security that it will bring a price that will pay his claim or hypothec in so far as the same amounts to or exceeds the value of the immovable. The right to payment of sums expended on the immovable cannot be claimed by dilatory exception, but recourse must be had to article 2072, Criminal Code. The third party sued en déclaration d'hypothèque has a right to call in his vendor and may exercise it by dilatory exception.

McIntyre v. Wilson, 14 Que. P.R. 45 (Sup. Ct.).

An hypothecary action can be brought only against the party in possession of the immovable and if taken against the debtor personally it must be alleged that he is in possession just as if taken against a third party. The deposit note given to a

mutual fire insurance company, as provided in article 7009, R.S.Q. 1909, although essential to the formation of the contract, does not constitute the title to the legal hypothec of article 7023. The issue of the policy describing the property insured is necessary and this involves, as a consequence, the hypothec, the assessment by-law of article 7011, the fixing of the proportions under article 7017 and the other formalities evidenced by the certificate of the secretary-treasurer according to article 7021. Hence, the production of the deposit note alone, in an action en déclaration d'hypothèque against the assured, will not support the conclusions. When a mutual fire insurance company is placed in liquidation the liquidator only can collect the amounts due on deposit notes which are not transferable. A deposit note on which the words "deposit note" are not "printed in conspicuous type at the head" is a nullity. When a defendant, summoned before a Court incompetent ratione personæ does not appear and the action is remitted to a competent Court, he is entitled to notice and to be put en demeure to defend.

Clement v. Dodier, 41 Que. S.C. 289 (Sup. Ct.).

The registration of the transfer of an hypothecary claim is necessary in order that the discharge of the debtor by the assignor may be registered and the hypothec erased from the registry. The expenses of a voluntary or judicial assignment of the hypothec claim is not to be borne by the debtor nor are those of the registration of the transfer.

Corbiere v. Stuart, 13 Que. P.R. 374 (K.B.).

IDENTITY.

Of causes of action, see Action.

Necessity of proving, on prosecution for second offence, see Criminal Law.

Parol evidence of, see Evidence, VI.

Evidence as to, generally, see Evidence, XI.

ILLEGAL CONTRACTS.

See Contracts, III.

ILLEGAL FEES.

See Extortion.

IMITATION.

Injunction against, see Injunction, I.

Of trade-mark, see Trade-marks, IV.

Of trade-name, see Trade-name.

IMPEACHMENT.

Of award of damages in eminent domain case, see Damages.

Of witnesses, see Witnesses, III.

Of attesting witness to will, see Wills.

IMPLIED AGREEMENT.

See Contracts, I.

IMPLIED COVENANT.

See Covenants and Conditions; Landlord and Tenant, II.

IMPLIED POWERS.

Of corporation, see Corporations and Companies.

IMPLIED WARRANTY.

In general on sale of goods, see Sale.

IMPRISONMENT.

For crime generally, see Criminal Law, IV.

Liability for false imprisonment, see False Imprisonment; Malicious Prosecution.

IMPROVEMENTS.

Recovery for, in eminent domain proceedings, see Damages.

Lien for, see Mechanics' Liens.

Public improvements, see Drains and Sewers; Highways, III; Public Improvements.

On land under mistake of title, see Contracts, V.

(§ I—4)—COMPENSATION FOR WHERE BENEFIT IS TAKEN ADVANTAGE OF.

Where plaintiffs are entitled by reason of a prior "oil lease" to enter upon and prospect for oil and gas upon land subsequently leased to defendants and upon which defendants have already done work and made improvements, if the plaintiffs wish to take the benefit of this work done and improvements made, defendant is entitled to compensation therefor. [McIntosh v. Leckie, 13 O.L.R. 54, followed.]

Maple City Oil and Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

INCOMPETENT PERSONS.

I. WHO ARE; INQUISITION; ADJUDICATION.
II. CONTRACTS; DEEDS.
III. TORTS.
IV. CONFINEMENT; SUPPORT IN ASYLUM.
V. SUITS BY OR AGAINST.
VI. POWERS OF COMMITTEE AND ADMINISTRATION OF ESTATE.

Competency to commit crime, see Criminal Law, I.

As to married woman, see Husband and Wife.

As to Indians, see Indians.

As to Infants, see Infants.

Evidence as to insanity generally, see Evidence.

Testamentary capacity, see Wills, I.

Incompetency of witnesses, see Witnesses, I.

Validity of contract with drunken person, see Drunkenness.

Habeas corpus to determine legality of confinement, see Habeas corpus.

I. Who are; inquisition; adjudication.

(§ I—2)—WHAT CONSTITUTES INCOMPETENCY.

The policy of the law is that the liberty of no man shall be interfered with on the ground of mental infirmity, if he have sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood where he lives.

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

One who is free from any mental disease cannot be regarded as of unsound mind within the meaning of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, sec. 7, if, notwithstanding his lack of mental acuteness, he has sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood in which he lives. [In re Barber, 39 Ch. D. 187, referred to.]

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

On an application for the appointment of a guardian of the estate of an alleged lunatic, in order to determine whether or not he is of unsound mind, evidence of the facts and circumstances which go to shew insanity must be submitted.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

A petition for the appointment of a guardian of the estate of a supposed lunatic must, under rule 753 (Saskatchewan rules, 1911) be addressed to the Judge of the Court.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

On an application for the appointment of a guardian of the estate of a supposed lunatic, the fact that he was committed to a hospital for the insane by a justice of the peace and that he is there at the time of making the application, is not evidence of insanity, for he may have been committed improperly.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

The affidavit of persons that, in their opinion, a supposed lunatic is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian for his estate, since it is necessary to state such facts from which the Court itself may judge whether the person is of unsound mind or not. [Re Bulger, 21 Man. L.R. 702, referred to.]

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

The Act, 1 Geo. V. (Ont.) ch. 20, amending the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, deals with cases on the border line between sanity and insanity, and mental disease need not be established in an enquiry under that Act, but the test is whether the person is so weak-minded as not to be able to manage his affairs.

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

Before a declaration of lunacy will be made on a summary inquiry under sec. 11 of "The Lunacy Act," R.S.M. 1902, ch. 103, the following rules must be strictly complied with: (a) The petition must be endorsed as required by rule 772 of "The King's Bench Act," and should be signed by the petitioner. (b) It must be personally served upon the supposed lunatic: Re Miller, 1 Ch. Ch. 215, unless service has been dispensed with. (c) Personal service will only be dispensed with when it would be dangerous to the lunatic to serve him and, to prove that, the affidavit of the medical superintendent of the asylum in which the party is confined is not sufficient without corroboration: Re Newman (1869), 2 Ch. Ch. 390; Re Mein (1869), 2 Ch. Ch. 429. (d) The petition should be presented by the nearest relative and, where the petitioner is out of the jurisdiction, some person within the jurisdiction should be joined as co-petitioner: Heywood & Massey's Lunacy Practice, 20. (e) It should be supported by the affidavits of at least two medical men: Re Patton, 1 Ch. Ch. 192, and such affidavits must show all the facts evidencing the lunacy from which the Court may judge for itself whether or not the prisoner is of unsound mind: McIntyre v. Kingsley, 1 Ch. Ch. 281; ex parte Persse (1828), 1 Moll. 219. (f) There should also be affidavits from members of the family of the alleged lunatic and other persons who know him, not merely giving their opinions, but stating with particularity the material facts pointing to unsoundness of mind and incapacity to manage himself and his affairs: Renton on Lunacy, 259. Nothing can be inferred against the supposed lunatic from the fact that he is confined in a lunatic asylum. He may be there improperly. If, however, proper evidence is produced that the person has been found a lunatic by a foreign tribunal having jurisdiction to so find, the Court would generally act upon such finding, though not binding upon it. It is doubtful whether there is any power to serve the petition out of the jurisdiction. Leave to do so was given in Re Webb (1906), 12 O.L.R. 194, but that was under the Ontario rules, which are not the same as those in force here.

Re Bulger, 21 Man. R. 702.

An issue as to lunacy under sec. 77 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, is to be conducted in the same manner and according to the same rules of law and procedure as any other trial.

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

Power to examine an alleged lunatic is conferred by sub-sec. (4), of sec. 7 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, only upon the Judge presiding at the trial of the issue as to his soundness of mind, and cannot be exercised by an Appellate Court. [Re Fraser, 24 O.L.R. 222, reversed on appeal.]

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

The applicant for interdiction for imbecility should, on pain of nullity of the proceedings, be interrogated by the Judge in presence of the clerk of the Court or his deputy, or by the prothonotary and the examination should be put in writing and communicated to the family council. Therefore, the decree for interdiction when the prothonotary who interrogated the applicant did not report the examination but contented himself with declaring his view of the mental state of the interdict is null and should be set aside.

Chatelle v. Chatelle, Q.R. 21 K.B. 158.

II. Contracts; deeds.

(§ II—10)—CONTRACTS; DEEDS.

Where the endorser of a promissory note was at the time of the endorsement mentally incapable of making a contract, and where it appears that the note was merely a renewal of certain subsisting and enforceable notes, upon which the endorser was jointly and severally liable with others, such circumstances will govern, and the plaintiff holder may revert to the earlier notes and recover upon them, upon the ground that the renewal endorsement was made under a mistake of fact, especially where it does not appear that the plaintiff had knowledge of the mental incapacity of the endorser.

Bank of Ottawa v. Bradfield, 8 D.L.R. 722, 4 O.W.N. 333, 23 O.W.R. 818.

Upon an action by the curator to a person interdicted for insanity, against the purchaser of an immovable property, it being alleged that said property had been bought by defendant a month only before the interdiction of the vendor and when the latter was insane, defendant pleaded denying the material allegations of plaintiff's action and alleging specially that said interdiction was irregular and null, and prayed that the same be avoided. Plaintiff, ès-qual., thereupon filed an inscription in law against that portion of said plea containing said last allegations and conclusions:—It was held that the interdiction of the vendor being set forth in the declaration as one of the principal reasons of the action, defendant was entitled to attack its legality, but that said interdiction having been adjudged on the petition of plaintiff who was not personally en cause, herein, the nullity of such interdiction could not be declared by the Court. Under such circumstances, the Court will maintain such inscription in law in part, and reject from the conclusions of the plea the words praying for the annulling of the ordinance of interdiction, with costs against defendant. On the merits of the case the Court maintained defendant's plea and dismissed plaintiff's action with costs.

Charland, ès-qual. v. Bissonnette, 18 Rev. de Jur. 56.

(§ II—11)—DEEDS.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a condition of insanity which is not merely temporary is proved to have existed from a time prior to the execution thereof, the onus is upon those supporting the conveyance to shew that such execution took place during a lucid interval such that the grantor was capable of understanding the nature of the act he was performing. [Russell v. Lefrancois, 8 Can. S. C.R. 325, followed.]

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

III. Torts.

(No cases.)

IV. Confinement; support in asylum.

(§ IV—21)—MAINTENANCE IN ASYLUM.

Lunatic—Maintenance—Insufficient material.

Re Barley, deceased, and Fawcett, a lunatic, 4 O.W.N. 426.

V. Suits by or against.

(No cases.)

VI. Powers of committee and administration of estate.

(§ VI—30)—POWERS OF COMMITTEE AND ADMINISTRATION OF ESTATE.

Before a guardian of a lunatic's estate can be appointed, it must appear that the alleged lunatic is at the time of the application of unsound mind and that he has property and is incapable of managing such property.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

A petition for the appointment of a guardian of the estate of a supposed lunatic must pray specifically for a declaration of lunacy.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

(§ VI—31)—APPOINTMENT, REMOVAL AND RESIGNATION.

An application for the appointment of a guardian of the estate of a supposed lunatic will be refused where no facts are set out from which the Court can determine whether or not the alleged lunatic is of unsound mind, or whether or not he is incapable of managing himself and affairs.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

A petition for the appointment of a guardian of the estate of a supposed lun-

atic must be supported by the affidavits of at least two medical men, containing not only the conclusions at which they arrive, but also the facts upon which these conclusions are based.

Re George, 8 D.L.R. 731, 22 W.L.R. 885.

Statutory committee.

Re Montgomery Estate, 6 D.L.R. 912, 4 O.W.N. 308.

(§ VI—33)—SALE OF PROPERTY OF INCOMPETENT.

Where, under an order of the Court, lands of a lunatic are sold, and a mortgage thereon taken in part payment, Ont. Con. Rule 66 applies, and the mortgage should be taken in the name of the accountant of the Court, unless otherwise ordered, but it is the duty of the committee to look after the mortgage investment as though the mortgage had been taken in his own name.

Re Gibson, 3 D.L.R. 448, 3 O.W.N. 1183, 22 O.W.R. 8.

INCORPORATORS.

See Corporations and Companies, IV.

INCORPOREAL RIGHTS.

Condemnation of, see Eminent Domain.

INDEMNITY.

Bond for, see Bonds, II.

(§ I—5)—AGAINST WHOM.

A defendant who is liable to the owner of a building for damages caused by the fall of a water tank erected by the former on the roof of the building, as a result of the faulty construction of the supports thereof, is entitled to indemnity from a defendant in warranty from whom the former obtained the tank and its supports.

Wilson v. The H. G. Vogel Co.; The H. G. Vogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

INDEMNITY INSURANCE.

See Insurance, VIII.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Highways; Master and Servant, III.

INDIANS.

I. IN GENERAL.
II. LANDS OF.

I. In general.

(No cases.)

II. Lands of.

(§ II—8)—TRIBAL LANDS AND PROPERTY.

The effect of the Act 2 Vict. (Can.) ch. 50 (see now C.S.L.C. 1861, ch. 42), is to place beyond question the title of the Seminary of St. Sulpice of Montreal to the Seigniory of The Lake of Two Mountains, and to make it impossible for the Indians of Oka to establish an independent title either to possession or control in the administration of the seigniory, either by prescription or aboriginal title or on the theory that the title of the seigniory was merely as trustees for the Indians; any benefits to which the Indians were entitled as upon a statutory charitable trust enforceable by legislation, or possibly in an action by the Attorney-General, were not such as to support an action for recovery of the land by the elected chiefs of the bands of Indians concerned.

Corinthe v. Seminary of St. Sulpice, 5 D.L.R. 263, 28 Times L.R. 549.

INDICTMENT, INFORMATION AND COMPLAINT.

I. FORM; REQUISITES.
II. SUFFICIENCY OF ALLEGATIONS.
A. In general.
B. Intent; knowledge.
C. Negation of defences or exceptions.
D. Duplicity; repugnancy.
E. Description of offence.
F. Amendment.
G. Sufficiency to support conviction.
III. JOINDER OF COUNTS OR PERSONS.
IV. QUASHING.

Falsely pretending to be a healer of the sick, particulars of offence, see Physicians, I.

Omitting to charge knowledge on information for receiving, see Receiving Stolen Goods.

Rights as to place of trial, see Venue.

I. Form; requisites.

(§ I—1)—FORM; REQUISITES.

C. signed an information for an offence against the Canada Temperance Act, leaving the date and a place for the magistrate's name in blank, and mailed it to magistrate J. J., being ill, handed the information to Magistrate M. C. then requested Magistrate M. over the telephone to take the information and to issue a summons thereon. Summons was issued and at the hearing, after the evidence was all in, the defendant's counsel appeared and objected to the magistrate's jurisdiction, but took no further part in the proceedings. Held, that the information was improper, because not laid and signed before the magistrate and that the magistrate acted without jurisdiction. Held, also, that the appearance of defendant's counsel merely to object to the jurisdiction did not operate as a waiver.

The King v. Murray, ex parte Copp, 40 N.B.R. 289.

Where an information under the Canada Temperance Act was laid within three

months after the offence, but no summons was issued thereon for a year and fourteen days after information laid. Held (per Barker, C.J., Landry, White and Barry, JJ., McLeod and McKeown, JJ., dissenting), that the delay in issuing summons did not deprive the magistrate of jurisdiction. The Act 7-8 Edw. VII., ch. 71, takes effect wherever Part II. of the Canada Temperance Act is in force, without being voted upon.

The King v. Peck, ex parte Beal, 40 N. B.R. 320.

(§ I—2)—VERIFICATION.

A conviction for an offence against the Liquor License Ordinance cannot be sustained under an information and warrant describing the accused as "Big Boy of Calgary, Alberta," where, before the accused pleaded to it, the information was amended, without being re-sworn to, by striking out the words "Big Boy" and substituting therefor the name of the accused, William Davis, and where his objection to the jurisdiction of the police magistrate to try him on the ground that no sworn information had been laid against him, was overruled and the trial proceeded with. [Regina v. McNutt, 3 Can. Cr. Cas. 184, and Re Conklin, 31 U. C.Q.B. 160, 165, specially referred to; Rex v. Crawford, 6 D.L.R. 380, distinguished.]

Rex v. Davis, 7 D.L.R. 608.

(§ I—3)—CONSENT OF OFFICIAL OR COURT.

Only in rare cases will the Court grant leave to prefer an indictment for criminal libel at the instance of a private prosecutor who has not been bound over at the preliminary inquiry.

Rex v. Daniel, 4 D.L.R. 443, 17 B.C.R. 150, 21 W.L.R. 563.

An "acting Attorney-General" is the Attorney-General pro tem., and as such may give a direction to Crown counsel for the preferment of a bill of indictment under Cr. Code sec. 873. Such direction to prefer an indictment may be in general terms written upon the bill authorizing counsel acting for the Crown at a specified Assize sitting to prefer the same.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

(§ I—4)—WHO MAY PREFER.

Where an indictment has been preferred by counsel acting on behalf of the Crown at a Court of criminal jurisdiction, it will not be presumed that he would not have preferred it but for the direction of the Attorney-General or acting Attorney-General written thereon, and the indictment may be sustained under the general powers conferred upon Crown counsel under Code sec. 872 if for the same charge as that upon which the accused was committed for trial, whether or not the Attorney-General's direction under Code sec. 873 was regularly given.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

(§ I—4a)—NEW INFORMATION ON THE SAME FACTS.

The discharge of the accused upon a preliminary enquiry for an indictable offence is not a bar to fresh proceedings upon a new information based upon the same facts.

The King v. Burke, 19 Can. Cr. Cas. 141.

II. Sufficiency of allegations.

A. In general.

(§ II A—5)—SUFFICIENCY OF ALLEGATION.

A search warrant issued under the Canada Temperance Act, R.S.C. 1906, ch. 152, will be quashed, upon certiorari, where no grounds of suspicion are stated in the information.

The King v. Nickerson, ex parte Weston, 40 N.B.R. 382.

The accused, a returning officer at an election of a member to serve in the Legislative Assembly of Saskatchewan, was charged with: (1) Conspiring to defraud D., a candidate, from being returned as elected; (2) conspiring to defraud the electors by illegally obtaining the return of one T.; (3) conspiring to defraud the public by procuring by illegal means the return of T. It was held, that such charges did not constitute any indictable offence under the Criminal Code, 1892, or at common law. Particulars delivered under C.C. 1892, sec. 616, do not form a part of the charge. The Court has no jurisdiction on the consideration of a "stated case" to decide any question not submitted by the case.

Rex v. Sinclair, 7 Terr L.R. 424.

(§ II A—7)—TIME.

Where the accused is committed under a warrant of commitment for extradition based on an information alleging the offence as of a year prior to the date shewn by the commitment, the information is not a sufficient basis for the commitment, and the prisoner will be discharged in a habeas corpus proceeding.

Re William Staggs (No. 1), 7 D.L.R. 738.

(§ II A—8)—PLACE.

An objection on the ground that the information for an indictable offence did not mention the place where the offence was committed is not a ground for habeas corpus upon the committal of the accused for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

B. Intent; knowledge.

(§ II B—10)—INTENT; KNOWLEDGE.

In an information for exposing for sale and selling obscene books under sec. 207 of Crim. Code (1906), as amended by 8 and 9 Edw. VII., ch. 9, it is necessary to allege that it was knowingly done, and an allegation that it was done "contrary to

law" and "contrary to the form of the statutes," is not sufficient.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

D. Duplicity; repugnancy.

(§ II D—20)—DUPLICITY.

The particular acts referred to in the sub-secs. of sec. 490 of the Crim. Code 1906, are the ingredients of the single offence of the unlawful use of a beverage trade-mark, and the fact that more than one of such particular acts are included in the statement of the offence as contained in an information or summons, does not invalidate such information or summons.

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

(§ II D—21)—ALTERNATIVE MATTER.

An information in a summary trial proceeding under Cr. Code secs. 773 or 777 for keeping a disorderly house is by sec. 2 (16), to be considered as a "count" or "indictment" as regards formal and other objections cured by the general provisions as to counts (Code secs. 852-858), and such information is not objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the statute by which the offence is defined. [R. v. Leconte (1906), 11 Can. Cr. Cas. 41 and R. v. Code (1908), 13 Can. Cr. Cas. 372, distinguished.]

The King v. Mah Sam, 19 Can. Cr. Cas. 1.

E. Description of offence.

(§ II E 2—30)—STATUTORY OFFENCES AND LANGUAGE.

Where the information and the conviction follow the language of the statute under which the conviction was made, that is all that is required, even though the information and the conviction charged two offences and the evidence was not confined to one offence. [Rex v. Leconte, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, applied.]

Rex v. Riddell, 4 D.L.R. 662, 19 Can. Cr. Cas. 400, 3 O.W.N. 1628, 22 O.W.R. 847.

(§ II E 3—40)—OBSCENITY.

A person cannot be summarily convicted by a magistrate under sec. 207 of the Crim. Code, which declares that it is an indictable offence to "knowingly . . . sell, or expose for sale" any obscene book, upon an information which did not charge that he "knowingly" exposed for sale or sold such book.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

F. Amendment.

(§ II F—55)—AMENDMENT.

Upon the summary trial of a charge of keeping a disorderly house, the magistrate has power to amend the information during the course of the trial, by changing the street number of the alleged disorderly house, without having the information re-sworn. [Reg. v. D'Eyncourt, 21 Q.B.D. 109, referred to.]

Rex v. Crawford, 6 D.L.R. 380, 22 W. L.R. 107, 20 Can. Cr. Cas. 49.

The powers of amendment granted by sec. 1124 of the Canadian Criminal Code, R.S.C. ch. 146, are not confined to summary convictions, but may be exercised in the case of convictions for indictable offences. [R. v. Randolph, 4 Can. Crim. Cas. 165; and R. v. Spooner, 4 Can. Crim. Cas. 209, discussed; R. v. Shing, 17 Can. Crim. Cas. 463, dissented from.]

Rex v. Crawford, 6 D.L.R. 380, 22 W. L.R. 107, 20 Can. Cr. Cas. 49.

A complaint under ch. 35 of 1 Geo. V. of Quebec, which prohibits the sale of cocaine, morphine or their compounds, except to wholesale dealers, physicians, druggists, dentists, veterinary surgeons, or the holders of physicians' prescriptions, cannot be amended, upon such Act being held void because in conflict with the subsequent enactment of the Dominion Parliament, 1 and 2 Geo. V. ch. 17, which makes it a crime to sell, take, or have in one's possession cocaine, without lawful excuse, so as to set out an offence under the Dominion Act, since the effect of allowing such amendment would be to change the nature and gravity of the offence charged in the original information. [The King v. Hayes, 6 Can. Cr. Cas. 357; Reg. v. France, 1 Can. Cr. Cas. 321; The King v. Lacelle, 10 Can. Cr. Cas. 229; The King v. Clark, 9 Can. Cr. Cas. 125; Reg. v. James, 12 Cox Cr. Cas. 127; Reg. v. Norton, 16 Cox Cr. Cas. 59; Reg. v. Carr, 26 L.C.J. 61, referred to.]

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

A conviction for a common assault may be sustained under an indictment for shooting at a person with intent to kill, where an accused person, when within shooting distance, pointed a gun at another, the bullet from which struck a horse the latter was riding. [Regina v. St. George, 9 C. & P. 483, followed.]

The King v. Chartrand, 4 D.L.R. 397, 21 W.L.R. 850.

An indictment cannot be so amended, after having been passed upon by the grand jury, to charge an offence substantially different from that charged in the original indictment. [Reg. v. Patterson, 26 O.R. 656; Reg. v. Weir (No. 3), 3 Can. Cr. Cas. 262; R. v. Benson, [1908] 2 K.B. 278; and R. v. Corrigan, 20 O.L.R. 99, referred to.]

Rex v. Cohen, 5 D.L.R. 437, 19 Can. Cr. Cas. 428, 3 O.W.N. 1409, 26 O.L.R. 497, 22 O.W.R. 456.

A conviction under the Canada Temperance Act was erroneously drawn up

in the "District of Chipman Civil Court." It was in fact made by the stipendiary magistrate for the district of Chipman. Upon certiorari the Court amended the conviction by striking out the words "Civil Court."

Ex parte Weston, ex parte Dykeman, 40 N.B.R. 379.

An indictment charging an offence under sec. 405 of the Criminal Code, R.S.C. 1906, ch. 146, of obtaining money by false pretences, upon which a true bill has been found by the grand jury, cannot be amended at the close of the case for the Crown so as to charge an offence under sec. 405a of obtaining credit by false pretences, inasmuch as the two offences are not substantially of the same nature. [Reg. v. Boyd, Que. 5 Q.B. 1, referred to.]

Rex v. Cohen, 5 D.L.R. 437, 19 Can. Cr. Cas. 428, 3 O.W.N. 1409, 26 O.L.R. 497, 22 O.W.R. 456.

(§ II F—56)—Of name of accused.

The true name of the person against whom the offence was alleged to have been committed may be substituted by the Court in an indictment after the grand jury has found a true bill, where the name originally in the indictment was that by which the same party was commonly known.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

G. Sufficiency to support conviction.

(§ II G—60)—Sufficiency to support conviction.

The information for the warrant upon which defendant was arrested stated an offence under the Indian Act, R.S.C. 1906, ch. 81, sec. 135. At the hearing the informant admitted that his knowledge was based on information and belief only. Upon certiorari:—Held, the magistrate acquired jurisdiction by the information, which was sufficient on its face, and even if the warrant was bad, the conviction would not therefore be set aside. The conviction purported to follow form 62 of the Criminal Code, R.S.C. 1906, ch. 146, but omitted to adjudge costs of commitment, and also omitted to order that the costs should be paid to the informant. Held, the Court would amend the conviction by adding the parts omitted.

The King v. Matheson; ex parte Belliveau, 40 N.B.R. 368.

An information charging, under the Motor Vehicle Act (Alta.), the offence as driving "at a greater speed than fifteen miles per hour" instead of in the words of the statute "at a greater speed than one mile in four minutes," charges the identical offence covered by the words of the statute and is sufficient, although it may be the better practice in such cases to follow the words of the statute itself. [Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, referred to.]

Rex v. Ley, 7 D.L.R. 764.

III. Joinder of counts or persons.

(§ III—65)—Joinder of counts or persons.

The Crown prosecutor may prefer indictments for as many different offences as he finds disclosed by the depositions, and also for the charge set out in the commitment for trial.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63.

Upon more than one information for separate offences of a similar character being lodged against a person, a magistrate should not hear evidence at the same time as to all the charges, where some of it would be relevant to one, but not to the others. [Hamilton v. Walker, [1892] 2 Q.B. 25; Regina v. Fry (1898), 67 L.J. Q.B. 67; Regina v. McBerny (1897), 3 Can. Cr. Cas. 339, 29 N.S.R. 327; and Rex v. Burke (No. 2), (1904), 8 Can. Cr. Cas. 14. followed; Rex v. Dunkley (1910), 1 O.W.N. 861, and Rex v. Sutherland, 2 O.W.N. 595, distinguished.]

Rex v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 22 O.W.R. 601, 20 Can. Cr. Cas. 98.

IV. Quashing.

(§ IV—70)—Quashing.

Where an indictment, upon which a true bill has been found by the grand jury, has been amended at the close of the case for the Crown so as to charge an offence substantially different from that charged in the original indictment, and the accused has been convicted of the offence charged in the amended indictment, a substantial wrong or miscarriage has occurred at the trial, inasmuch as the accused has been convicted upon a charge which has not been dealt with by the grand jury, and sec. 1019 of the Criminal Code, R.S.C. 1906, ch. 146, is, therefore, inapplicable, and the conviction must be quashed. [R. v. Bates, [1911] 1 K.B. 964, referred to.]

Rex v. Cohen, 5 D.L.R. 437, 19 Can. Cr. Cas. 428, 3 O.W.N. 1409, 26 O.L.R. 497, 22 O.W.R. 456.

The absence of a properly proved transcript of the depositions is not a ground for quashing the indictment, provided such indictment sets out the same charge as the one contained in the commitment. [R. v. Lepine, 4 Can. Cr. Cas. 145; R. v. Traynor, 4 Can. Cr. Cas. 410, and R. v. Jodrey, 9 Can. Cr. Cas. 51, specially referred to.]

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63, 18 Rev. de Jur. 309.

(§ IV—71)—Selection and qualification of jurors.

An information will not be quashed on the ground that the jury which returned it was illegally constituted because the sheriff, in drawing it, struck from the panel the names of two regularly drawn jurors, who, to his own knowledge, were exempt from jury duty, and substituted

therefor two other duly qualified jurors, without having before him the affidavit of exemption required by sec. 43 of ch. 162 of R.S.N.S. 1900, as such requirement is not imperative, although a disregard thereof is a dereliction of the sheriff's duty.

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

INDORSEMENT.

Of bills and notes generally, see Bills and Notes, III.

Of cheques, see Cheques.

INFANTS.

I. In general; control; support; rights and liabilities.
- A. In general.
- B. Support of, and care for.
- C. Custody.
- D. Disabilities and liabilities.

II. Sale, lease or mortgage of real estate.

III. Actions.

Relation of parent to, see Parent and Child.

I. In general; control; support; rights and liabilities.

B. Support of, and care of.

(§ I B—5)—Support of, and care for.

Money in hands of trustees—Payment for maintenance.

Re Carnahan, 6 D.L.R. 857, 4 O.W.N. 115, 23 O.W.R. 97.

(§ I B—8)—Criminal liability for failure to provide necessaries.

A father is not criminally liable under sec. 242 of the Crim. Code for failing to provide necessaries for a child ten years of age, who was taken by its mother, in anger, from the father's house on a bitterly cold night, and who was, with its mother, frozen to death, where the father, who had provided a home according to his station in life, had reason to believe that the mother and child had gone to a neighbour's, but, instead, they were lost on the way, since the father did not have reason to anticipate that the mother would expose the child to such danger. [Rex v. Wilkes, 12 O.L.R. 264, 11 Can. Cr. Cas. 226, specially referred to.]

The King v. Sidney, 5 D.L.R. 256, 21 W.L.R. 853.

C. Custody.

(§ I C—11)—Parent's right.

Application by the father for the custody of two children, aged seven and five respectively, who had been brought into Court by their mother under a writ of habeas corpus. The evidence shewed, in the opinion of the Judge, that it was more in the interest of the children that they should remain with their mother than that the father should have the custody of them. Held, that under sec. 32 of the Infants' Act, R.S.M. 1902, ch. 79, an order should, under the circumstances of this case, be made for the delivery of the children into the sole custody of the mother, notwithstanding the prima facie common law right of the father. [Re Foulds (1893), 9 M.R. 23, referred to.] Conditions attached that, without leave of a Judge, the children shall not be removed from the province, and that they shall not be taken out of the city of Winnipeg without the father being kept informed of their whereabouts. Liberty to the father to apply again in any way in the matter, should he desire to do so, because of circumstances arising hereafter.

Re Tomlinson, 21 Man. R. 786.

As a general rule any agreement whereby a father relinquishes the custody of his child in favour of another is contrary to public policy and, hence, illegal, but the Court will nevertheless give effect to an agreement of adoption when it is clearly for the moral benefit of the child or in some very serious and important respect clearly right that such should be done. The Court should, however, exercise its powers in this regard with great caution.

In re Gray, 7 Terr. L.R. 402.

A father will not necessarily be deprived by the Court in an alimony action of the custody of minor children, although the mother was given the right to visit them weekly, where it appeared that he was a fit and proper custodian for the children, and that he was willing and able to care for them, and that for several years the personal care of the younger child had fallen to him, although the wife is granted a decree for alimony.

Karch v. Karch (No. 2), 4 D.L.R. 250, 3 O.W.N. 1446, 22 O.W.R. 534.

The custody of a fourteen-year-old girl was denied her father, where it appeared that for eight years she had lived with her maternal aunt, and that the child, who was extremely nervous, greatly feared her father and had a strong aversion to her step-mother, and the Court found that they were not proper custodians for the child, whose welfare required that she should remain with the aunt.

Re Hart, 4 D.L.R. 293, 22 O.W.R. 200, 3 O.W.N. 1287.

Section 3 of 1 Geo. V. (Ont.) ch. 35, providing that the father of a minor child may at any time by deed dispose of its custody and education for any length of time while the child remains under the age of twenty-one years and that such disposition shall be good and effectual against every person claiming in any way the child's custody or education, does not apply to make irrevocable an agreement signed by a widower relinquishing the custody of his infant daughter to her ma-

ternal grandparents until she reaches her majority or marries under that age, and covenanting that the father will not revoke the instrument. [Fidelity Trust Company v. Buchner, 5 D.L.R. 282, 26 O. L.R. 367, followed; Chisholm v. Chisholm (1908), 40 Can. S.C.R. 115; Roberts v. Hall (1882), 1 O.R. 388, at pp. 404, 406; Re Davis (1909), 18 O.L.R. 384; Lord Westmeath's Case (1819), Jacob 251, note (c); Humphrys v. Smith (1853), 17 Jur. 24, 22 L.J.N.S. Q.B. 116, 16 Eng. L. & Eq. 221; Re O'Hara (1900), 2 I.R. 232, at p. 241; Halsbury's Laws of England, vol. 17, p. 123; Macpherson on Infants, 83, specially referred to; Re Hutchinson, 26 O.L. R. 113, reversed on appeal.]

Re Hutchinson, 5 D.L.R. 791, 3 O.W.N. 1552, 22 O.W.R. 390, 26 O.L.R. 113 and 601.

Generally speaking, the best place for an infant is with its parents, and merely because the parent is poor and the person who seeks to have possession of the child is rich and for that reason its pecuniary position will be bettered by the change, a child should not be taken away from its parent without regard to any other consideration of the natural rights and feelings of the parent. [The Queen v. Gyngall, [1893] 2 Q.B. 232, per Lord Esher, at p. 243, followed.]

Re Hutchinson, 5 D.L.R. 791, 3 O.W.N. 1552, 22 O.W.R. 390, 26 O.L.R. 113 and 601.

D. Disabilities and liabilities.

(§ I D—22a)—Deposits in bank.

Section 95 of the Bank Act, R.S.C. 1906, ch. 29, does not impose upon a bank in Ontario, which has more than $500 on deposit in the name of an infant, without knowledge of his infancy, a liability to repay to the infant the amount of a cheque for over $500 drawn by him upon his account.

Freeman v. Bank of Montreal, 5 D.L.R. 418, 3 O.W.N. 1364, 22 O.W.R. 276, 26 O.L.R. 451.

(§ I D 2—23)—Insurance.

A minor, having attained his majority, can be sued for the recovery of the amount of a promissory note, made by him while a minor, in payment of the first premium on a policy of insurance on his life, where the defendant retains the insurance policy and where he has not taken any procedure to annul the insurance contract: and, the insurance premium having been so paid, the insurance stands in force for all purposes as of right; and a minor, having attained his majority, can avoid a contract entered into during his minority in so far only as he proves legal injury or prejudice.

Simoneau v. Hebert, 18 Rev. de Jur. 363.

II. Sale, lease, or mortgage on real estate.

(§ II—35)—Sale, lease or mortgage of real estate.

Application to sell property and divide proceeds—Prospective rights of infant—Suggested payment into Court.

Re Laws, 6 D.L.R. 912, 4 O.W.N. 304.

III. Actions.

(§ III—41)—How represented; guardian ad litem.

Where on an exception to the form the Court orders the summoning of a family council to appoint a tutor to represent and assist him and the defendant hinders and prevents the family council from meeting and the minor becomes of age, the exception falls to the ground and the Court may then declare the minor to be properly in the record and he must plead personally to the action as brought, and if he fails to do so judgment may be rendered against him ex parte. [Gareau v. Denis, 2 Que. P.R. 389, approved.]

Serling v. Levine, 7 D.L.R. 266.

The incapacity of a minor to be sued is only relative, it is not an absolute nullity and may be denounced by an exception to the form revealing the fact of minority; but such exception will only be maintained if the defendant can prove prejudice from the method whereby the summons was served.

Serling v. Levine, 7 D.L.R. 266.

(§ III—44)—Compromise or settlement of.

If the widow agrees to divide with her children the damages awarded under the Workmen's Compensation Act for the death of her husband it is not necessary for a family council to be called to authorize the tutor of the minors to accept their share which is a mere donation.

In re Turner, 13 Que. P.R. 261 (Sup. Ct.).

(§ III—55)—Suspending the payment of damages to infant during minority.

The Court has the power, by its judgment, to order that a sum assessed by a jury as the amount of damages sustained by the plaintiff, a minor suing through his tutor in an action of tort or ex quasi-delicto, be paid, in part at once, the remainder when he becomes of age, and not at all if he dies before, and that the interest on such remainder be paid to his tutor until he comes of age or dies during minority.

Montreal Street Ry. Co. (defendant, appellant) v. Girard (plaintiff, respondent), 21 Que. K.B. 121.

INFORMATION.

For criminal offence, see Indictment, etc.

INFRINGEMENT.

Of copyright, see Copyright.
Of trade-mark, see Trade-mark, IV.
Of trade-name, see Trade-name.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxes, V.

INJUNCTION.

I. RIGHT TO, AND WHEN GRANTED.
A. In general.
B. Contract rights; covenant.
C. Transfer or disposition of property.
D. Illegal or tortious acts; crimes.
E. Taking of, injury to, or trespass upon, real property.
F. Water rights.
G. As to corporate matters; associations.
H. As to office; elections.
I. Against legal proceedings.
J. Against officers generally.
K. Against taxes or assessments.
L. As to parks, highways and railroads.
M. As to patents, copyrights, trade-marks, trade-names and imitations.
II. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS (interim injunctions).
III. PROCEDURE.

Review of discretion as to, see Appeal, VII.

I. Right to, and when granted.

A. In general.

(§ I A—2)—ANTICIPATED OR THREATENED INJURY.

Where a right at law is clearly or fairly made out it is the duty of the Court to interfere by interlocutory injunction to prevent effect being given to an illegal vote at a meeting of company shareholders. [See Kerr on Injunctions, 4th ed., p. 357.]

Elliot v. Hatzic Prairie, Limited, 6 D.L.R. 9, 21 W.L.R. 897.

(§ I A—4)—INJURY OR INCONVENIENCE TO DEFENDANT.

Where a railway company had agreed in building its road to erect permanent bridges over plaintiff's irrigation ditches and it appeared that, without first erecting temporary bridges, and maintaining them for some months, the agreement could only be performed with great difficulty and considerable delay and consequent loss to the company and there was no proof that plaintiff would sustain more than nominal damages, the Court has a discretion to refuse an interim injunction to restrain the railway company from erecting the temporary structures, leaving it open for the Court at the trial to make a mandatory order for their removal or to award damages or to do both, and this particularly in view of an express statutory power to award damages in lieu of, or in addition to an injunction for breach of contract.

Canadian Pacific R. Co. v. Canadian Northern R. Co., 7 D.L.R. 120, 22 W.L.R. 289.

The ordinary rule is to grant damages in lieu of an injunction in cases where (a) the injury to plaintiff's legal rights is small, and (b) is capable of being estimated in damages, and (c) can be adequately compensated by a small money payment, and (d) where it would be oppressive to defendant to grant an injunction. [Shelfer v. City of London Electric Lighting Co. (No. 1), [1895] 1 Ch. 287, at 322, approved.]

Canadian Pacific R. Co. v. Canadian Northern R. Co., 7 D.L.R. 120, 22 W.L.R. 289.

(§ I A—7)—MUTUALITY OF REMEDY.

Where a statutory proceeding to quash a municipal by-law (as under sec. 242 of the City Act, R.S.S. ch. 84) would practically serve every purpose that an injunction could serve, an injunction to restrain the passing of the by-law ought not to be granted even if the by-law is ultra vires. [Neal v. Rogers, 22 O.L.R. 588; Aslatt v. Corporation of Southampton, 16 Ch. D. 143; City of London v. Town of Newmarket, 2 D.L.R. 244; Kerr on Injunctions, 4th ed., pp. 3, 4 and 5; 17 Halsbury's Laws of England, 202, par. 451; Fry on Specific Performance, 4th ed., p. 502, par. 1167, referred to.]

Keay v. City of Regina, 6 D.L.R. 327, 22 W.L.R. 185.

(§ I A—14)—AGAINST TRANSFER OR COLLECTION OF NOTE.

The right to grant an injunction is not limited to cases in which irreparable mischief may otherwise result and in which the plaintiff could not be compensated in damages; and the transfer of a promissory note may be enjoined in an action for cancellation thereof if the Court is satisfied that it is just and convenient to grant the same. [See Mackenzie's Yearly Practice (Eng.) 1912, pages 1258 et seq.; 6 Encyc. Laws of England, page 468.]

Thompson v. Baldry, 1 D.L.R. 32, 19 W.L.R. 773, 48 C.L.J. 108, 22 Man. L.R. 76.

B. Contract rights; covenant.

(§ I B—20)—CONTRACT RIGHTS.

A contract entered into by the proprietor of a country newspaper to accept and use exclusively every week the "ready prints" furnished by a publisher may be enforced by an injunction restraining the defendant during the period covered by it from using or publishing any ready prints

except those published by the plaintiff, who should not be limited to the recovery of damages for the breach of the contract. [Metropolitan Electric Co. v. Ginder, [1901] 2 Ch. 799, followed; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 417, distinguished.]

Winnipeg Saturday Post, Limited v. Couzens, 21 Man. R. 562.

Non-compliance with terms—Interim injunction—Motion to continue—Exclusive license—Balance of convenience.

United Nickel Co. v. Dominion Nickel Co., 4 O.W.N. 480, 23 O.W.R. 619.

(§ I B—24)—CONTRACTS NOT TO ENGAGE IN OR AID COMPETING BUSINESS.

On transferring to the plaintiffs his shares in a company dealing in automobiles and their accessories, the defendant covenanted that he would not engage in, carry on, be interested in, have money invested in or hold shares in any business similar to or in competition with the business carried on by the said company in the Province of Manitoba, Saskatchewan or Alberta for a period of five years. The company had power to engage in other lines of business. Held, (1) the covenant only extended to the business actually carried on by the company at the time of the signing of it and was, therefore, not too wide to be enforceable. [Maxim v. Nordenfeldt, [1893] 1 Ch. 630, [1894] A.C. 535, distinguished.] 2. Extrinsic evidence might be given to show what was the business carried on by the company at the time. (3) The plaintiffs were entitled to an injunction in the terms of the covenant against the defendant who had accepted the position of manager for another company carrying on, at Winnipeg, the business of dealers in automobiles, limited to dealing in automobiles.

Kelly v. McLaughlin, 21 Man. R. 789.

(§ I B—27)—RESTRAINING PROCEEDING WITH BUILDING CONTRACT, AFTER CANCELLATION.

As the owner may, at will, resiliate a contract for construction of a building the contractor who continues the work after notice of resiliation will be stopped by injunction.

Ettenberg v. Desroches, 13 Que. P.R. 279 (Sup. Ct.).

C. Transfer or disposition of property.

(§ I C—31)—SUPPLEMENTARY TO RECEIVERSHIP.

The executors are not necessary parties to a motion to continue an injunction restraining a judgment debtor legatee from dealing with his legacy and appointing a judgment creditor receiver thereof.

Gilroy v. Conn. 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

(§ I C—32)—BETWEEN HUSBAND AND WIFE.

An injunction is improperly granted to restrain a debtor and his wife from using or in any way transferring certain funds placed to the credit of the wife upon the mere ground that such funds had been and still were the property of the husband but had been deposited in the wife's name in the absence of any allegation that the money had been given to the wife and that the same was fraudulent and void as to creditors. (Per Harvey, C.J., and Stuart, J., on an equal division of the Court.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

As shares of stock may be easily lost to judgment creditors, the Court will, as an exercise of discretion, grant an interlocutory injunction restraining their transfer by one to whom it was alleged they were fraudulently transferred, notwithstanding it did not appear on the application that there was imminent danger that they would be transferred and lost to the judgment creditor if the writ were denied.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

Upon an application by a judgment creditor for an interlocutory injunction to prevent the disposal of shares of stock by the wife of the judgment debtor, to whom it is alleged the latter transferred them in his lifetime with intent to defraud his creditors, the judgment debtor's examination in the suit in which the judgment was rendered cannot be considered. [Clinton v. Sellers, 1 Alta. L.R. 135, specially referred to.]

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

E. Taking of, injury to, or trespass upon, real property.

(§ I E—40)—TRESPASS UPON REAL PROPERTY.

An injunction will not be continued against a landlord for trespass on the demised premises where the plaintiff has not made out a case of actual damage, present or future, there being a sufficient remedy in an action for damages if any were sustained.

Taylor v. Pelof. 1 D.L.R. 212, 3 O.W.N. 571, 20 O.W.R. 927.

(§ I E—42)—RIGHT OF LANDLORD TO RESTRAIN TENANT.

An action by a lessor for an injunction restraining a lessee from using the land demised in a manner contrary to the lease, may be maintained as an independent action, without the addition of a prayer for the cancellation of the lease. [McArthur v. Coupal, 16 Que. S.C. 521, distinguished, and dictum therein disapproved; Wilder v. City of Quebec, 25 Que. S.C. 128, and Rheaume v. Stuart, Que. 20 K.B. 414, referred to; see also Mignault, Le Droit Civil du Bas-Canada, vol. 7, p. 290.]

Audet v. Jolicoeur, 5 D.L.R. 68.

Alleged obstruction and nuisance—Injunction restraining—Forfeiture of lease.

Appelbe v. Douglas, 4 O.W.N. 389, 23 O. W.R. 396.

(§ I E—43)—COMMISSION OF TRESPASS OR WASTE.

In an ordinary case of trespass where there is an adequate legal remedy in the nature of damages, an injunction will only be granted by a Court of Equity when special circumstances are shewn.

Godard v. Godard, 4 N.B. Eq. 268.

(§ I E—44)—WRONGFUL SEIZURE OF GOODS; INJUNCTION AGAINST.

An injunction will not be granted to restrain a person from seizing, or from keeping possession of, or from selling, or from advertising for sale, a carriage and three cows claimed by the plaintiff, where he has a full, complete and adequate remedy at law in replevin or in an action for damages. [Moren v. Shelburne Lumber Co., Russell's Equity Decisions, N.S. 134, applied.]

Prairie Stock Farm Co., Limited v. McFatridge, 5 D.L.R. 749.

(§ I E—46)—ERECTION OF BUILDING OR OTHER STRUCTURE.

Trespass—Boundary.

Douglas v. Bullen, 3 D.L.R. 898, 3 O. W.N. 1619, 22 O.W.R. 837.

(§ I E—47)—EXTRACTION OF GAS, PETROLEUM OR OTHER MATERIALS.

Mining rights—Mandamus.

Curry v. Wettlaufer, 3 D.L.R. 900, 3 O. W.N. 1641.

(§ I E—48)—BY PUBLIC IMPROVEMENT.

A municipal corporation which exceeds its powers by infringing the property rights of an adjoining owner in widening a street, will be enjoined and held in damages.

Peterson v. Bitulithic & Contracting Co., 7 D.L.R. 586, 22 W.L.R. 398.

F. Water rights.

(§ I F—58)—POLLUTION.

The owner of land on the bank of a river can maintain an action to restrain the fouling of the water by municipal drainage works without shewing that the fouling is actually injurious to him, if it appears that there is a probability that in summer the stream would thereby be made dangerous to health. [Crossley v. Lightowler, L.R. 2 Ch. 478, and Young v. Bankier, [1893] A.C. 691, applied.]

Crowther v. Town of Cobourg, 1 D.L.R. 40, 3 O.W.N. 490, 20 O.W.R. 844.

Not only will damages be awarded for past injuries, but an injunction will be granted to restrain the defendant from dumping debris from a quarry upon a steep declivity on land owned by or under his control, from which earth was washed into a mill pond owned by the plaintiff, which not only fouled the waters thereof but threatened as well to fill the pond itself, notwithstanding it did not appear that the plaintiff had title, either by deed or right of possession, to the bank of the pond at the place where such debris washed into it.

Fisher & Son v. Doolittle, 5 D.L.R. 549, 3 O.W.N. 1417, 22 O.W.R. 445.

(§ I F—59a)—OBSTRUCTIONS.

Riparian owners have a right of action to compel the removal of a dam which seriously interferes with their riparian rights and to compel the restoration of the former status in quo so that the waters may escape from the lake at their natural level, and this without prejudice to their claim for damages.

Village of Marbleton v. Ruel, 1 D.L.R. 624, 21 Que. K.B. 434.

G. As to corporate matters; associations.

(§ I G—60)—AS TO CORPORATE MATTERS.

An injunction should not be granted to restrain the president of the board of directors of a church corporation from proceeding with a sale of pews to the church members, where plaintiffs set up as a ground for the injunction that two-thirds of the members are opposed to the proposed sale, but where the constitution of the church corporation is not being infringed by the defendant officer.

Gold v. Maldaver, 6 D.L.R. 333, 4 O.W. N. 106, 23 O.W.R. 75.

(§ I G—62a)—ILLEGAL RESOLUTIONS.

In an action to restrain a company from acting upon a resolution said to have been illegally passed at a shareholders' meeting, it need not be shewn that application was first made to the company to begin proceedings, if it appear that such an application would have been futile. [Rose v. British Columbia Refinery Co., 16 B.C.R. 215, referred to.]

Elliot v. Hatzic Prairie, Limited, 6 D.L. R. 9, 21 W.L.R. 897.

(§ I G—64) — FINANCIAL INSTITUTIONS; BANKS.

The Courts of Justice should interfere with the business of a financial institution only for the most weighty reasons; an injunction which would suspend the business of a bank should not be granted on the sole ground of apprehension of a call on the shareholders to make payments on their stock unless there are specific allegations of fraud or bad management.

Ducout v. Forget, 14 Que. P.R. 42 (Sup. Ct.).

I. Against legal proceedings.

(§ I I—75)—RESTRAINING ACTION.

Fundamentally, as well as under sec. 57, sub-sec. 9, of the Judicature Act (Ont.), the law is that no cause pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction, but that the

remedy, if any, must be by an application for a stay in the original action.

Boeckh v. Gowganda-Queen Mines, Limited, 6 D.L.R. 292, 4 O.W.N. 27, 23 O.W. R. 4.

Where in contravention of sec. 57, subsec. 9, of the Judicature Act (Ont.), a motion in a new action is made for an injunction against a judgment in a prior action between the same parties seeking the identical remedy already sought and refused in the original action, the Court in dismissing the motion for injunction may broaden it into a motion for judgment and also dismiss the substantive action, where its decision of the injunction motion in effect disposes of the whole action.

Boeckh v. Gowganda-Queen Mines, Limited, 6 D.L.R. 292, 4 O.W.N. 27, 23 O.W. R. 4.

(§ I I—78a)—CONDEMNATION PROCEEDINGS.

Where an order appointing an arbitrator for the purpose of assessing compensation under the Victoria Water Works Act has been made by a Judge of the Supreme Court, an interim injunction to restrain such arbitration will not be granted upon the motion of the municipality in the absence of evidence that the municipality is likely to suffer damages if the arbitration proceeds.

Healey v. Corporation of Victoria, 5 D. L.R. 704, 21 W.L.R. 966.

An action for an injunction restraining a board of education from proceeding with an arbitration under the School Sites Act, 9 Edw. VII. (Ont.) ch. 93, to fix the value of lands desired by the board for a school site, and from taking possession of the lands, and for a declaration that the board has no right to arbitrate and that the arbitration and award are irregular and void, and to set aside the award, is not maintainable in the High Court of Justice, but such relief can be obtained only upon a summary application to the County Judge under sec. 20 of the Act.

Sandwich Land Improvement Co. v. Windsor Board of Education, 3 D.L.R. 423, 3 O.W.N. 1150.

Condemnation proceedings — Public schools—Expropriation of land for site—Restrain arbitrators from proceedings—School Sites Act, 9 Edw. VII. ch. 93—Remedy by summary application to County Court Judge—Dismissal of action—Costs.

Sandwich Land Improvement Co. v Windsor Board of Education (No. 2), 6 D.L.R. 854, 4 O.W.N. 112, 23 O.W.R. 142.

J. Against officers generally.

(§ I J—80)—AGAINST OFFICERS GENERALLY.

An injunction will lie to restrain a municipality from proceeding to confiscate and destroy articles (e.g., eggs) which have been neither inspected nor seized.

City of Montreal v. John Layton & Co., Limited, 1 D.L.R. 160.

(§ I J—83)—AS TO ORDINANCES; BY-LAWS.

Injunction will not lie to prevent the passing of a town by-law after it had been carried by a majority of the ratepayers when there is an appropriate remedy in a motion to quash the by-law. [Little v. McCartney, 18 Man. L.R. 323, 9 W.L.R. 449; King v. Toronto, 5 O.L.R. 163, and Re Sawyer, 124 U.S. 200, specially referred to.]

City of London v. Town of Newmarket, 2 D.L.R. 244, 3 O.W.N. 565, 20 O.W.R. 929.

Upon an application by a person (not in the name of the Attorney-General) for an injunction, restraining a city corporation from passing a certain twice-read by-law respecting an agreement between the defendant city and a certain railway company, renting to it, for 99 years at a nominal rental, a valuable portion of a city park, for hotel purposes, and granting a partial exemption from taxation, and thereby in effect bonusing the company in contravention of secs. 185 and 210 to 240 of the City Act, being ch. 84, R.S.S., the application for the injunction will be refused, in view of sec. 242 of the City Act (ch. 84, R.S.S.) which expressly provides a method available to any elector of the city, to apply to the Court within two months after the passing of any ultra vires by-law to quash the same.

Keay v. City of Regina, 6 D.L.R. 327, 22 W.L.R. 185.

(§ I J—85)—SCHOOL OFFICERS.

An injunction will be granted restraining the trustees of a school district from preventing the child, of a parent whose permanent and principal place of residence is within the school district, from attending the school without the payment of a fee chargeable only against "non-resident" pupils.

Inkster v. Minitonka School District, 6 D.L.R. 57, 22 W.L.R. 57.

L. As to parks, highways, and railroads.

(§ I L—104)—TELEPHONES AND ELECTRIC LIGHT POLES.

Where a public service corporation proceeds with its undertaking without complying with the statutory requisites as to its use of the highway, it is deemed a trespasser upon the highway and may be enjoined from further continuance of such trespass.

County of Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 3 O.W.N. 607, 21 O.W. R. 194, 25 O.L.R. 467.

M. As to patents, copyrights, trade-marks, trade-names, and imitations.

(§ I M—117)—To prevent notice or claim of infringement.

The fact that a foreign corporation has written letters from its head office in the foreign country addressed to and received by merchants in Ontario, threatening actions for damages for infringement of its Canadian trade-mark in respect of sales of goods of plaintiff's manufacture bearing a similar name, does not alone bring the foreign corporation within the jurisdiction of an Ontario Court for the purposes of plaintiff's action for an injunction to restrain the continuance of such notices; nor will the jurisdiction attach in respect of such injunction action from the additional circumstances that the foreign corporation, while not maintaining any branch in Ontario, transacts business in the province in respect of which an order for service out of Ontario would be permissible under Ont. Consolidated Rule 162 in an action relating to such business. [As to the statutory right in England to enjoin infringement notices, see 17 Halsbury's Laws of England, p. 258.]

Capital Manufacturing Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ I M—118)—Copyright.

An injunction will be granted to protect a copyright and to restrain infringement although in the infringing work the protected literary matter has been inseparably mixed up with the defendant's own compilation so that the injunction will have the indirect effect of restraining the publication of both. [Mawman v. Tegg (1826), 2 Russ. 385, followed; see also MacGillivray on Copyright, 1st ed., p. 88; Kerr on Injunctions, 4th ed., p. 290.]

Cartwright v. Wharton, 1 D.L.R. 392, 3 O.W.N. 499, 25 O.L.R. 357.

Interim injunction—Infringement of copyright—Damages—Costs.

Hawkes v. Whaley Royce, 4 O.W.N. 394, 23 O.W.R. 404.

II. Preliminary and interlocutory injunctions (interim injunctions).

(§ II—130)—Preliminary and interlocutory injunctions.

Where there is a bona fide dispute by the defendant of the plaintiff's title to riparian rights in an action for interference, an interlocutory injunction will not be granted, unless the interim injury sustained by the plaintiff is clearly greater, in case he succeeds in the action, than the interim injury which the defendant would sustain, by the interlocutory injunction. [See Mackenzie's Yearly Practice (Eng., 1912, pages 1263, 1264; Canadian Ten Year Digest, 1720, 1728, 1730.]

Minnesota and Ontario Power Co. v. Rat Portage Lumber Co., 1 D.L.R. 95, 3 O.W.N. 502, 20 O.W.R. 876.

It is not usual to grant an interim injunction ex parte after the defendant has entered an appearance in the action, although it may be done in pressing cases; and then the plaintiff applying ought to inform the Judge of the fact. [Mexican Co. of London v. Maldonado, [1890] W.N. 8, approved.]

Capital Manufacturing Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.N. 920.

On an ex parte application for an injunction, the fact that a prior interim injunction had been granted and that a motion made to continue same had been dismissed for irregularity, should be disclosed to the Judge to whom the second application for a similar injunction is made, and the fact of such disclosure should at least be evidenced in the order itself by a statement or recital that the prior orders had been read on the last application. [See also 17 Halsbury's Laws of England, p. 278.]

Capital Manufacturing Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ II—131a)—Novel and difficult question.

A novel and difficult legal question should not be dealt with upon a motion for an interim injunction, but the plaintiff will be left to his remedy at the trial.

Rickart v. Britton Manufacturing Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

(§ II—134)—Dissolution and continuance.

Claim to hay—Remedy in damages.

Hewitt Allen v. Adams, 1 D.L.R. 907.

Contract—Removal of machinery—Interim injunction—Motion to continue—Unnecessary party.

The Commissioners of the Transcontinental Railway v. Grand Trunk Pacific Railway Company and the Commissioners of the Temiskaming and Northern Ontario Railway, 4 O.W.N. 495, 23 O.W.R. 624.

(§ II—134a)—Nuisance.

Restraining nuisance—Locus standi of plaintiffs — Enlargement of motion — Leave—Speedy trial.

Smith v. Harris (No. 1), 6 D.L.R. 861, 4 O.W.N. 134, 23 O.W.R. 100.

III. Procedure.

(§ III—135)—Procedure.

The procedure to obtain an injunction is by petition and this petition constitutes an instance. Therefore, the petitioner who does not reside in the province should give security for costs and furnish a power of attorney.

Thomas v. Fish, Limited, 13 Que. P.R. 406 (Sup. Ct.).

(§ III—137)—PARTIES.

Blasting in streets—Skill and care—Addition of parties.

Bell Telephone Co. v. Avery, 6 D.L.R. 852, 3 O.W.N. 1664, 22 O.W.R. 963.

(§ III—138)—AFFIDAVIT.

It is within the discretion of a Judge sitting in chambers to act upon an affidavit to which exhibits have been annexed, contrary to Ordinance 38, r. 23, but the party offering such affidavit may be deprived of costs, under Ordinance 38, r. 3 or Ordinance 65, r. 27 (20).

D'Israeli Asbestos Company v. Isaacs et al., 40 N.B.R. 431.

(§ III—139)—DELAY IN APPLYING FOR.

Where delay in applying for an interlocutory injunction is satisfactorily explained the writ will not be denied.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

(§ III—142)—BONDS; ENFORCEMENT; DAMAGES.

Where an order declared that "an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant . . . by reason of the injunction herein which the plaintiff, according to the practice of this Court, ought to pay" and sent the issue for trial and directed the parties to file pleadings, and upon the trial of the issue the Court dealt only with the amount of damages and did not consider the question whether any damages should be assessed and it appeared that the Judge issuing the order did not intend to decide the latter question, the duty devolves upon the Court to do so. (Per Harvey, C.J., and Stuart and Beck, JJ.) [Smith v. Day, 21 Ch. D. 421, considered.]

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

The undertaking of a plaintiff in an injunction suit to abide by any judgment the Court may make as to damages suffered by the defendant by reason of the injunction is not a contract with the defendant but a conditional obligation to the Court which becomes absolute only when the Court finds as a condition precedent to liability that the case in view of all the circumstances is a proper one in which to direct an enquiry as to damages. (Per Beck, J.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

The mere vacating of an interlocutory injunction is not sufficient to entitle the defendant to an enquiry as to the damages sustained by him in the absence of a shewing on his part that the injunction was improperly granted upon a consideration of the facts involved in the action. (Per Beck, J.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

Where an injunction against a debtor and his wife restraining them from using funds deposited in the wife's name stopped the use also of money to which the husband had no claim, but which was used in another business in which the wife was a partner, and it was shewn that such business had been profitable but that the injunction suspended the same for a time and caused the wife and her partner great inconvenience she was entitled to damages therefor. (Per Harvey, C.J., and Stuart, J., on an equal division of the Court.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

A claim for damages upon an injunction undertaking is not established on shewing only that the defendant by reason of being restrained from withdrawing his bank deposit account lost the opportunity of securing an assignment of an option for the purchase of lands, the contents of which were not offered in evidence. (Per Harvey, C.J., and Stuart, J.)

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64.

(§ III—150)—LOCAL JUDGE; INTERIM INJUNCTION.

A local Judge has no power under Ontario Con. Rule 46 to grant an interim injunction except in cases of emergency and on proof to his satisfaction that the delay required for an application to the High Court is likely to involve a failure of justice; and this power is not to be exercised without notice of the application being given, unless the Court is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief.

Capital Manufacturing Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

An interim injunction for a period not exceeding eight days may be granted by a local Judge under Ontario Con. Rule 46, and after the expiry of an eight-day injunction granted by one local Judge a second eight-day injunction should not be granted by another local Judge to the same effect as the first injunction.

Capital Manufacturing Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ III—155)—DISCRETION OF COURT; WHEN TO BECOME OPERATIVE.

In an action by a railway company, which had the right to expropriate the land in dispute, to restrain the defendant from interfering with the construction by the company of its railway across a certain road, in which action a counterclaim was made by the defendant for a declaration of his right to the road as a private way and for an injunction restraining the company from trespassing thereon, the ex parte injunction granted the company should not be dissolved and the injunction

awarded the defendant upon the merits in accordance with his counterclaim should not be made operative until an opportunity is given to the company to take expropriation proceedings. [Sandon Water Works and Light Co. v. Byron N. White Co., 35 Can. S.C.R. 309, followed.]

Canadian Northern R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

(§ III—160)—AMENDMENT OF INJUNCTION ORDER.

Upon an application to amend an injunction, in an action in which the plaintiff (a sub-lessee) claimed against the defendant (assignee of the fee in the demised premises) damages for wrongful distress, and an injunction limiting the right to distrain, and where the injunction, statement of claim, lease and sublease, all erroneously described the demised premises as "lot 7, block 150" instead of "lot 7, block 152"; leave to amend will be granted, but with the proviso that no process for contempt shall lie against the defendant for any act in the interval between the service of the original injunction order and the amendment, with respect to "lot 7, block 152."

Pigeon v. Preston, 6 D.L.R. 399, 22 W. L.R. 181.

INNKEEPERS.

Liquor license, see Intoxicating Liquors.

INSANE PERSONS.

See Incompetent Persons.

INSOLVENCY.

I. IN GENERAL.
II. UNLAWFUL PREFERENCES.
III. WHAT PASSES TO ASSIGNEE OR TRUSTEE.
IV. CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.
V. DISCHARGE.

As to assignment for creditors, see Assignments for Creditors.
As to bankruptcy, see Bankruptcy.
Of banks, see Banks, IV.
Of railway, see Railway, VII.
Of corporation, see Company, VI.
Of partnership, see Partnership.
As to receivers, see Receivers.

I. In general.

(§ I—3)—WHAT CONSTITUTES INSOLVENCY.

A person who operates a factory in which he manufactures cheese and butter out of materials belonging to other parties and who sells the product in his own name, receiving a commission thereon, is a trader, and is subject to the provisions of the Code of Procedure, Quebec, regarding abandonment of property.

Blanchette v. Levesque, 5 D.L.R. 481, 41 Que. S.C. 477.

A debtor should be held to be "in insolvent circumstances" within the meaning of sec. 40 of the Assignment Act, R. S.M. 1902, ch. 8, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do. (Review of authorities upon question of insolvency.)

Empire Sash and Door Co. v. Maranda et al., 21 Man. R. 605.

Temporary financial embarrassment does not of itself constitute a state of insolvency especially if the debtor has given notice thereof to the creditor demanding an assignment. The debtor who resists a demand for an assignment is only to be considered as refusing to assign if his contention is based on frivolous grounds. The merchant who, after contesting such demand, makes large sales of his stock and uses the proceeds to pay the creditor demanding it and his creditors generally is not thereby in the position of one who conceals or withholds his property.

Drouin Bros. & Rattray v. Perron, 14 Que. P.R. 7 (Sup. Ct.).

II. Unlawful preferences.

(No cases.)

III. What passes to assignee or trustee.

(§ III—10)—WHAT PASSES TO ASSIGNEE OR TRUSTEE.

If a purchaser upon a sale of a restaurant license under suspensive condition becomes insolvent before all the instalments are paid, and there results a default under a suspensive condition which provides that failure to pay any instalment should entitle the vendor to re-take possession and that the ownership of the license should revert to him, the vendor is entitled to re-take the license sold, even though such license be the only asset of the creditors, provided always the sale was made for good consideration and without fraud.

Turgeon v. St. Charles, 7 D.L.R. 445.

(§ III—11)—INVOLUNTARY LIQUIDATION OF INSURANCE COMPANY.

The fact that a permanent fund required by the charter of a mutual insurance company to be maintained for the security of its policy-holders was depleted and non-existent when a policy of insurance was issued, does not render the contract null and void so as to relieve the insured from liability on a note given for the premium thereon.

China Mutual Insurance Co. v. Smith, 3 D.L.R. 766, 11 E.L.R. 120.

(§ III—12)—RIGHTS OF ASSIGNEE.

Where a so-called financial agent, who obtains moneys for investment in a blind pool under promises of 30 per cent. profit per month, becomes insolvent and absconds, and, prior to his absconding, has paid out to some of the depositors fictitious profits out of the moneys deposited with him by the mass, no action lies in favour of the curators named to the abandonment to recover these profits from the winner. [Forget v. Ostiguy, [1895] A.C. 318, distinguished.]

Wilks v. Matthews, 7 D.L.R. 395.

IV. Claims against and distribution of estates.

(§ IV—16)—PRIORITIES.

All creditors (apart from privileged creditors) are entitled to share alike in the proceeds of their debtor's property and if some alone receive the proceeds the others are prejudiced, even if the property be sold for its full value, and although a right of redemption has been reserved by the debtor; and the purchaser cannot ask that the objecting creditors exercise this right of redemption on the debtor's behalf.

Landry v. McCall, 6 D.L.R. 793, 41 Que. K.B. 348.

V. Discharge.

(No cases.)

INSPECTION.

Of documents for discovery, see Discovery and Inspection, I.

Of subject of action, order for, see Discovery and Inspection, I.

INSTRUCTIONS TO JURY.

See Trial, III.

INSURANCE.

I. COMPANIES, OFFICERS AND AGENTS.
- A. Right and manner of doing business.
- B. Foreign corporations.
- C. Dissolution; forfeiture; insolvency; rights of members of mutual companies.
- D. Officers and agents.

II. INSURABLE INTEREST.
- A. In property.
- B. In life.

III. THE POLICY OR CONTRACT.
- A. In general.
- B. Reformation; rescission.
- C. Cancellation; surrender; paid-up policy.
- D. Construction.
- E. Warranties; representations; conditions; description.
- F. Forfeiture.
- G. Reinstatement.
- H. Premiums and assessments.

IV. TRANSFER OF POLICY OR OF INTEREST THEREIN.
- A. Assignment generally.
- B. Change of beneficiary.

V. WAIVER; ESTOPPEL.
- A. Of insured or beneficiary.
- B. Of insurer.

VI. THE LOSS; REMEDIES OF THE ASSURED.
- A. Notice; proofs; arbitration.
- B. Risks and causes of loss, injury or death.
- C. Extent of injury or loss; of recovery.
- D. Interest in proceeds.
- E. Defences; release.
- F. Subrogation; rights of carrier.
- G. Apportionment or contribution.
- H. Actions; enforcing payment.

VII. RE-INSURANCE.

VIII. GUARANTY POLICIES.

I. Companies, officers, and agents.

B. Foreign corporations.

(§ I B—11a)—RIGHT TO SUE OR BE SUED.

The provisions of ch. 7 of the B.C. Companies Act of 1910, will not permit an insurance company organized and having its head office and principal place of business in another province, although registered and having a registered office in British Columbia, to sue or be sued in the Courts thereof, except in respect to business transacted therein.

Pearlman v. Great West Life Assurance Co., 4 D.L.R. 154, 21 W.L.R. 557.

The fact that a foreign mutual insurance company collects assessments from members residing in the Province of Quebec constitutes the possession of assets on its part in said Province; hence the company could be summoned to answer an action entered in the Province of Quebec.

Hodges v. The Commercial Travellers Mutual Benefit Society, 13 Que. P.R. 352 (Sup. Ct.).

C. Dissolution; forfeiture; insolvency; rights of members of mutual companies.

(§ I C—17)—RIGHTS OF MEMBERS GENERALLY.

As a policy of insurance is not ipso facto cancelled by the involuntary liquidation of the mutual insurance company that issued it, a member thereof is not entitled to a deduction of the unearned premium for the unexpired portion of the policy from the amount due on a premium note given by him to the company, notwithstanding that the policy stipulated what proportion of the premium the company should retain upon its cancellation, as such stipulation applied only to voluntary cancellations by the parties to the contract.

China Mutual Insurance Co. v. Smith, 3 D.L.R. 766, 11 E.L.R. 120.

(§ I C—19)—Insolvency.

Upon the involuntary liquidation of a mutual insurance company a member thereof is liable for the full amount of notes given by him for the premium on a policy of insurance; and he is not entitled to a deduction for the amount of the unearned premium for the unexpired portion of the life of such policy. [Hill v. Baker, 205 Mass. 303, followed.]

China Mutual Insurance Co. v. Smith, 3 D.L.R. 766, 11 E.L.R. 120.

II. Insurable interest.

(No cases.)

III. The policy or contract.

A. In general.

(§ III A—41)—Validity generally.

Where one who is incapacitated by drink from knowing what he is doing signs an application for life insurance, filled in by the agent of the insurance company, which contains a material misrepresentation, and also a provision that, in the event of any such material misrepresentation in the application, the policy shall be void, and the untrue statement is never brought to the knowledge of, or ratified by the applicant, the application is a fraud by the agent upon both the insurance company and the applicant, and there is no valid contract of insurance.

Imperial Life Assurance Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372.

(§ III A—46)—Renewal.

A reference in an insurance renewal receipt to the renewal policy by its number as continued, for a fixed term is sufficient to incorporate the terms of the policy in the new contract of insurance so created to comply with section 144 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, by which no condition or stipulation shall be valid to the prejudice of the assured, or of the beneficiary, unless set out in full upon the face or back of the instrument forming or evidencing the contract. [Venner v. Sun Life, 17 Can. S.C.R. 394; Jordan v. Provincial Provident Institution (1898), 28 Can. S.C.R. 554; Hay v. Employers' Liability Assurance Corporation (1905), 6 O.W.R. 459, followed.]

Youlden v. London Guarantee and Accident Co., 4 D.L.R. 721, 3 O.W.N. 832, 21 O.W.R. 674, 26 O.L.R. 75.

(§ III A—47)—Acceptance of risk.

An application for insurance when duly accepted by an insurance company constitutes a valid contract to insure, and if the property covered by such application be destroyed by fire before the arrival of the policy itself, the insured will be entitled to recover the amount of the insurance.

Anglo-American Insurance Co. v. LeBaron, 2 D.L.R. 877.

B. Reformation; rescission.

(§ III B—51)—Rescission.

Where an agent of a life insurance company, by an innocent error in calculation made at the time the policy issued, represented the surrender value of the policy to be greater than it really was, which correct amount could have been ascertained by insured by reference to a mortality table, in the absence of fraud or evidence shewing that this representation induced insured to take out the policy, recission on the part of the insured will not be allowed, especially where many years elapse before action is brought. [Shaw v. Mutual Life Insurance Co. of New York, 23 O.L.R. 559, affirmed.]

Shaw v. Mutual Life Insurance Co. of New York, 7 D.L.R. 637, 46 Can. S.C.R. 606.

C. Cancellation; surrender; paid-up policy.

(§ III C—56)—Notice.

A statement in a notice sent a policyholder of a mutual insurance company by the receiver thereof in involuntary liquidation, that he understood the legal effect of such proceedings to amount to a cancellation of outstanding policies of insurance, does not in fact amount to a cancellation so as to entitle a member to a deduction of the unearned premium for the unexpired portion of the policy, from the amount due on a premium note given by him to the company.

China Mutual Insurance Co. v. Smith, 3 D.L.R. 766, 11 E.L.R. 120.

D. Construction.

(§ III D—60)—Construction.

A contract of insurance supported by a renewal receipt for the premium is to be regarded as a new contract of insurance depending upon a new agreement between the parties.

Youlden v. London Guarantee and Accident Co., 4 D.L.R. 721, 3 O.W.N. 832, 21 O.W.R. 674, 26 O.L.R. 75.

(§ III D 1—65)—Of policies on property.

The word "railway" as used in a warranty by the insured in a policy of fire insurance covering lumber, that no railway ran within a specified distance of the insured property, is not limited to railways opened and used for general public traffic but also embraces railways in course of building upon whose tracks construction trains only are running.

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

On July 3rd, 1911, Christ Church Cathedral, Fredericton, was partially destroyed by fire, and a chime of bells in the tower was wholly destroyed. The building was insured for $55,000 in ten different companies, and the schedule of insurance in all of the policies was the same, being as follows:—(1) On the stone building. Roof

covered with tin shingles, including the tower, spire and chancel thereof, as well as choir room and vault, and all monuments and memorial tablets in said building, situate on the south side of Church street, in the city of Fredericton, occupied as a place of public worship, and known as Christ Church Cathedral. Amount, $42,000; rate, .80; premium, $336.00. (2) On pipe organ and appurtenances belonging thereto, including choir music, communion table, pulpit, font, lectern, desks, pews and seating chairs, carpets, stoves, furnaces and their attachments, steam-heating apparatus, including piping, clocks, printed books, plate and plated ware, vestments and all church furnishings, furniture and fixtures, fuel, lighting equipment, including acetylene plant and all piping used in connection therewith while contained in said building. Amount, $10,000; rate, $1.00; premium, $100.00. (3) On stained glass and all other windows in said building. Amount, $3,000; rate, $1.00; premium, $30.00. Amount, $55,000; premium, $466.00. Held, all parties agreeing that the bells were intended to be insured under the policies, that the "chime of bells" fell within class (2) under the description "all church furnishings, furniture and fixtures."

The Bishop of Fredericton v. The Union Assurance Company et al., 4 N.B. Eq. 408.

A provision in a policy of insurance that the insurer shall not be liable for loss where it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue or, if the insured misrepresented or omitted to communicate any circumstances which were material to be known to the company in order to enable it to judge of the risk withdraws the effect of a warranty by the insured in the application that his answers therein are true and introduces materiality as an essential of the misrepresentation, which shall relieve the company from liability. [Anderson v. Fitzgerald, 4 H.L. Cas. 484, and Fitzrandolph v. Mutual Relief Society, 17 Can. S.C.R. 333, distinguished.]

Clarke v. British Empire Insurance Co., Limited, 4 D.L.R. 444, 21 W.L.R. 774.

(§ III D 1—66)—PROPERTY COVERED.

A misrepresentation of the value of a stallion must be wilful or fraudulent to avoid the policy covering the same, value being a matter of opinion.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

(§ III D 2—70)—OF POLICIES ON PERSONS.

In a policy of insurance stipulating for the payment to the insured's wife "should his death occur within the tontine period, hereof, otherwise to himself, his executors, administrators, or assigns, the sum of $1,000" and further providing that it was issued and accepted under the insurer's semi-tontine dividend plan upon special provisions incorporated in the policy and made a part thereof, one of which was that upon completion of the tontine period, if the policy had not been terminated previously by surrender, lapse or death, the legal holder thereof should have the option to withdraw in cash the accumulated reserve fixed by the policy at $465.70, and in addition thereto the surplus apportioned by the defendants to the policy, and the insured outliving the tontine period, he and his wife agreed to take such option and surrender the policy and accept its entire cash value of $642.70 and there was afterwards a disagreement as to the amount of the option, the insured and his wife were not entitled in an action on the policy to recover $1,000 —the face value thereof—but their recovery would be limited to the amount of the option.

Labonté v. North Life Assurance Co., 3 D.L.R. 177, 3 O.W.N. 595, 21 O.W.R. 93.

An agreement of a member of a mutual benefit and benevolent brotherhood issuing life and accident insurance certificates that his contract should be governed by the constitution either as it existed when his certificate was issued or as subsequently altered or amended, is neither contrary to public order nor against good morals and it must be enforced and given full effect unless some valid reason is found for not so doing.

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110.

(§ III D 2—71)—ACCIDENT INSURANCE POLICIES.

Where an insurance policy contains a clause the language of which is intended to limit the liability of the insurers under certain circumstances to a fractional amount of the sum payable in other circumstances, such clause is to be construed strongly against the insurers. [Re Etherington and Lancashire and Yorkshire Accident Ins. Co., [1909] 1 K.B. 591, followed; Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. Rep. 945, specially referred to.]

Wadsworth v. Canadian Railway Accident Insurance Co., 3 D.L.R. 668, 21 O.W.R. 601, 3 O.W.N. 828, 26 O.L.R. 55.

(§ III D 2—72)—STATUTORY CONDITIONS.

In those provisions of sec. 197 of 8 Edw. VII. (Que.), ch. 69, now contained in sub-sec. (1) of art. 7028, R.S.Q. 1909, providing that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument, forming or evidencing the contract, and, unless so set out, no term or condition, stipulation, or proviso, modifying or impairing the

effect of any such contract made or "renewed" after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary, the word "renewed" refers to such renewals as are made by the payment of the premiums from time to time due on policies issued before the passage of the section. [Carter v. Brooklyn Life Insurance Co., 110 N.Y. 15, at pp. 20, 21, specially referred to; Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, not followed.]

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

The parties to a certificate of life and accident insurance issued by a mutual benefit and benevolent brotherhood may, by special agreement, contract themselves out of those provisions of sec. 197, of 8 Edw. VII. (Que.), ch. 69, now contained in sub-secs. (1) and (3) of art. 7028, R. S.Q. 1909, requiring insurance companies under certain conditions that where an insurance contract made by any company or association is evidenced by a written instrument to set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and directing that, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the coming into force of this Act, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary, and giving the privilege to mutual benefit or charitable associations, however, instead of following the above provision to indicate therein, by particular references, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not inserted in the instrument of contract itself, at or before the delivery of such instrument of contract to deliver also to the assured a copy of the constitution, by-laws and rules therein referred to. [Noel v. Laverdière, 4 Q.L.R. 247; Renaud v. Arcand, 14 L.C.J. 102; Saint-Roch Society v. Moisan, 7 Que. Q.B. 128; Beaudry v. Janes, 15 L.C.J. 118; Hargrove v. Royal Templars, 2 O.L.R. 79, specially referred to; see Cousins v. Moore, 6 D.L.R. 35.]

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110.

(§ III D 2—73)—LIMITATION OF AGENT'S POWER TO MODIFY POLICY.

Where a policy of life insurance contains a provision to the effect that the agent has no power to modify the contract of insurance, or to bind the company by making any promises or by receiving any representation or information not contained in the application for the policy, a false representation by the agent to the insured made at the time of taking out the policy, even if it amounts to a promissory representation will not bind the insurance company. (Dictum per Fitzpatrick, C.J.)

Shaw v. Mutual Life Insurance Co. of New York, 7 D.L.R. 637, 46 Can. S.C.R. 606.

E. Warranties; representations; conditions; description.

(§ III E 1—75)—IN POLICIES ON PROPERTY.

A condition of an application for fire insurance to the effect that the applicant's covenant or agreement that certain statements were full and true expositions of all the facts and circumstances, so far as known to him, regarding the condition, situation, value and risk of the property to be insured, together with the diagram of the premises accompanying the application, should be held to constitute the basis of the company's liability, and form a part of and be a condition of the contract of insurance, is not binding on the applicant if not evidenced in the manner prescribed by secs. 169 and 170 of the Ontario Insurance Act, R.S.O. 1897, ch. 203.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

There is no misrepresentation or concealment by an applicant for a policy of fire insurance of the fact that the property was incumbered, where, without being aware that the application called for such disclosure, the applicant signed a blank application, which was filled out several days later by the agent of the insurance company, who, without the applicant's knowledge, wrote the word "none" after the clause relating to incumbrance, and placed a diagram of the premises on the application, since, under the circumstances, there was no intentional misstatement or concealment by the applicant. [Guardian Insurance Co. v. Connely, 20 Can. S.C.R. 208, referred to.]

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

Upon an application for a fire insurance policy, where the insurer's agent sends a sub-agent, having limited authority, to the applicant to get the application signed and the amounts apportioned as to value and risk, and where, instead of having the necessary appraisement made by the applicant, the sub-agent, at the applicant's request, makes it himself and inserts it into the application, and where the applicant then without reading it signs the application; this was an adoption of the application by the applicant. (Per Galliher, J.A., dismissing appeal in an equally divided Court.)

Mahomed v. Anchor Fire and Marine Insurance Co., 7 D.L.R. 619, 22 W.L.R. 561.

Upon an application for a fire insurance policy, where an agent of the proposed insurer sends to the applicant a sub-agent, whose functions are limited to getting the application signed and the amounts apportioned as to value and risk, and where the insurer's sub-agent, upon the suggestion of the applicant, appraises the property, makes the apportionment and inserts same in the application, which thus completed is signed and adopted by the applicant, the insurer is not bound by the knowledge of the sub-agent as to such appraisement, but, as to it, the sub-agent is presumed to be the agent of the applicant. (Per Irving, J.A., dismissing appeal in an equally divided Court.) [Biggar v. Rock Life, [1902] 1 K.B. 516, applied; Bawden v. London, Edinburgh and Glasgow Insurance Co., [1892] 2 Q.B.D. 534, distinguished.]

Mahomed v. Anchor Fire and Marine Insurance Co., 7 D.L.R. 619, 22 W.L.R. 561.

If an applicant for a fire insurance policy chooses to sign, without reading, the application filled in by some other person, and acquiesces in that form of application, he must be treated as having adopted it. (Per Irving, J.A., dismissing appeal in an equally divided Court.) [Biggar v. Rock Life Assurance Co., [1902] 1 K.B. 516, applied.]

Mahomed v. Anchor Fire and Marine Insurance Co., 7 D.L.R. 619, 22 W.L.R. 561.

(§ III E 1—76)—CONCEALMENT.

The defence to an action on a policy of fire insurance of the concealment by and the failure of the applicant for the insurance to state in his application that he feared incendiarism fails, where the only evidence on the question was that seven or eight years before a threat had been made to burn him out.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

The defence to an action on a policy of fire insurance of the non-disclosure by the plaintiff of the fact that the property to be insured was incumbered, rests upon the question whether the insurance company was prejudiced by such non-disclosure.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

The failure of an applicant for fire insurance to disclose to the insurance company all material circumstances pertaining to the property to be insured, even though the applicant is innocent of wrong intent, will vitiate the contract of insurance where the company has been prejudiced by such non-disclosure.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

A policy of insurance which contains a condition that the insurer shall not be liable for loss when it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue or if the insured misrepresented or omitted to communicate any circumstances which are material to be known to the insurer to enable it to judge of the risk it undertakes, is invalidated where the insured in answer to questions in the application for insurance on a stallion, replied that he had owned the stallion three months and that he had paid $2,000 for it, and where in answer to the next following question he gave the name of the original vendor from whom he had purchased same two weeks prior to the application at a price not exceeding $500, although the assured may be shewn to have sold the stallion meanwhile for a large price and to have re-purchased from the buyer (not mentioned in the application) at the price of $2,000. [Western Assurance Co. v. Harrison, 33 Can. S.C.R. 473, followed; Clarke v. British Empire Insurance Co., 4 D.L.R. 444, reversed.]

Clarke v. British Empire Insurance Co. (No. 2), 6 D.L.R. 353, 22 W.L.R. 89.

The length of time a person has owned a stallion and the price paid for same are material to the risk and any concealment or non-disclosure in connection therewith in an application for insurance on such stallion in which questions are put to the assured for the purpose of obtaining such information, will be sufficient to invalidate the policy. [Western Insurance Co. v. Harrison, 33 Can. S.C.R. 473, applied; Clarke v. British Empire Insurance Co., 4 D.L.R. 444, reversed on appeal; Porter on Insurance, 4th ed., 175, referred to.]

Clarke v. British Empire Insurance Co. (No. 2), 6 D.L.R. 353, 22 W.L.R. 89.

(§ III E 1—77)—GOOD FAITH.

Where a table of rates and classifications attached to a policy of insurance on a horse shewed that the limit of age for such an animal was ten years and that the rate under that age did not vary, an inadvertent overstatement within such limit of age by the assured of the horse's age, which was eight years, was immaterial to the risk.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

(§ III E 1—78)—PREVIOUS FIRES; LOSSES OR CLAIMS.

Where the question in an application for fire insurance upon a printed form supplied by the insurance company was answered by the applicant that he had had no previous fire, but the printed form also contained a reference to "the property to be insured," which might be viewed as limiting the scope of the question to any previous fires affecting the same stock in trade, the answer will not be held to be one material to the risk so

as to invalidate an insurance policy if the previous fire was upon another stock in trade and was of so trifling a character that it could not reasonably be supposed to have affected the acceptance of the application by the insurers. [Western Assurance Co. v. Harrison, 33 Can. S.C.R. 473, distinguished.]

Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

(§ III E 1—80)—TITLE AND INCUMBRANCES.

A mortgagor of insured property is the sole and unconditional owner thereof within the meaning of a provision of a policy of insurance avoiding the same if the insured is not such owner. [Western Assurance Co. v. Temple, 31 Can. S.C.R. 373, affirming 35 N.B.R. 171, followed.]

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

A transfer of insured property as security for a debt is a violation of provisions in the policy avoiding it if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage or if any change take place in the title or interest of the property otherwise than by the insured's death.

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

(§ II E 1b—82)—MORTGAGES.

Where a defence had not been brought within the rule of art. 2487 C.C., and that the judgment of the Superior Court against the insurer should not be reversed.

Phœnix Assurance Co. v. Morin, 18 Rev. de Jur. 94.

(§ III E 1—87a)—"IN COURSE OF CONSTRUCTION."

A contract of fire insurance on a building, described in the policy as being "in course of construction" is void, where, without the knowledge of the defendant company or of the agent who issued the policy, work on the building had been suspended, and it remained in an uncompleted state until destroyed by fire, where the plaintiff in his application stated that he desired a "builder's risk rate" for a short time only, which, at the trial, he explained as meaning a risk on a building that was in course of construction, since such description was misleading and inaccurate, as, under the circumstances, it meant that the work of completing the building was in active progress. [Dodge v. York Fire Insurance Co., 2 O.W.N. 571, 18 O.W.R. 241, specially referred to; and see footnote.]

Dodge v. Western Canada Fire Insurance Co., 4 D.L.R. 465, 21 W.L.R. 558.

In a contract of fire insurance on a building described in the policy as being "in the course of construction," where the work on the building has been suspended, and owing to financial embarrassment it remained in an incompleted state until destroyed by fire, the term "in course of construction" is ambiguous and must be interpreted not as a question of law but of fact in view of all the circumstances, including what passed between and was within the knowledge of the contracting parties. [Dodge v. York Fire Insurance Co., 4 D.L.R. 465 (n), 2 O.W.N. 571, 18 O.W.R. 241, since affirmed by the Supreme Court of Canada, followed; Dodge v. Western Canada Fire Insurance Co., 4 D.L.R. 465, reversed on appeal.]

Dodge v. Western Canada Fire Insurance Co. (No. 2), 6 D.L.R. 355.

Under a contract of fire insurance on a building, described in the policy as being "in course of construction," where the work on the building had been suspended, and it remained in an incompleted state until destroyed by fire, the risk remains in force, it being clear that the term "in course of construction" does not mean that construction must be continued from day to day or month to month without interruption but is to be construed in the light of such contingencies as weather, conditions of trade and labour, and inevitable accident, and even financial embarrassment. [Dodge v. York Fire Insurance Co., 4 D.L.R. 465 (n), 2 O.W.N. 571, 18 O.W.R. 241, since affirmed by the Supreme Court of Canada, followed; Dodge v. Western Canada Fire Insurance Co., 4 D.L.R. 465, reversed on appeal.]

Dodge v. Western Canada Fire Insurance Co. (No. 2), 6 D.L.R. 355.

(§ III E 1—91)—CHANGE OF LOCATION.

Antedating a consent to a transfer of a fire insurance policy covering a stock of goods on their removal from one warehouse to another, will not operate to bind the insurance company, when obtained after the fire but without disclosing the fact, in the knowledge of the insured, but not known to the insurance company that the fire had already occurred.

Kline v. Dominion Fire Insurance Co., 1 D.L.R. 733, 3 O.W.N. 698, 21 O.W.R. 285, 25 O.L.R. 534.

(§ III E 2—111)—FALSE ANSWERS OR CONCEALMENT.

A husband, beneficiary in a policy of insurance upon the life of his wife, is a party to and affected by her misrepresentation and concealment of the fact where he knew that at the time she made application for such insurance she was suffering from consumption, and had been informed by a physician that she could live but a short time, and in spite of such knowledge that she was so affected, he took her to the agent of the insurance company and himself paid the premium for the insurance which he knew was being made for his benefit and omitted to disclose those facts to the company.

Strano v. Mutual Life Assurance Co., 5 D.L.R. 719, 3 O.W.N. 1372, 22 O.W.R. 311.

(§ III E 2—115)—Health and habits.

Where an applicant for insurance declared in his medical examination that each of his answers to the questions therein was, to the best of his knowledge, information and belief, complete and true, and was a continuation of and formed a part of his application for insurance, and the application itself contained the statement that the applicant was, to the best of his information, knowledge and belief, in good health and that such statements and the statements made or to be made to the insurer's examining physician should form the basis of the contract of insurance, and if there was therein any untruth or suppression of facts material to the contract, the policy should be void, such statements were no more than statements founded on knowledge, information and belief, and were not absolutely and unqualifiedly warranted to be true, and, unless it could be found that the applicant knowingly misstated the facts and induced the issue of the policy on such facts, as stated, the insurer should not be exonerated from liability under it. [Sawyer v. Mutual Life, 4 D.L.R. 295, 21 W.L.R. 493, affirmed; Confederation Life v. Miller, 14 Can. S.C.R. 330, followed.]

Sawyer v. Mutual Life Assurance Co. of Canada (No. 2), 8 D.L.R. 2, 22 W.L.R. 418.

Where an applicant for insurance disclosed to the insurer's agent that he had been just prior to the making of the application under medical treatment and the agent communicated this to the insurer's medical examiner, and the latter admitted that he discussed that illness with the applicant at the time of his examination and that it was his own omission and not that of the applicant, that the answer to the question was not correctly written down, there was no intentional concealment or suppression of the fact of the recent medical treatment on the part of the applicant sufficient to avoid the policy. [Sawyer v. Mutual Life, 4 D.L.R. 295, affirmed.]

Sawyer v. Mutual Life Assurance Co. of Canada (No. 2), 8 D.L.R. 2, 22 W.L.R. 418.

In the medical examination part of an application for a policy of life insurance, where it is the duty of the medical examiner to insert the applicant's answers properly and where he thought he had done so, the error (if any) of that officer is to be attributed to the insurer and not to the assured. [Biggar v. Rock Life, [1902] 1 K.B. 516, distinguished; Confederation Life v. Miller, 14 Can. S.C.R. 330, referred to; Sawyer v. Mutual Life, 4 D.L.R. 295, affirmed; see also Strano v. Mutual Life, 5 D.L.R. 719.]

Sawyer v. Mutual Life Assurance Co. of Canada (No. 2), 8 D.L.R. 2, 22 W.L.R. 418.

Where an applicant for insurance informed the insurer's agent, who had secured the application, that he had been lately under medical treatment and the agent, with the consent of the applicant, consulted the physician who had treated the applicant as to his health, and thereafter the applicant submitted to a medical examination, in which he gave a negative answer to a question appearing therein, in the following form: "Have you now, or have you ever had any disease or disorder of the heart or blood vessels? Atheroma, palpitation of the heart, varicose veins, etc., aneurism," and the medical examiner failed to explain the meaning of the technical terms therein, and nothing appeared in the evidence to shew that the applicant knew that he had any of the diseases or disorders referred to in the question, such answer was an innocent misstatement not avoiding the policy, even though it was untrue at the time it was made. [Sawyer v. Mutual Life, 4 D.L.R. 295, affirmed.]

Sawyer v. Mutual Life Assurance Co. of Canada (No. 2), 8 D.L.R. 2, 22 W.L.R. 418.

Answers by an applicant for insurance to questions on her medical examination, which the application declared to form the basis of the contract, so that any untruth or suppression of material facts therein would avoid the policy, in which answers the applicant stated that she had had pneumonia about a year before; that she had fully recovered therefrom, that she had had occasional mild attacks of bronchitis, and that she had recently consulted a physician because of a cold, when in fact she was aware that she was then suffering from tuberculosis, and had been informed by such physician that she could live but a short time, were sufficient misrepresentations and suppressions of material facts of which the company should have been informed, to avoid the policy. [Jordan v. Provincial Provident Institution, 28 Can. S.C.R. 554, and Von Lindenau v. Desborough, 3 Man. & Ry. 45, referred to.]

Strano v. Mutual Life Assurance Co., 5 D.L.R. 719, 3 O.W.N. 1372, 22 O.W.R. 311.

(§ III E 2—120)—Occupation.

A contract of life insurance is void where the insured has violated a condition thereof forbidding him, within two years from date of contract, to engage in railway employment, without a permit from the insurance company.

Smith v. Excelsior Life Insurance Co., 4 D.L.R. 99, 3 O.W.N. 1521, 22 O.W.R. 863.

A condition of a contract of life insurance that it shall be void if, within two years from the date of the contract, the insured shall, without a permit, engage in the employment of a railway, is reasonable and valid.

Smith v. Excelsior Life Insurance Co., 4 D.L.R. 99, 3 O.W.N. 1521, 22 O.W.R. 863.

F. Forfeiture.

(§ III F 2—145)—For non-payment of premiums or assessments.

A correspondence for the revival of life insurance lapsed for non-payment of

premiums, carried on between the insurers and the insured, in which the former make it clear that they will only agree to the revival upon a cash payment of a specified sum, this condition being accepted by the insured, cannot, of itself, operate as a revival. If, therefore, the insured dies before he has made the payment, his representatives cannot recover on the policies. Nor does it matter that, at the time of his death, he had applied for, and was in the expectation of receiving, assistance from the insurer, in the shape of a loan, to make the stipulated payment.

Canada Life Assurance Co. (defendant, appellant) v. Taafe (plaintiff, respondent), 21 Que. K.B. 204.

H. Premiums and assessments.

(§ III H—155)—PREMIUMS AND ASSESSMENTS.

Where by the terms of a policy of life insurance the balance of the whole year's premium was to be deducted on making settlement of the claim the deferred half-yearly payment of premium which had not accrued due during the lifetime of the assured is not a debt of his estate, and the loss through the deduction thereof from the face of the policy falls upon the beneficiary in whose favour a statutory appointment operating as a declaration of trust had been made in the lifetime of the assured.

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

(§ III H—156)—PREMIUM NOTES.

Liability of maker—Effect of failure to pay—Avoidance of policy—Condition in application—The Insurance Act, R.S.C. 1906, ch. 34, sec. 71.

Great West Life Insurance Co. v. Lyttle, 7 D.L.R. 798.

(§ III H—157)—MUTUAL BENEFIT ASSESSMENTS.

Payments of dues upon previous existing contracts at most only keep them alive and subject to all their conditions and, therefore, are not renewals of such contracts. [Carter v. Brooklyn Life Insurance Co., 110 N.Y. 15, not followed. See Cousins v. Moore, 6 D.L.R. 35.]

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110.

The rule of law established in the Province of Quebec that notwithstanding a covenant in a policy of insurance whereby premiums were made payable at the insurer's office a practice of sending for them to the insured's domicile would constitute such a recognized mode of the contract as would import abandonment of the covenant to pay at the insurer's office, with the result that the insured would not be in default to pay unless called upon at his domicile, applies to policies issued by benevolent societies as well as to those of old line insurance companies, though the insured in such society are themselves insurers and the debtors in a sense themselves the creditors.

Royal Guardians v. Clarke, 6 D.L.R. 12.

IV. Transfer of policy or of interest therein.

A. Assignment generally.

(§ IV A—162)—OF WIFE; INTEREST.

Where the benefits of a life insurance policy have been settled upon the wife of the assured by a written appointment in her favour having the statutory effect of a declaration of trust for her separate use, a subsequent charge or mortgage of the policy made by the husband and wife jointly but solely for the husband's benefit is a debt of the assured which the wife is entitled to have satisfied out of his general estate so as to free the policy from such mortgage or charge. [Hall v. Hall, [1911] 1 Ch. 487, applied.]

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

Where the insured in a life insurance policy assigned the same to secure the payment of his debt on the security of the policy, and his wife who had been named as the beneficiary in the policy joined with him in executing the assignment and in signing the charge or lien, such charge when made solely for the benefit of the insured is payable primarily out of his estate so as to free the insurance policy in favour of the wife as between herself and the estate where the designation of the wife as beneficiary on the face of the policy is by statute (R.S.M. 1902, ch. 83, and R.S.O. 1897, ch. 203), declared the creation of a trust for her separate use free from the debts of his estate. [Re Tatham, 2 O.L.R. 343; Re McGarry, 18 O.L.R. 524, specially referred to; Hall v. Hall, [1911] 1 Ch. 487, applied; see also Hudson v. Carmichael (1854), Kay 613, and Paget v. Paget, [1898] 1 Ch. 470.]

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

(§ IV A—166)—RIGHT OF ASSIGNEE.

The assignee for creditors of the assured is entitled to maintain a joint action with the beneficiary to whom the loss is made payable by the policy, for the moneys payable under a fire insurance policy placed by the insolvent debtor upon his goods, notwithstanding that the transfer of the policy has not been consented to by the insurers.

Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

B. Change of beneficiary.

(§ IV B—170)—CHANGE OF BENEFICIARY.

Where an attempt is made to change the beneficiary of a policy of life insurance by a declaration in the will of the insured, which is ineffective to make such change under the law as it stands at the date of the death of the testator, an Act which

comes into force subsequent to his death cannot be invoked to validate the declaration.

Re Stewart Estate, 8 D.L.R. 165, 4 O.W.N. 293, 23 O.W.R. 343.

Where policies on the life of the assured are made payable to his widow, her interest becomes vested at the death of the assured, subject to any declaration in the will or elsewhere sufficient to effect a change.

Re Stewart Estate, 8 D.L.R. 165, 4 O.W.N. 293, 23 O.W.R. 343.

A daughter being neither trustee, guardian nor agent for her father, who lived with her, at and for some time prior to his death, whom the father, while so living with her, makes sole beneficiary of the moneys payable under a policy of insurance issued on his life, is not bound to supply her father with independent legal advice at the time he nominates her as sole beneficiary under the policy, the father being at the time compos mentis and there being an entire absence of fraud or undue influence. [Nobel's Explosives Co. v. Jones (1881), 17 Ch. D. 721, 739, referred to.]

Clark v. Loftus, 4 D.L.R. 39, 26 O.L.R. 204, 3 O.W.N. 1027, 21 O.W.R. 705.

In the absence of agreement to make one the beneficiary, the insured is in no sense a trustee for the beneficiary from time to time named in a policy of insurance containing a clause giving power to the assured to change the beneficiary named.

Clark v. Loftus, 4 D.L.R. 39, 26 O.L.R. 204, 3 O.W.N. 1027, 21 O.W.R. 705.

Where an insured by virtue of the rights accruing to him under an insurance policy changes the beneficiary, this is a gift inter vivos and not a testamentary disposition. [Fulton v. Andrew, L.R. 7 H.L. 448, distinguished.]

Clark v. Loftus, 4 D.L.R. 49, 26 O.L.R. 204, 3 O.W.N. 1027, 21 O.W.R. 705.

Where the insured, in a life insurance policy originally made payable to his personal representatives, endorses on the policy a declaration that the policy and the insurance thereunder should remain payable as in the policy mentioned, subject to alteration during his lifetime, but, if not "assigned or otherwise disposed of," that on his death, if his wife survived him, the policy should be for her benefit, such declaration is not sufficiently positive or unconditional to operate as a declaration of trust in favour of the wife or to confer upon her the benefits of the policy as her separate estate under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83. (Per Howell, C.J.M., Richards and Perdue, JJ.A.) [As to statutory appointments of beneficiaries of life insurance policies, see Mr. Labatt's article in 36 C.L.J. 249 and Cameron on Insurance, pp. 121, 214.]

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

While the appointment of an insurance policy made in favour of the wife of the assured under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83, may by sec. 15 thereof be revoked and the benefits declared in favour of the wife may by a writing be diverted to the estate of the assured, the writing must indicate in clear and conclusive language the intention of the assured to alter the appointment first made in her favour. (Per Howell, C.J.M.)

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

In order to create a trust in favour of the wife of the assured, the statutory appointment of the benefits of a life insurance policy which under the Manitoba Insurance Act, R.S.M. 1902, ch. 83, sec. 7 (similar to sec. 159 (1) of the Ontario Insurance Act, R.S.O. 1897, ch. 203) the assured may make in writing, must be in clear and unequivocal words taking effect immediately as upon an immediate declaration of trust and so as to divest the assured of all beneficial interest therein for the time being subject only to any future appointment, the making of which may be reserved to him by the statute. Per Perdue, J.A. (Cameron, J.A., dissenting on this point).

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

Under sec. 160 of ch. 203 of the Insurance Act, R.S.O. 1897 (now 2 Geo. V. ch. 33, sec. 179), the beneficiaries named in a certificate of insurance issued by a mutual insurance association may be changed by a provision of a will which describes the certificate only by stating the amount thereof, and giving the name of the association that issued it.

Re Watson and Order of Canadian Home Circles, 4 D.L.R. 170, 3 O.W.N. 1605, 22 O.W.R. 834.

A sufficient declaration of beneficiary is created under R.S.O. 1897, ch. 203, sec. 151 (3), by a statement written by an insured person, after the death of the beneficiary named therein, on a certificate of insurance issued by a mutual benefit association, to the effect that the benefit thereunder should be paid to a person "who for many years had advanced money to [the insured] and kept up the premiums, and who [was] a holder for value," notwithstanding such change of beneficiary was void under the rules of the association, since such rules must yield to the statute.

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 3 O.W.N. 1208, 26 O.L.R. 367, 22 O.W.R. 72.

An adopted child or grandchild of an insured person is not within the preferred class of beneficiaries mentioned in sec. 7 of ch. 15 of 4 Edw. VII.

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 3 O.W.N. 1208, 22 O.W.R. 72, 26 O.L.R. 367.

Change of beneficiary to pay insurance moneys into Court—Principle on which such orders made.

Re Heitner and Manufacturers' Life Insurance Co., 6 D.L.R. 879, 4 O.W.N. 251, 23 O.W.R. 413.

V. Waiver; estoppel.

B. Of insurer.

(§ V B 5—212)—Assent to removal.

An insurance company in giving a formal assent to a transfer already made of the insured goods to another building will not be held to have waived their right to afterwards claim on learning that a fire had already destroyed the goods that the rights of the parties became fixed at the time of the fire, and that it was an implied term of the consent that no loss had occurred whereof prompt notice had not been given to the insurance company as required by the terms of the policy.

Kline v. Dominion Fire Insurance Co., 1 D.L.R. 733, 3 O.W.N. 698, 21 O.W.R. 285, 25 O.L.R. 534.

(§ V B 5—230)—Notice or proofs of loss.

The failure of an insured person to give written notice of loss is waived by an insurance company, since it did not appear that it was thereby prejudiced, where, on the day after the destruction of the insured property the president and two of the directors of the company, in response to a message from the insured, came and inspected the ruins, and told him that they would return the next day, which they did, when they obtained detailed particulars of the loss, which they reduced to writing, and pursuant to their instructions, the insured attended the next meeting of the board of directors of the company and gave them all the information they desired, and the secretary of the company prepared and the insured signed a statutory declaration of loss, which, together with the policy, were retained by the company, and where the insured subsequently paid an assessment on his premium note, and, after the insured and the company were at arm's length, the former gave the latter a further statutory declaration of loss, after which the company returned the premium note and declared the policy of insurance cancelled.

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ V B 5—235)—Participation in adjustment.

No waiver of a breach of policy of insurance can arise on the part of an insurer from a fact that it sent the insured proofs of claim which were filled out by him and returned to the company where the blanks themselves expressly stipulated that by furnishing them and investigating the claim the insurer should not be held to waive a breach of any condition of the policy.

Evans v. Railway Passengers' Assurance Co., 3 D.L.R. 61, 3 O.W.N. 881, 21 O.W.R. 442.

VI. The loss; remedies of the assured.

A. Notice; proofs; arbitration.

(§ VI A—246)—Notice.

Where the policy of guarantee insurance calls for immediate notice of any shortage and the insured fails to notify the insurer until a month after the discovery of loss, this notice is tardy and the insured cannot recover, even though the unfaithful employee be apprehended and convicted as a result of his (the insured's) efforts.

Lachine School Commissioners v. London Guarantee and Accident Co., Ltd., 3 D.L.R. 335.

Under a policy insuring against accident and other causes of disablement and providing that written notice of the happening of an accident or event giving rise to a claim must be given an insurer within a specified time, there can be no recovery in the absence of such notice, even though the insured was incapacitated from complying with the requirement as to notice by the event which gave rise to his claim. [Gamble v. Accident Assurance Co., I.R. 4 C.L. 204, specially referred to.]

Evans v. Railway Passengers' Assurance Co., 3 D.L.R. 61, 3 O.W.N. 881, 21 O.W.R. 442.

Notice to a fire insurance company by the person to whom, by the terms of the policy, the loss is by direction of the assured made payable is a valid notice on behalf of the assured. [See also Welford & Otter-Barry's Fire Insurance, 1911 ed., p. 249.]

Strong (assignee of Jeffrey) and Gault Brothers, Ltd. (plaintiffs) v. Crown Fire Insurance Co. (defendants), 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

Where an insurance company receives a notice of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application, there is a waiver of any irregularity in the giving of the notice of loss.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

The Court may, under sec. 172 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, if deemed equitable, relieve an insured person from an omission to give an insurance company written notice of loss. [Prairie City Oil Co. v. Standard Mutual Fire Insurance Co., 44 Can. S.C.R. 40, and Bell Bros. v. Hudson Bay Insurance Co., 44 Can. S.C.R. 419, referred to.]

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ VI A—247)—Proofs of loss.

A false statement by an insured person in a statutory proof of loss as to a fact

not required by the Ontario Insurance Act, R.S.O. 1897, ch. 203, to be stated, will not vitiate a claim for loss under sub-sec. (c) of condition 15 of the Act. [Goring v. London Mutual Fire Insurance Co., 10 O.R. 247, referred to.]

Patterson v. Oxford Farmers Mutual Fire Insurance Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

A condition in a policy of insurance that the proofs of loss must be delivered within thirty days to the secretary of the insurer on blanks furnished by it means within thirty days after the insurer supplied the blanks.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

Where an insurance company receives proofs of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application, there is a waiver of the condition in the policy that the proofs of loss must be sent to the insurer within a certain time.

Clarke v. British Empire Insurance Co., Ltd., 4 D.L.R. 444, 21 W.L.R. 774.

A statement by the insured in the proofs of loss furnished the insurer that the insured property at the time of its destruction belonged to the insured and no other person had any interest in it except a specified bank for advances, but which failed to state the nature of the bank's interest or the amount of the advances and made no mention of a transfer given the bank as security, is not a compliance with the provision of the policy that the proofs of loss shall state the interest of the insured and all others in the insured property.

Guimond v. Fidelity Phœnix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

A mere statement by the insured in the proofs of loss furnished the insurer that the origin of the fire was unknown to him is not a compliance with the requirement of the policy that the insured in his proofs of loss "shall render a statement to this company signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire."

Guimond v. Fidelity Phœnix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

No waiver by the insurer of the provisions of a policy as to what the proofs of loss must contain is shewn by the fact that its adjuster went to the place of fire to ascertain its cause and the amount of loss caused by it and that while there he made enquiries of the insured as to his knowledge of the origin of the fire, the quantity of the goods destroyed, what books or paper he still had and other insurance, and had measurements made for the purpose of estimating the quantity of the goods destroyed.

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

Where an action upon a fire insurance policy is premature by reason of having been brought within sixty days from the completion of proofs of loss, but more than sixty days after the delivery of the first "proofs of loss" by the insured, the Court may relieve the insured from strict compliance with Ontario statutory condition 13 as to furnishing proofs of loss by virtue of the statutory powers contained in sec. 172 of the Ontario Insurance Act, enabling the Court to deal with the merits of the action where it considers it inequitable that the insurance should be forfeited for insufficiency of the proofs supplied before action.

Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

The mere fact that an insurer retained the proofs of loss furnished by the insured for a long time without objection cannot be held to constitute a waiver of fuller or further proof. [McManus v. Aetna Insurance Co., 11 N.B.R. 314, followed; Imperial Fire Insurance Co. v. Bull, 18 Can. S.C.R. 697, 1 S.C. Cas. 1, affirming 15 Ont. App. 421, distinguished.]

Guimond v. Fidelity Phoenix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

Section 2 of the Fire Insurance Policy Ordinance, N.W.T. (Alta.), 1911, ch. 113, giving power to the Court to hold the insurance company liable notwithstanding trifling defects in the proofs of loss occurring by necessity, accident or mistake, or where it appears inequitable to hold the insurance void by reason of imperfect compliance with the conditions of the policy, should not be applied to dispense with reasonable formal proofs called for by the insurance company which the insured deliberately refused to furnish without assigning any reason for the refusal.

Forest v. Home Insurance Co., 8 D.L.R. 764, 22 W.L.R. 773.

Where one of the statutory conditions of a fire insurance policy requires the assured to supply, with his proofs of loss, a certificate of a justice or other officer resident in the vicinity of the fire certifying, in effect, that the circumstances have been investigated by such official and do not indicate the perpetration of any fraud by the assured, the refusal of the assured to furnish such certificate within the statutory time, although demanded by the company, is a bar to the action.

Forest v. Home Insurance Co., 8 D.L.R. 764, 22 W.L.R. 773.

B. Risks and causes of loss, injury or death.

(§ VI B 1—259a)—MARINE INSURANCE.

In a contract of marine insurance it was provided that the insured should not

have a right to claim for total loss, either of vessel or freight, on account of the estimated amount of repairs exceeding the value of the vessel, nor a right under any circumstances to abandon either vessel or freight, provided the vessel remained in specie, unless the amount which the insurers would be liable to pay (exclusive of all general average charges, and charges for getting off or raising and bringing into port a vessel stranded or submerged, and of all repairs consequent upon decay) under an adjustment, as of partial loss, after making all the usual deductions, would exceed half the value of the vessel as declared in the policy. It was further provided that the highest valuation under which the vessel is insured in any policy should be the basis for ascertaining a technical loss of freight under the policy:—Held, that under such a contract so long as the vessel remained in specie no claim for total loss either of vessel or freight could be made except on the basis of calculation as to values set out in the policy.

Slaughenwhite v. Western Assurance Co., 11 E.L.R. 310.

(§ VI B 2a—260)—UNDER LIFE POLICIES.

It was held (confirming judgment appealed from) that upon the evidence it could not properly be said that the cause or manner of occurrence of the death was unknown, but that on the contrary it had been directly and positively proved.

Dominion of Canada Guarantee and Accident Co. v. McKercher, 18 Rev. de Jur. 136.

(§ VI B 3—290)—EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

In an accident insurance policy, insuring against bodily injuries caused solely by external, violent, and accidental means, and insuring also against disability from certain illnesses, including fits, the injury sustained by an assured through being severely burned while lying unconscious in an epileptic fit, and from which injury his death resulted, is to be classified under such insurance policy as a loss of life caused solely by external, violent and accidental means, and the amount of insurance upon that classification is not cut down under a clause of the policy stating that in cases of injuries happening from fits the insurers will pay one-tenth of the amount payable under the general proviso for bodily injuries. [Winspear v. Accident Insurance Co., 6 Q.B.D. 42; Lawrence v. Accidental Insurance Co., 7 Q.B.D. 216, and Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. Rep. 945, distinguished.]

Wadsworth v. Canadian Railway Accident Insurance Co., 3 D.L.R. 668, 21 O.W.R. 601, 3 O.W.N. 828, 26 O.L.R. 55.

C. Extent of injury or loss; of recovery.

(§ VI C 2—364)—DOUBLE LIABILITY.

A passenger on a street car who had arrived at his destination and descended to the street, when the car stopped for the purpose on his signal, but, seeing an approaching motor car likely to run him down, unsuccessfully attempted to get back on the car then in motion and was injured in so doing cannot claim under the double indemnity clause of an accident insurance policy limited to accidents while "riding as a passenger in or upon a public conveyance." [Anable v. Fidelity and Casualty Co., 63 Atl. Rep. 92, 73 N.J.L. 320, and 74 N.J.L. 686, approved.]

Wallace v. Employers' Liability Assurance Corporation, 2 D.L.R. 854, 3 O.W.N. 778, 21 O.W.R. 249, 26 O.L.R. 10.

A double indemnity clause in an accident insurance policy whereby inter alia the amount of insurance was doubled if the injury insured against was "caused by" the burning of a building if the assured was in it at the commencement of the fire, does not apply to fix the insurers with liability where the injury was caused by the explosion of a coal-oil lantern, brought into the building by the assured for temporary personal purposes only, nor to the fire resulting therefrom which badly scorched the building and so severely burned the assured that he died from the shock. [Houlihan v. Preferred Accident Insurance Co., 145 N.Y. St. Rep. 1048, dissented from.]

Wadsworth v. Canadian Railway Accident Insurance Co., 3 D.L.R. 668, 21 O.W.R. 601, 3 O.W.N. 828, 26 O.L.R. 55.

D. Interest in proceeds.

(§ VI D 2—395)—MUTUAL BENEFIT INSURANCE.

Where the beneficiary named in a certificate of insurance issued by a mutual benefit association incorporated under the laws of Massachusetts did not survive the insured, upon the death of the insured without having named a new beneficiary, the proceeds of such insurance become a part of his estate under R.S.O. 1897, ch. 203, secs. 147 and 151 (3), and are not payable according to the rules and regulations of the association, as prescribed by R.S.O. 1897, ch. 211, sec. 12, since the latter Act is applicable only to associations incorporated under its provisions. [Gillie v. Young (1901), 1 O.L.R. 368, specially referred to; Mingeaud v. Packer (1891), 21 O.R. 267, affirmed on appeal by an equally divided Court; Mingeaud v. Packer (1892), 19 A.R. 290, and Re Harrison (1900), 31 O.R. 314, referred to.]

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 3 O.W.N. 1208, 26 O.L.R. 367, 22 O.W.R. 72.

E. Defences; release.

(§ VI E—400)—DEFENCES; RELEASE.

In the absence of evidence, it cannot be

said that a change in the use of premises from a billiard and pool room to a restaurant is such a material change as will make the risk under a fire insurance policy more hazardous, even where gasoline is used on the premises. [Morton v. Anglo-American Fire Insurance Co., 2 O.W.N. 1470, affirmed.]

Anglo-American Fire Insurance Co. v. Morton, 8 D.L.R. 802, 23 O.W.R. 316, 46 Can. S.C.R. 653.

H. Actions enforcing payment.

(§ VI H 3—425)—CONTRACTUAL LIMITATION OF TIME.

Where the insurers have made a demand upon the insured for proofs of loss, the right of action under Ontario statutory condition 17 relating to fire insurance policies, does not accrue until sixty days after the proofs of loss have been furnished, and where incomplete proofs of loss were first supplied and invoices and a statutory certificate were then promptly demanded by the insurers by way of further proof, the sixty-day period is to be computed from the completion of the proofs upon the latter being supplied. [Rice v. Provincial Insurance Co., 7 U.C. C.P. 548, distinguished.]

Strong v. Crown Fire Insurance Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901.

VII. Reinsurance.

(No cases.)

VIII. Guaranty policies.

(§ VIII—435)—GUARANTY POLICIES.

Where the employer represents in an application for guarantee insurance that an audit of the employee's (a/ bookkeeper) books made regularly once a year at a fixed period and the audit is delayed for some months and loss occurs by theft in the meantime, the insurer will be relieved of all liability.

Lachine School Commissioners v. London Guarantee and Accident Co., Ltd., 3 D.L.R. 335.

In matters of guarantee insurance the employer, who is the beneficiary under a policy guaranteeing him against loss by embezzlement or theft of money by his employee, must comply strictly with all conditions, stipulations and undertakings contained in the policy.

Lachine School Commissioners v. London Guarantee and Accident Co., Ltd., 3 D.L.R. 335.

INTEMPERATE PERSONS.

Sale of liquor to, see Intoxicating Liquors.

See also Drunkenness.

INTENT.

As element of assault, see Assault and Battery.

Construing contract according to, see Contracts.

As element of crime generally, see Criminal Law.

Presumption and burden of proof as to, see Evidence.

Parol evidence as to, see Evidence, VI.

Opinion evidence as to, see Evidence, VII.

Evidence as to, generally, see Evidence, XI.

As element of homicide, see Homicide.

Of person selling liquor, see Intoxicating Liquors.

Of one infringing trade-mark, see Trademarks.

As question for jury, see Trial.

Of testator, see Wills, III.

INTEREST.

I. WHEN RECOVERABLE.
- A. In general, on contracts.
- B. On debts, loans and advances.
- C. As damages; on amount recovered as damages.
- D. On judgments; verdicts; awards.
- E. On legacies and annuities; claims of distributees.
- F. Liability of officer, receiver, trustee or personal representative.
- G. Liability of province, county or municipality.
- H. Necessity and effect of demand.

II. COMPUTATION; AMOUNT; RATE; FREQUENCY OF PAYMENT.
- A. In general.
- B. Rate.

III. COMPOUND INTEREST.

On money deposited in lieu of bail, see Bail and Recognizance.

Default in payment of, on note, see Bills and Notes.

Default in payment of interest on mortgage, see Limitation of Actions; Mortgage, VI.

Usurious interest, see Usury.

I. When recoverable.

B. On debts, loans and advances.

(§ I B—24)—ON BANK ACCOUNT.

Where the proceeds of the sale of the bonds of a railway company incorporated by a Provincial Legislature for the purpose of building a railway wholly within the Province were deposited with a bank to the special account of the treasurer of the Province in accordance with the terms of an Act guaranteeing the payment of the bonds by the Provincial Government, which special account was to carry interest at such rate as the bank and the railway company might agree upon and the bank agreed with the railway company to pay 3½ per cent. interest on the deposit, the Crown is entitled to the interest at such rate thereon accrued up to the time

of its demand in an action to recover the proceeds under a subsequent Act passed for the purpose of protecting the Province in its guarantee of the bonds, in which such proceeds are declared to be a part of the general revenue fund of the Province and are ordered to be paid forthwith to the Provincial treasurer.

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

H. Necessity and effect of demand.

(§ I H—56a)—ON DEPOSIT IN BANK.

On the wrongful refusal of a bank to honour a demand for the withdrawal of a special deposit, the depositor may be allowed interest thereon in an action for its recovery at the legal rate from the date of the demand even though the legal rate is in excess of the rate of interest at which the special deposit was to be carried.

The King v. The Royal Bank, 2 D.L.R. 762, 20 W.L.R. 929.

II. Computation; amount; rate; frequency of payment.

(No cases.)

III. Compound interest.

(No cases.)

INTERIM INJUNCTION.

See Injunction, II.

INTERLOCUTORY ORDERS.

As to appeal, see Appeal.
Generally, see Motions and Orders.

INTERPLEADER.

I. SHERIFF.
II. CUSTODIAN OF MONEY OR GOODS.

I. Sheriff.

(§ I—10)—BY SHERIFF.

Creditors' Relief Act—Validity of assignment of "future book-debts"—Attachment of debts—Priorities—Threshers' lien ordinance.

Case (J. I.) Thresher Machine Co. v. Sing, 7 D.L.R. 814, 21 W.L.R. 278.

Interpleader—Seizure under execution—Claim under prior sale—Bills of sale and Chattel Mortgage Act—Change of possession.

Dominion Bank v. Salmon, 4 O.W.N. 460, 23 O.W.R. 608.

II. Custodian of money or goods.

(§ II—20)—CUSTODIAN OF MONEY OR GOODS.

Payment into Court—Rival claims to money due from sale of chattels.

Crabbe v. Crabbe, 2 D.L.R. 921, 3 O.W.N. 604, 20 O.W.R. 65.

Benefit certificate in favour of granddaughter—Change to brother—Preferred class.

Re Ancient Order of United Workmen and Riddell, 1 D.L.R. 925.

Form of issue as to ownership.

Re Smith, 6 D.L.R. 849, 4 O.W.N. 188.

Want of neutrality—Architects' commission.

Barber v. Royal Loan and Savings Co., 5 D.L.R. 885, 4 O.W.N. 91, 23 O.W.R. 31.

Adverse claims to valuable chattel—Form of issue.

Re Smith, 4 O.W.N. 457, 23 O.W.R. 530.

INTERPRETATION.

Of contracts, see Contracts, II.
Of statutes, see Statutes, II.

INTERROGATORIES.

To witness, see Witnesses, II.
See also Depositions.

INTERVENTION.

Parties intervening, see Parties, III.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

I. PROHIBITION AND REGULATION; STATUTES, BY-LAWS AND ORDINANCES.
  A. In general.
  B. Conditions of business.
  C. Local option.
II. LICENSES.
  A. In general.
  B. Discretion as to granting.
  C. Contest; remonstrance; renewal.
  D. Cancellation; revocation; forfeiture.
III. UNLAWFUL SALES; OFFENCES AND PROCEEDINGS.
  A. In general.
  B. Sales by clubs and their agents.
  C. Sales by agent, clerk or partner.
  D. By druggists.
  E. To prohibited persons.
  F. Prohibited hours and days.
  G. Place of sale.
  H. Seizure and destruction.
  I. Trial of offenders.
  J. Second and subsequent offences.
IV. CIVIL REMEDIES.
  A. In general; nuisances.
  B. Civil damages.

I. Prohibition and regulation; statutes, by-laws and ordinances.

A. In general.

(§ I A—8)—AS TO AMENDING INFORMATION CHARGING OFFENCE.

Section 95 of the Liquor License Act

(Ont.) requiring all information or complaints for the prosecution of any offence under the Act to be laid within thirty days after the commission of the offence, and sec. 102 of the same Act permitting a trial magistrate to amend or alter an information under the Act and to substitute for the offence charged therein any other offence under the Act must be read together and thus read do not permit a substitution in an information charging the accused with selling liquor without a license on a certain date, of a different charge on a different date at a time more than thirty days after the alleged commission of such different and substituted offence. [Rex v. Ayer, 14 Can. Cr. Cas. 210, 17 O.L.R. 509; Rex v. Guertin, 15 Can. Cr. Cas. 251, 19 Man. L.R. 33, specially referred to.]

Rex v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

C. Local option.

(§ I C—33)—PROCEDURE; ELECTION.

Where a local option by-law is voted upon at the same time as other by-laws, the fact that the ballot used bore the words "For the By-law" and "Against the By-law" respectively instead of the words "For Local Option" and "Against Local Option," respectively in respect of which the voter was to signify his vote is a departure from the statutory form which is not cured by the provisions of sec. 204 of the Consolidated Municipal Act, Ont., 1903, and by sec. 7 (35) of the Interpretation Act, 1907, which provide that deviations not affecting the substance or calculated to mislead or which appear not to have affected the result are not to be grounds for annulling the vote. [R. S.O. 1897, ch. 245, sec. 141, as amended by 8 Edw. VII., ch. 54, sec. 10, considered.]

Re Milne and Township of Thorold, 1 D.L.R. 540, 25 O.L.R. 421.

Where a petition is filed to submit a by-law to the electors for repeal of a local option by-law, and a petitioner's name also appears upon the voters' list, it is to be presumed that the municipal officer, in preparing said list, properly performed his official duty, and that every name thereon is that of a duly qualified voter, and the burden is upon the opponents of the petition to shew the contrary.

Rex ex rel. Sovereen v. Edwards, 8 D. L.R. 450, 22 W.L.R. 723.

Where a petition, to a rural municipal council, is presented for submission to the electors of the municipality, for the repeal of a local option by-law, and the petition complies with the requirements of sec. 74 of the Liquor License Act, ch. 101, R.S.M. 1902, the petitioners have a legal right to have the by-law submitted as directed by the statute, and mandamus will issue to compel such submission.

Rex ex rel. Sovereen v. Edwards, 8 D. L.R. 450, 22 W.L.R. 723.

II. Licenses.

A. In general.

(§ II A—37)—PETITION; OBJECTIONS.

The question of the validity of requisitions for a poll under sec. 124 of the Liquor License Ordinance, C.O. (N.W.T.), 1898, ch. 89, as amended by statute 2-3 Geo. V. (Alta.) ch. 8, sec. 26, should be decided before, rather than after, the poll, and the Court will, therefore, grant an interim injunction restraining the taking of the poll until after the trial of an action brought to determine the validity of the requisitions.

Gross v. Strong, 6 D.L.R. 843.

The question of the validity of requisitions for a poll under sec. 124 of the Liquor License Ordinance, C.O. (N.W.T.), 1898, ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.), ch. 8, sec. 26, should be decided before, rather than after, the poll; and the Court will, therefore, grant an interim injunction restraining the taking of the poll until after the trial of an action brought to determine the validity of the requisitions.

Pinchebeck v. Strong, 6 D.L.R. 847.

Where a petition to submit a liquor by-law is presented to a municipal council, and objection is made to such petition for any reason which requires proof by evidence aliunde the petition, the council cannot go back of the petition, except for the one purpose of ascertaining if the petition and affidavit, on their face, comply with the statute. [Re Williams and Town of Brampton, 17 O.L.R. 398, referred to; R.S.M. 1902, ch. 101, sec. 74, construed.]

Rex ex rel. Sovereen v. Edwards, 8 D. L.R. 450, 22 W.L.R. 723.

(§ II A—39a)—SALE OF LICENSE.

A license certificate for the sale of spirituous liquors is a commercial object and may be transferred and dealt with like any other commercial asset. [Canadian Breweries Co. v. Gariépy, 16 Que. K.B. 44, followed.]

Turgeon v. St. Charles, 7 D.L.R. 445.

A hotel or restaurant license is a right personal to the original licensee, and such license cannot be effectively sold and transferred to a third party without the approval of the license commissioners. [Wollenberg v. Merson, 1 D.L.R. 212, referred to.]

Lepage v. Bouchard, 8 D.L.R. 395.

B. Discretion as to granting.

(§ II B—40)—DISCRETION AS TO GRANTING.

On the 17th of October, 1910, P. was granted a liquor license for his hotel for a period ending on the 15th of January, 1911. On the 14th of December following, at the next regular meeting of the board,

he applied for a renewal. There was no objection lodged, nor was there any charge against the applicant as a licensee. After a number of adjournments, the application was eventually refused, on the 11th of January, 1911. The composition of the board was changed on the 15th of January, 1911. P. applied to the new board for a renewal, or, in the alternative, for a fresh license. These applications were also finally refused on the 28th of March, 1911. On application to Clement, J., a writ of mandamus was issued to the new board ordering the granting of a license unconditionally. On appeal from this order the Court was evenly divided. Per Macdonald, C.J.A., and Galliher, J.A. (applying and following The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas v. The Queen (1858), 27 L.J.Q.B. 434), that the successors of the old board, who ought to have renewed the license, could be compelled to perform the duty which they refused to perform, and the change in the by-law, subsequently effected, making it discretionary with the new board to grant or refuse a renewal, does not affect the position, as at the time of the commission of the wrong complained of no discretion was required, but simply a ministerial act. Per Irving, J.A., P. had no vested right to a renewal under the by-law in force at the time he obtained his license, and that the Court had no power to order the new board to consider P.'s application according to such by-law. Per Martin, J.A., as there was no evidence of mala fides on the part of the commissioners in refusing the application, the writ of mandamus could not be supported.

Prudhomme v. The Board of License Commissioners for the City of Prince Rupert, 16 B.C.R. 487.

C. Contest; remonstrance; renewal.

(§ II C—45)—CONTEST.

Under the Quebec License Act the License Commissioners of the City of Montreal, in adjudicating upon the rights and the qualification of a person asking for the confirmation of a certificate for a license for a restaurant, exercise judicial functions, and there is no distinction to be made between an application to which an opposition has been filed and one which is unopposed. The commissioners must give notice to the applicant of whether or not an opposition is made to his application for confirmation of the certificate before deciding it on the facts within their knowledge of which he is ignorant but which justify a refusal of the application.

Blouin v. Choquet, 13 Que. P.R. 317 (Sup. Ct.).

Petition or opposition to the confirmation of certificates for licenses for the sale of liquor in a municipality, filed with the municipal council, must contain the signatures of the majority of the municipal electors residing or having their place of business in the polling sub-division in which is situated the house for which the license in question is to apply. Such petition or opposition must be filed with the clerk of said council previous to the date fixed for the taking into consideration of said certificate. It must be established that proof was duly submitted to said council to prove to the satisfaction of the council that the demand for license is opposed by the majority of all the electors resident as aforesaid in the polling subdivision.

Mousseau et al. v. The Corporation of the Township of Litchfield, 18 Rev. de Jur. 1.

(§ II C—46)—OPPOSITION TO RENEWAL.

The holder of a liquor license, the renewal of which is opposed, has the right to be heard in support of his claim for a renewal and to submit evidence in respect thereof, and a judgment rendered by License Commissioners refusing a renewal to the license holder, but without his having been called upon to defend himself is radically null and will be quashed on certiorari.

Nurnberger v. Choquet, 1 D.L.R. 512.

The License Commissioners for the Province of Quebec although endowed with ministerial functions, yet, in cases of oppositions to renewals of license certificates, exercise judicial duties, and such contestations must be heard and tried as any other case brought into Court.

Nurnberger v. Choquet, 1 D.L.R. 512.

D. Cancellation; revocation; forfeiture.

(§ II D—50) — CANCELLATION, REVOCATION AND FORFEITURE.

The holder of a license which has been cancelled is only subject to the penalties imposed by law if he continues to occupy the licensed premises and sell intoxicating liquors therein after having received from the collector of revenue of the Province notice that his license has been so cancelled, and until such notice has been given his continuing to occupy the said premises and sale of liquors therein is not an offence under the Licensing Act (Quebec).

Metropole Co. v. Recorder's Court, 18 Can. Cr. Cas. 492.

III. Unlawful sales; offences and proceedings.

A. In general.

(§ III A—55)—UNLAWFUL SALES.

A licensed retail liquor dealer making a sale of liquor in a larger quantity upon a single sale than his license permits, is properly convicted under the Liquor License Act, R.S.B.C. 1911, ch. 142, of selling liquor without having first obtained a license authorizing him so to do.

Rex v. Campbell, 8 D.L.R. 321.

An information for selling liquor without a license authorizing such sale under the Liquor License Act, ch. 142, R.S.B.C. 1911, sec. 66, need not describe the offence in the exact words of the statute, if the defendant, from the form of the information, receives particulars of the charge such as he himself might ask for if the information had been in the words of the statute.,

Rex v. Campbell, 8 D.L.R. 321.

Conviction—Evidence—Acting as messenger.

Rex v. Davis, 8 D.L.R. 1046, 4 O.W.N. 358, 23 O.W.R. 412.

A summary conviction for selling intoxicating liquor without a license will be quashed for want of jurisdiction in the magistrate, if the only evidence before him was that the defendant purchased the liquor for the use of himself and others upon a hunting expedition and received from the treasurer of the common fund re-imbursement only for the purchase made by the defendant at the treasurer's request, and where there is nothing to discredit the evidence so given. [See also R. v. Howarth, 33 U.C.Q.B. 537; R. v. Coulson, 27 O.R. 59; R. v. Beagan (No. 1), 6 Can. Cr. Cas. 54.]

The King v. Lawless, 2 D.L.R. 105, 3 O.W.N. 669, 21 O.W.R. 247.

Upon a conviction for selling liquor without a license when the defence has been that only non-intoxicating liquor has been sold, it is a good ground for quashing the conviction that the magistrate refused to allow the liquor found on the premises to be analyzed.

Rex v. Stephenson, 8 D.L.R. 404, 4 O. W.N. 272, 23 O.W.R. 269.

The defendant was convicted by a justice of the peace at Moosomin of unlawfully keeping liquor for the purposes of sale, barter or traffic without the license therefor, by law required, and was committed to the jail at Prince Albert. She appealed from this conviction by way of a case stated under sec. 900 of the Criminal Code, 1892. Six objections were taken to the conviction, of which, however, four only were argued before the Judge, viz.: That there was no evidence to support the charge; that inadmissible evidence was received contrary to the objection of the defendant's counsel; that the justice exceeded his jurisdiction in committing the defendant to jail at Prince Albert, and that the penalty imposed was excessive:—Held, that the evidence disclosing the presence in the defendant's house of glasses containing beer, and also bottles containing other liquor, as well as empty bottles, empty glasses and a corkscrew, a primâ facie case was raised under the Ordinance, and this not being rebutted by the accused, there was evidence sufficient to support the charge. That, although inadmissible evidence was received it was immaterial, because there was ample evidence apart from that to support the charge, and it was not shewn that such improper evidence had influenced the justice's mind in any way. That there was no statutory provision that a justice, in committing to jail, should commit to any particular jail, and that therefore the justice had jurisdiction to commit the accused to the Prince Albert jail. As to the last objection above mentioned, the defendant's counsel stated that the points he wished to take were that the costs imposed were excessive, and that there was a variance between the minute of adjudication and the conviction:—Held, on the evidence, that the costs were not excessive, and that, as the objection to the variance between the minute of adjudication and the conviction had not been raised before the justice, it could not be raised before the Judge.

Rex v. Ollie Nugent, 7 Terr. L.R. 233.

The provisions of the Liquor License Act respecting prosecutions for the sale of intoxicating liquor without license authorize the Recorder to condemn the offender not only to a fine but also to the costs of prosecution and to imprisonment if such costs are not paid. Under this Act the offender may be ordered to pay the expense of conveying him to jail. But the order to pay these costs should be entered in the minute of the proceedings and not merely in the warrant of commitment. If it is not the conviction will be quashed.

Antaya v. City of Montreal, 13 Que. P.R. 273 (Sup. Ct.).

Defendant's wife sold liquor for the defendant and was convicted of selling liquor in violation of the Canada Temperance Act. Later, on the same evidence, defendant was convicted of keeping liquor for sale:—Held, the defendant's conviction was good.

Ex parte Campbell, 40 N.B.R. 350.

A parish Court commissioner has jurisdiction to try offences under the Canada Temperance Act. The Act 62 Vict., ch. 57, does not make the Village of St. Mary's an incorporated town, and does not deprive a parish court commissioner of his jurisdiction in that village. A conviction made upon evidence obtained by means of an illegal search warrant, held good.

The King v. Clarkson; Ex parte Hayes, 40 N.B.R. 363.

The Act 7 and 8 Edw. VII. (Dom.), ch. 71, re-enacts sec. 117 of the Canada Temperance Act with amendments and, therefore, a conviction for a third offence under sec. 117 as amended is good, although the first two convictions were made before the passing of the amending Act.

Ex parte Staples, 40 N.B.R. 378.

A conviction under the Canada Temper-

ance Act, R.S.C. 1906, ch. 152, was set aside where no place of trial was mentioned in the summons and defendant did not appear.

The King v. Wilson; Ex parte Harrington, 40 N.B.R. 383.

In a prosecution for a violation of the Nova Scotia Temperance Act 1910, the burden is upon the party wishing to set up a defence under it of proving that the Canada Temperance Act is in force in the county where the offence is alleged to have been committed. The Nova Scotia Temperance Act 1910, sec. 6, sub-sec. 1, enacts that "Any person who shall procure for or offer for sale to any other person or persons any intoxicating liquor shall be deemed to have made an unlawful sale of liquor. Provided that this section shall not apply to the procuring of liquor on a valid prescription or certificate":—Held (Russell, J., dissenting), that the true meaning to be given to the word "deemed" as here used is that the fact of the procuring or offering for sale shall be treated as primâ facie evidence of an unlawful sale, leaving it open to the party accused to shew that there was no sale, or that the sale or procuring was within the exceptions permitted by the statute.

The King v. Fraser, 45 N.S.R. 218.

(§ III A—59)—Liability of property owners and occupants.

The effect of sec. 112 of the Ontario Liquor License Act (amendments of 1907 and 1908) is to make liable for illegal sales of intoxicating liquor by his tenant on his premises in a local option district an owner of unlicensed hotel premises resident elsewhere and having no knowledge of the infraction of the liquor laws, by reason of the enactments contained in that statute that "in the event of the premises being an unlicensed tavern the owner who permits any part of it in which liquor is sold or kept for sale to be occupied by any other person shall be "conclusively presumed" to be an "occupant" thereof and that an "occupant" shall be personally liable for any offence committed on the premises by any person who is suffered to remain upon the premises. [Ontario statute 7 Edw. VII., ch. 46, sec. 5, as amended 8 Edw. VII., ch. 54, sec. 6, construed; Rex v. Bradley (1908), 13 O.W.R. 39, approved.]

The King v. Bradley, 19 Can. Cr. Cas. 110, 3 O.W.N. 58.

Unlawful sales—Liability of restaurant waiter—Purchase from licensed premises—Agent of customer—B.C. Municipal Act, R.S.B.C. 1911, ch. 170, sec. 318, sub-sec. 5.

Rex v. Begeotas, 8 D.L.R. 1032.

(§ III A—59a)—Liability of telegraph operator sending order for liquor.

Where it was shewn upon the trial of a telegraph operator for selling liquor contrary to law, that upon being asked if he had any liquor, he told his questioner that he had not, but that he could telegraph for a bottle, which he did, but signed the telegram with the name of the other party, and the bottle was sent to the latter who paid the accused therefor, the purchaser not knowing to whom to apply for the liquor and the accused taking an active part in the matter, it was sufficient to warrant the trial Justice to conclude that the accused did receive an order for the liquor and that he placed it with the dealer.

Rex v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

E. To prohibited persons.

(§ III E—78)—Intemperate persons.

An hotel is not a "public place" within the meaning of sec. 13 of 2 Geo. V., ch. 55, amending the Liquor License Act (Ont.); such a "public place" must be a street, square, park or other open place. [Case v. Story, L.R. 4 Ex. 319, referred to.]

Rex v. Cook, 8 D.L.R. 217, 4 O.W.N. 383, 23 O.W.R. 425.

F. Prohibited hours and days.

(§ III F—83)—Hours.

Where a bartender of a licensee, permitted to sell intoxicating liquors, sold, during prohibited hours, two separate orders for intoxicating liquors to two individuals both present at the same time and place, each man paying for the liquor furnished him, such constitutes two separate and distinct violations of the Saskatchewan Liquor License Law, and the holder of the license is liable to two separate penalties. [Apothecaries Co. v. Jones, [1893] 1 Q.B.D. 89, and R. v. Scott, 33 L.J.M.C. 15, distinguished.]

Mahoney v. Leschinski, 1 D.L.R. 535, 20 W.L.R. 589, 19 Can. Cr. Cas. 169.

Intoxicating liquors—Liquor License Act—Construction of sec. 54—"Sale or other disposal"—Sale completed on Saturday—Possession given on Sunday—Not mere question of title—Scope of prohibition.

Rex v. Clark, 4 O.W.N. 529.

G. Place of sale.

(§ III G—86)—What is place of sale.

To constitute the offence under sec. 111 of the Ontario Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9, in an unlicensed place, of keeping up a bar sign or of displaying bottles and casks so as to induce a reasonable belief that liquors are sold there it is essential that what is done should induce a belief that (a) premises in fact unlicensed are licensed or (c) that liquor, i.e., intoxicating liquor, is "sold or served therein;" the statute requires something more to be shewn than what would be necessary and proper for the sale of non-intoxicating liquors.

Rex v. Bevan, 8 D.L.R. 86, 4 O.W.N. 400, 23 O.W.R. 510, 20 Can. Cr. Cas. 237.

Liquor License Act—Sec. 111 as amended by 2 Geo. V., ch. 55, sec. 9—Plea of guilty—Return of magistrate.

Rex v. Dorr, 4 O.W.N. 429, 23 O.W.R. 663.

H. Seizure and destruction.

(§ III H—90)—SEIZURE AND DESTRUCTION.

A commissioner of police appointed under R.S.C. 1906, ch. 92, is a person "fulfilling a public duty" within the terms of the Ontario statute, R.S.O. 1897, ch. 88, and is entitled to notice of action thereunder before suit is brought against him for a return of a fine and costs alleged to have been irregularly levied upon the plaintiff by the commissioner in virtue of his office in respect of plaintiff's possession of intoxicating liquor within a prohibited district in alleged contravention of Criminal Code, secs. 150 and 151. Where an order for the forfeiture and destruction of intoxicating liquor seized was made by a commissioner of Dominion police assuming to act under the authority of Code sec. 614 in the presence of the owner of the liquor brought before him by the seizing officer, and the commissioner had, by statute, jurisdiction over the subject-matter and over the owner in respect thereof, a notice of action must be given within six months under R.S.O. 1897, ch. 88, even if the forfeiture was irregularly made or was wholly void or contrary to natural justice, and was not reduced to writing; and semble the action itself must be brought within six months under Criminal Code, sec. 1149.

Geller v. Loughlin, 18 Can. Cr. Cas. 461, 24 O.L.R. 18, 19 O.W.R. 318.

J. Trial of offenders.

(§ III J—91)—TRIAL OF OFFENDERS.

A magistrate may try a person in his absence for selling liquor without a license where he has been duly summoned and is represented by counsel at the trial.

Rex v. Matheson; Ex parte Martin, 2 D.L.R. 835, 10 E.L.R. 585.

The provision of sec. 24 of the Nova Scotia Temperance Act (N.S. Laws 1910, ch. 2, as amended N.S. Laws 1911, ch. 33) which declares that the offender on each subsequent conviction shall be "liable to imprisonment for three months," gives no discretion to the magistrate to lessen the term of imprisonment. (Dictum per Townshend, C.J.)

The King v. Fraser, 7 D.L.R. 496, 11 East. L.R. 580, 20 Can. Cr. Cas. 167.

A conviction for selling liquor without a license will be quashed, where a magistrate with whom three informations were lodged against the accused for separate sales to different persons, heard evidence at the same time tending to prove the three offences, and found the accused guilty in all three cases.

Rex v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 22 O.W.R. 601, 20 Can. Cr. Cas. 98.

K. Second and subsequent offences.

(§ III K—94)—SECOND AND SUBSEQUENT OFFENCES.

A second summary conviction for unlawful sale of liquor under the Ontario Liquor License Act is not invalid because it charges an offence prior in time to the date of conviction for the first offence.

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

Where there is no proof, either by admission or certificate, of the prior offences upon a charge of a third offence of selling intoxicating liquor without a license under the Liquor License Act (Sask.), the conviction imposing a larger penalty than is authorized for a first offence must be quashed. [R. v. Brook, 7 Can. Cr. Cas. 216, and R. v. Nurse, 8 Can. Cr. Cas. 173, followed.]

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 246.

Offering in evidence before an accused person was found guilty of the subsequent offence on a trial for a second offence of selling liquor without a license, of a certificate of his former convictions, is not such a violation of sub-sec. (a) of sec. 85 of the Liquor License Act of N.B. 1903, as will oust a magistrate of jurisdiction, where the latter, upon objection to the admission of such certificate, did not proceed further with such inquiry until the accused was found guilty of the subsequent offence, as such provision of the Liquor License Act relative to the order of time to be observed by the Court in proving the first and second offences is directory only except as to the questions to be put to the accused. [Rex v. Graves (No. 2), 16 Can. Cr. Cas. 318, 21 O.L.R. 329, followed.]

Rex v. Matheson; Ex parte Martin, 2 D.L.R. 835, 10 E.L.R. 585.

Where on the trial for an offence against the provisions of the Nova Scotia Temperance Act, the prosecutor in answer to a question as to whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, replied in the affirmative, this question and answer before adjudication of the principal charge does not constitute an enquiry by the magistrate "concerning such previous conviction," in contravention of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, and a motion for the discharge of the prisoner on habeas corpus will be refused. [R. v. Passerini, 6 East. L.R. 541 distinguished.]

Rex v. McNutt, 7 D.L.R. 651, 20 Can. Cr. Cas. 174.

IV. Civil remedies.

B. Civil damages.

(§ IV B—102)—FOR DEATH OF PERSON TO WHOM LIQUOR SOLD.

The civil liability imposed under the Ontario Liquor License Act upon a hotelkeeper for the death of a person caused by intoxication from drinking in the hotel is

not avoided by shewing that the deceased resumed drinking elsewhere while still intoxicated as a result of his drinking in the hotel, if such intoxication was the proximate cause of death and if the subsequent drinking was alone insufficient to lead to the cause of death apart from his intoxicated condition at the time when the subsequent drinking began. [See also Trice v. Robinson, 16 O.R. 433; McCurdy v. Swift, 17 U.C.C.P. 126; Bobier v. Clay, 27 U.C.Q.B. 438.]

De Struve v. McGuire, 2 D.L.R. 100, 3 O.W.N. 685, 21 O.W.R. 138, 25 O.L.R. 491.

INTOXICATION.

See Drunkenness.

INVENTIONS.

Patents for, see Patents.

IRREGULAR INDORSEMENT.

Indorsement before delivery, see Bills and Notes, III.

JAILS.

(§ I—1)—LIABILITY FOR INJURIES TO INMATES.

Where a small rural community allowed its peace officer to combine also the duties of several other officers, and, as such peace officer, he placed a prisoner in the lock-up, which three hours afterwards burned up, and in which fire the prisoner lost his life, all during the absence of the peace officer, who was attending to other duties, it was not unreasonable on the part of the municipality to permit its peace officer to attend to the duties of other offices which he held, and it was not the duty of the municipality to keep said officer or any one else in constant attendance on the prisoner. [McKenzie v. Chilliwack, 15 B.C.R. 256, affirmed on appeal.]

McKenzie v. Township of Chilliwack, 8 D.L.R. 692, [1912] A.C. 888.

JEOPARDY.

See Criminal Law, II.

JOINDER.

Of causes of action, see Action, II.
Of parties plaintiff, see Parties, I.
Of parties defendant, see Parties, II.

JOINT ACTION.

See Parties, I.

JOINT CREDITORS AND DEBTORS.

I. IN GENERAL.
II. RELEASE OF ONE JOINT DEBTOR.

I. In general.

(No cases.)

II. Release of one joint debtor.

(§ II—7)—VERDICT AGAINST ONE.

In an action for tort where two persons are alleged to have been guilty of negligence causing an injury and are joined as defendants, each defendant is to be considered as charged with a breach of duty which he individually owed to the plaintiff and a verdict may be supported which is in favour of one defendant and against the other both at common law and under Sask. Rule 34 (Sask. Rules of 1911). [See also Underhill on Torts, 9th ed., 49, 50 (a), 50 (d).]

Harris v. Gottselig, 1 D.L.R. 671, 20 W. L.R. 391.

JOINT TENANTS.

See Co-tenancy.

JUDGES.

I. IN GENERAL.
II. APPOINTMENT OR ELECTION AND REMOVAL.
III. DISQUALIFICATION; ELIGIBILITY.
IV. CHANGE; SPECIAL JUDGE; ASSIGNMENT OF JUDGES.
V. COMPENSATION.
VI. LIABILITY.

I. In general.

(No cases.)

II. Appointment or election and removal.

(No cases.)

III. Disqualification; eligibility.

(§ III—23)—INTEREST; BIAS.

In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, no person who is to take part in it should be in such a position that he might be suspected of being biased. [Allinson v. General Medical Council, [1894] 1 Q.B. 750, followed.]

Rex v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17.

IV. Change; special Judge; assignment of Judges.

(No cases.)

V. Compensation.

(No cases.)

JUDGMENT.

I. RENDITION; ENTRY; AMENDMENT; SUMMARY JUDGMENT.

A. In general.
B. By confession.
C. Jurisdiction; necessity of service or appearance.
D. For and against whom; several or joint.
E. Form and substance.
F. Entry; record; summary or speedy judgment.
G. Modification; varying terms of.

II. EFFECT AND CONCLUSIVENESS.
A. In general.
B. Decrees interlocutory, by default, or direction, or on demurrer; dismissal.
C. Collateral attack.
D. What matters concluded.
E. As to parties.

III. THE LIEN.
A. In general.
B. On what property.
C. Sufficiency of index.

IV. FOREIGN JUDGMENTS.
A. Of foreign country.
B. Of sister province.

V. DISCHARGE; ASSIGNMENT.

VI. REVIVAL; ENFORCEMENT.
A. Enforcement.
B. Revival; scire facias.

VII. RELIEF AGAINST; REHEARING; ACTIONS TO ANNUL.
A. In general.
B. Defences.
C. Grounds.
D. Procedure.
E. Time.
F. Rehearing.

On appeal, see Appeal and Error, VIII.
Against labour union, see Conspiracy.
In contempt proceeding, see Contempt, V.
Sentence in criminal case, see Criminal Law, IV.
On foreclosure, see Mortgage, VI.
In partition suit, see Partition.
Decree in suit for specific performance, see Specific Performance, II.

I. Rendition; entry; amendment; summary judgment.

A. In general.

(§ I A—2)—BY DEFAULT.

When the claim is for a declaration that plaintiff has acquired a title to land by possession, the Court will not grant judgment in default of appearance without an examination of the witnesses in open Court, if the writ has not been served personally.

Wallace v. Potter, 7 D.L.R. 114, 22 W. L.R. 281.

(§ I A—3)—BY CONSENT.

Consent minutes—Motion to enforce terms of—Jurisdiction of master.

Sovereign Bank v. Sevigny, 4 O.W.N. 459, 23 O.W.R. 651.

Where a plaintiff has filed no defence to a counterclaim he should be held, under the Manitoba King's Bench Rules, 1911, to have denied all material allegations in it, and a default judgment signed upon the counterclaim will be set aside.

Thompson v. Yockney, 8 D.L.R. 776, 22 W.L.R. 863.

B. By confession.

(§ I B—5)—BY CONFESSION.

So long as the defendant has not served on the plaintiff the confession of judgment which he has signed the plaintiff may ignore it and proceed to judgment ex parte.

Ducoudu v. Berthelet, 13 Que. P.R. 190 (Sup. Ct.).

C. Jurisdiction; necessity of service, or appearance.

(§ I C 2—19)—IRREGULAR SERVICE OF WRIT.

A judgment, recovered in an action upon a promissory note against an incorporated company, in which the plaintiffs are four directors, one of the four being secretary-treasurer, of the defendant company, and in which the writ of summons was served upon the defendant company by delivering it to the secretary-treasurer while himself a party plaintiff, is voidable for want of due service of the writ.

Crawford v. Calville Ranching Co., 6 D.L.R. 375, 22 W.L.R. 50.

E. Form and substance.

(§ I E—25)—FORM AND SUBSTANCE.

A declaratory judgment may be had, declaring that a by-law was not submitted or voted upon according to law, in order to remove the uncertainty as to the actual effect of the submission and voting; whether any consequential relief is or could be claimed or not. [Jud. Act (Ont.) R.S.O. 1897, ch. 51, sec. 57, subsec. 5; Bunnell v. Gordon (1890), 20 O. R. 281; Barraclough v. Brown, [1897] A.C. 615; London Association of Shipowners and Brokers v. London and India Docks Joint Committee, [1892] 3 Ch. 242; Re Van Dyke and Village of Grimsby (1909), 19 O.L.R. 402, referred to.]

Stoddart v. Town of Owen Sound, 8 D. L.R. 932, 27 O.L.R. 221, 4 O.W.N. 83.

(§ I E 3—35)—CONFORMITY TO PLEADINGS AND PROOF.

Admissions made by a defendant on examination for discovery are sufficient to grant an application for judgment under Rule 229 of the Judicature Ordinance, C.O. 1898, ch. 21. Whether a Judge will exercise the powers given to him by Rule 229 at all, and also the manner of exercising those powers, are both discretionary, and inasmuch as in the present case the admissions shewed that the defendant had no defence, and the plaintiff's claim was greatly in excess of the defendant's counterclaim, judgment

was ordered to be entered for the full amount of the plaintiff's claim, and execution stayed for one month, the same to be further stayed until the trial of the counterclaim on condition that the defendant within the month pay into Court the difference between the amount of the plaintiff's claim and the defendant's counterclaim.

Legare v. Glass & Large, 7 Terr. L.R. 221.

F. Entry; record; summary or speedy judgment.

(§ I F 1—45)—SUMMARY OR SPEEDY JUDGMENT.

An order obtained under order 14, rule 1 (a), of the rules of the Supreme Court of Nova Scotia for leave to enter final judgment is not in itself a "final judgment" though it is a final order deciding the rights of the parties and one from which an appeal may be taken.

Chesley v. Benner et al., 8 D.L.R. 625.

Under order 46, rule 1, of the rules of the Supreme Court of Nova Scotia providing for an order of arrest in certain actions and that the defendant be imprisoned until final judgment in the action and for thirty days thereafter, if the final judgment is against him, and further providing that within thirty days after final judgment an order may be made under the Collection Act for his appearance at a further examination, the period of thirty days in which such order may be obtained runs from the time of the entry of the judgment and not from the time of the order for leave to enter judgment.

Chesley v. Benner et al., 8 D.L.R. 625.

In an action against the drawer of a cheque, summary judgment will not be granted where the material is sufficient to justify the suspicion that the plaintiff, to whom it was endorsed, is not the holder in due course; and it appears that a defence may be established as between the drawer and the payee.

Gordean v. Douglas, 7 D.L.R. 458.

A judgment should not be held to be invalid because the clerk of the Court had omitted to make, in the procedure book, the note required by sec. 105 (now 109) to be entered, in a case where some defendants have been served and some have not, that the plaintiff had requested him to strike out the names of the defendants that had not been served and to amend the style of the action accordingly, and it should not, after a great lapse of time, the judgment standing unreversed, be presumed, from the absence of such a note in the procedure book, that the plaintiff had not given such instructions.

Dixon v. Mackay, 21 Man. R. 762.

The affidavit verifying the cause of action on a motion for summary judgment may be made in general terms.

Codville v. Smith, 7 Terr. L.R. 395.

When, at the close of the trial, counsel for the losing party asks the Judge to grant the "usual stay" and the Judge says "Yes" and nothing more is said, the meaning is that the successful party may sign judgment, but may neither issue an execution nor register a certificate of judgment until after the lapse of the time allowed for appealing from the decision.

Johnston v. Henry, 17 W.L.R. 327, 21 Man. L.R. 700.

A claim based on a contract for lease and hire of services under which the plaintiff demanded a balance due for salary and damages as provided for in the contract should be recovered under the provisions for summary procedure.

Delestre v. Montreal Opera Co., 13 Que. P.R. 264 (Sup. Ct.).

Promissory note—Examination by defendants of plaintiff's officer—Disclosure of facts entitling to defend—Object of Con. Rule 603—Costs.

Quebec Bank v. Freeland, 6 D.L.R. 900, 4 O.W.N. 305, 23 O.W.R. 245.

Con. Rule 603—Action on guaranty—Proof of amount due—Reference.

Union Bank of Canada v. McKillop, 5 D.L.R. 882, 4 O.W.N. 36, 23 O.W.R. 16.

(§ I F 1—46)—SUMMARY JUDGMENT; LIQUIDATED DEMAND.

Summary judgment should not be ordered under Rule 603 (Ont. C.R. 1897) in an action by a solicitor against his client for costs of an action against a municipal corporation as to the validity of a drainage by-law which was disposed of by a special statute validating the by-law and fixing and directing payment of the client's costs as between solicitor and client by the municipality, where the fund for payment of such costs was held by the municipality, subject to notice of the solicitor's lien and the client produced evidence to shew that such fund was intended to go to the solicitor and consented to the fund being held by the municipal corporation subject to the lien claim pending the trial of the action.

Gundy v. Johnston, 5 D.L.R. 470, 3 O.W.N. 1601, 22 O.W.R. 798.

Summary judgment should not be granted under Ont. Rule 603 (C.R. 1897), upon a Chambers application founded upon affidavits that there is no defence to an action upon a promissory note, where there is any real question either of law or of fact between the parties.

Clarkson v. McNaught (No. 2), 2 D.L.R. 55, 3 O.W.N. 741, 21 O.W.R. 350.

Rule 603—Action on bills of exchange —Defence—Reference under Con. Rule 607.

Charlebois v. Martin, 2 D.L.R. 905, 3 O.W.N. 1155.

Rule 603—Action against directors of

company for wages—Companies Act, sec. 94—Affidavit of solicitor's agent.

Rogers v. Wood, 2 D.L.R. 914, 3 O.W.N. 1241.

In order to obtain summary judgment for a liquidated demand on affidavits negativing any possible defence the indorsement on the writ must shew beyond question that the claim is for liquidated damages.

Lembke v. Chin Wing, 4 D.L.R. 431, 17 B.C.R. 218, 21 W.L.R. 895.

The power of summarily directing judgment to be entered for the plaintiff for a liquidated demand on a Chambers application where it appears that there is no real defence (Ont. Rule 603, C.R. 1897), is to be exercised with caution and only where it is plain that the facts set up by the defendant could not possibly entitle him to defend, and the plaintiff's proofs are complete. [Farmers Bank v. Big Cities Realty and Agency Co. (1910), 1 O.W.N. 397, applied; and see 1912 Yearly Practice, p. 120.]

Clarkson v. McNaught (No. 1), 2 D.L.R. 52, 3 O.W.N. 638 and 670, 21 O.W.R. 629.

Con. Rule 603—Action on covenant in mortgage—Release—Delay in bringing action.

Martin v. Clarke, 2 D.L.R. 917, 20 O. W.R. 901, 3 O.W.N. 569.

Upon a motion for summary judgment upon a specially endorsed writ in an action by the endorsee of a promissory note against the maker, the latter is entitled to unconditional leave to defend on shewing by affidavit that it was obtained from him by fraud on the part of the original payee. [Flour City Bank v. Connery, 12 Man. L.R. 305; Fuller v. Alexander, 52 L.J.Q.B. 103, 47 L.T. 443, and Millard v. Baddeley, W.N. (1884) 96, applied.]

Bank of Ottawa v. Adler, 6 D.L.R. 410.

Rule 603—Application by defendant for reference under Con. Rule 607—Practice.

Union Bank of Canada v. Aymer (No. 1), 1 D.L.R. 910, 3 O.W.N. 771.

Rule 603—Application by defendant for reference under Con. Rule 607—Doubt as to accuracy of affidavit—Omission.

Union Bank of Canada v. Aymer (No. 2), 1 D.L.R. 912, 3 O.W.N. 773.

Motion for judgment—Con. rule 603—Contract containing proviso as to local option.

Smyth v. Bandel, 4 O.W.N. 425, reargued, see 4 O.W.N. 498.

Motion for judgment—Costs of action—Parties agree that Judge should determine question.

Bartrum, Harvey & Co. v. Scott, 4 O.W. N. 389, 23 O.W.R. 537.

G. Modification; varying terms of.

(No cases.)

II. Effect and conclusiveness.

A. In general.

(§ II A—60)—Effect and conclusiveness.

If a judgment debtor against whom judgment had been rendered in a prior action between the same parties (in which original action he was defendant), proceeds as plaintiff against the judgment creditor in a new and separate action seeking in his new action, as against the judgment rendered in the original action, the identical relief for which at the trial and on appeal therefrom he had failed to plead in the original action, and had unsuccessfully sought leave to amend his pleading, such new and separate action cannot be maintained, as the prior judgment is conclusive, not only upon all matters which were actually brought forward, but also as to all matters which might have been brought forward as part of the subject matter of the contest. [Henderson v. Henderson, 3 Hare 100; Humphries v. Humphries, [1910] 1 K.B. 796, [1910] 2 K.B. 531; Cooke v. Rickman, [1911] 2 K.B. 1125; Re Ontario Sugar Co., 22 O. L.R. 621, 24 O.L.R. 332, referred to; and see annotation to this case, p. 294.]

Boeckh v. Gowganda-Queen Mines, Ltd., 6 D.L.R. 292, 4 O.W.N. 27, 23 O.W.R. 4.

Conclusiveness of former judgment—Res judicata.

Johnson v. Hetherington, 7 D.L.R. 784.

A prior judgment dismissing a motion on behalf of the company to set aside an appointment to examine certain company directors in support of an application for a winding-up order and holding such witnesses to be compellable witnesses for examination under sec. 135 of the Winding-up Act, R.S.C. 1906, ch. 144, supplemented by Con. Rules 1897 (Ont.) 489, 491, 492, is conclusive as against the company so as to bar or waive any preliminary objection to defects of form in the petition raised by their subsequent motion to dismiss, if such defects were of such a character as might have been given effect to had they been raised on the prior motion and if the prior judgment implies the validity of the form of petition. [Re Baynes Carriage Co. (No. 1), 7 D.L.R. 258, referred to.]

Re Baynes Carriage Co. (No. 2), 8 D.L. R. 309, 4 O.W.N. 118, 27 O.L.R. 244.

Where a liquidator on winding up the affairs of a bank places the names of the transferees of stock made after the proceedings were commenced upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank, under sec. 125 of the Bank Act, R. S.C. 1906, ch. 29, instead of the names of the holders of the stock on the day the proceedings were begun, he is not estopped from later placing the names of the original holders of stock on the list, though

he had already obtained judgments against the transferees.

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 4 O.W.N. 67, 27 O.L.R. 192.

The plaintiff, an extra-provincial corporation, sued S. in a County Court for debt. S. died and the plaintiff then recovered judgment by default against the defendant as administrator of S. Execution was issued and returned nulla bona, although the administrator had assets in his hands. The plaintiff then brought this action against the defendant personally upon the County Court judgment relying on the judgment as evidence of assets, and the return of the execution as evidence of waste. Judgment having been given for the plaintiff, the defendant moved to set it aside on the ground that the County Court judgment was void because (1) no affidavit of debt had been filed under C.S. 1903, ch. 118, sec. 44, and (2) the plaintiff had no license under C.S. 1903, ch. 18. Held, the County Court judgment was conclusive against the defendant upon both defences and that they could not be set up in this action.

Sanford Manufacturing Company, Limited v. Stockton, 40 N.B.R. 423.

Where a judgment finds that a party (e.g., plaintiff) has caused to another damages in a given amount, such judgment has the effect of a final judgment res judicata, even though it does not condemn such party to pay such amount; and in a subsequent action the production of the first judgment is sufficient proof of the amount of damages suffered either as set-off or as direct action; nor can such judgment in a previous action be attacked or enquired into for alleged irregularities in procedure or insufficiency of proof.

Brazer v. J. Elkin & Co., Limited, 3 D. L.R. 114.

Right to lumber—Action for declaration—Facts found in prior action.

Quebec Bank v. Sovereign Bank, 4 O.W. N. 463, 23 O.W.R. 574.

(§ II A—65)—COURT MUST BE OF COMPETENT JURISDICTION.

Before a matter can be considered res judicata it must have been determined by the judgment of a Court of competent jurisdiction.

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

(§ II A—66)—MERGER OF PRIOR CLAIM.

When, upon a demand for restitution of the thing given in pledge, the issue turns upon the payment of the debt and the debtor without succeeding in proving payment in full establishes that the debt has been reduced by payment or compensation (set-off), the Judge may adjudicate on the fact and embody the finding in the dispositif of the judgment in which case res judicata will be established between the parties.

Klock v. The Molsons Bank (No. 1), 2 D.L.R. 445, 41 Que. S.C. 370.

(§ II A—67)—IN SHIPPING; WRECK COMMISSIONERS' DECISION.

The decision of the Wreck Commissioner in favour of a person accused of a breach of regulations under the Canada Shipping Act, R.S.C. 1906, ch. 113, does not constitute res judicata as against an individual complaining under sec. 926 of that Act that he has been aggrieved by such breach.

Eastaway v. Lavallee, 5 D.L.R. 229.

B. Decrees interlocutory, by default, or direction, or on demurrer; dismissal.

(§ II B—72)—BY DEFAULT.

Effect and conclusiveness of default judgment—Irregularity of service of summons—Sheriff's return—Discontinuance against one of the defendants—Setting aside judgment—Leave to defend.

Urbasz v. Gall, 7 D.L.R. 826, 21 W.L.R. 753.

Signing a default judgment against one of three members of a partnership does not prevent recovery against the others. [Castle v. Baird, 15 O.W.R. 273, followed.]

Thomas v. McNaughton, 2 D.L.R. 211, 21 W.L.R. 267.

Relief from a judgment obtained in an undefended action will not be granted merely on the ground that judgment was taken contrary to some loose understanding between counsel for the several parties that the trial of the action should be postponed to a later day.

Ferguson v. Swedish Canadian Lumber Co., Limited, 2 D.L.R. 557, 10 E.L.R. 386.

(§ II B—76)—DISMISSAL.

Where an action has been dismissed for non-compliance with an order for the payment of certain costs by the plaintiff, the Court has no power to restore the action to the list for trial upon the plaintiff's paying such costs. [Script Phonography Co., Ltd. v. Gregg, 59 L.J. Ch. 406; Whistler v. Hancock, L.R. 3 Q.B.D. 83; King v. Davenport, L.R. 4 Q.B.D. 402; Farden et al. v. Richter, L.R. 23 Q.B.D. 124, referred to.]

Smith v. Yukon Gold Co., 5 D.L.R. 31, 21 W.L.R. 902.

Where an action or other proceeding is discontinued on payment of costs, the adverse party may inscribe for judgment on such discontinuance. [See Latour v. Campbell, 1 L.N. 163 (Johnson, J.); Regina v. Atkinson, 15 Q.L.R. 171 (Andrews, J.); Majeau v. Cie. Ass. Mut. de la cité de Montréal, 6 Q.P.R. 21 (Lavergne, J.).]

Blake v. Goyette, 13 Que. P.R. 412 (Sup. Ct.).

(§ II C 2a—86)—JUDGMENT BY DEFAULT.

It was held, confirming judgment of the

Superior Court, Lafontaine, J., that, having regard to the statutory origin of the proceeding by petition in revision of default judgments, the leave given to file such a petition does not have the effect of obliterating the default judgment, and that consequently the defendant, petitioner in revision, is not entitled to have this action declared perempted, after two years from the said filing.

Taylor v. Grant, 18 Rev. de Jur. 90.

C. Collateral attack.

(§ II C 2—91)—LACK OF JURISDICTION.

The amendment of the Division Courts Act (Ont.) substituting the words "fail for want of jurisdiction" for the words "abate for want of jurisdiction," in 10 Edw. VII. (Ont.) ch. 32, sec. 79 (1) does not give a Division Court jurisdiction to try an action which should have been brought in the Court of another Division.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

(§ II C 2—93)—SPECIAL TRIBUNALS.

The rule that the judgment of a Court which has jurisdiction cannot be called in question by collateral attack applies to the decisions of special tribunals and to proceedings that are directed by statute.

United Shoe Machinery Co. v. Laurendeau, 2 D.L.R. 77.

D. What matters concluded.

(§ II D—117)—CONTRACTS.

Res judicata cannot be claimed as to the construction of a contract in a prior action in which the defendant in the second action was a joint defendant, but as to whom such contract was not in issue.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

(§ II D 3—121)—ALIMONY.

Arrears of alimony due under a judgment which has been registered in the land registry office, pursuant to sec. 35 of the Ontario Judicature Act is a statutory charge upon the lands belonging to the husband, and may be enforced by a petition in the original action.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

(§ II D 6—136)—JOINT AGREEMENT.

The decision adverse to the plaintiff company in a previous action in which it sued another person who jointly with the present defendant had entered into the contract in question with the company, by which previous decision it was held adversely to the company that both the present defendant, not a party to the previous action, and the party then sued were entitled to certain rights against the plaintiff as to the supply of gas and that the cutting off of the supply to the defendant in the first action operated as a forfeiture in favour of the present defendant of the plaintiff company's claim to an oil and gas lease over his farm, operates as res judicata in bar to the company's second action as regards the same points of controversy. [Welland County Lime Works v. Shurr, 1 D.L.R. 913, 3 O.W.N. 715, 21 O.W.R. 480, specially referred to.]

Welland County Lime Works Co. v. Augustine, 4 D.L.R. 315, 3 O.W.N. 1329, 22 O.W.R. 235.

Joint agreement—Judgment—Res adjudicata.

Welland County Lime Works Co. v. Augustine (No. 2), 8 D.L.R. 1046, 4 O.W.N. 338, 23 O.W.R. 399.

E. As to parties.

(§ II E 1—154)—VENDOR AND PURCHASER.

In an action against the lessee of certain land for possession or other relief, brought by both parties to a contract for the sale thereof, the legal estate being still in the vendor and constituting a substantial interest in the land, the defence of res judicata fails as to the vendor, though judgment had been registered against his co-plaintiff in a former action brought by the latter against the same defendant, and involving the same issues, and though the vendor on his examination for discovery disclaim any interest in the property.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

(§ II E 1—162)—EQUITABLE OWNER OF LAND.

Where final judgment was rendered against the purchaser in a land contract in an action brought by him for possession or for other relief against a lessee of the said property, a suit involving the same issues afterwards brought by the vendor must be dismissed.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

(§ II E 2—163)—AS BETWEEN DEFENDANTS.

In an action by the Attorney-General on the relation of a city and its building inspector and by the city in its own right against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and of any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company that it was not subject to the by-laws and also denied their validity, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the latter possessed all the powers of its predecessor, the Attorney-General is not estopped by the judg-

ment in the former action and as against him the application to amend should be refused. [St. Mary Magdalene v. Attorney-General, 6 H.L.C. 189; People v. Halladay, 93 Cal. 241, 29 Pac. R. 54, writ of error dismissed, 159 U.S. 415, distinguished.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

(§ II E 8—195)—MORTGAGE CASES.

A decision given in favour of execution creditors against the execution debtor rejecting his claim that the lands seized under the execution were exempt from seizure under execution as being his homestead is res judicata as against a mortgagee of the lands from the execution debtor subsequent to the operation of the execution or judgment as a charge on the lands; but the mortgagee may apply for a rehearing of the case on the ground of the discovery of new evidence of a material character.

Johnson Bros. v. Hewitt, 1 D.L.R. 251, 19 W.L.R. 937.

III. The lien.

B. On what property.

(§ III B—209)—HOMESTEAD.

Where a judgment creditor registers an execution against the debtor in the land titles office during the interval between the debtor's entry for homestead and the grant of the certificate of title, and the land is subsequently acquired as a homestead by the debtor under the Dominion Lands Act, the Court will not, upon application of the judgment debtor, grant a declaratory judgment declaring that the land in question is not subject to any rights of the judgment creditor under the execution, or that the execution is not a charge or lien upon the land, or that it is a cloud upon the judgment debtor's title, since such a declaratory judgment would not establish any rights, inasmuch as the execution only binds the land which is subject to it and under the Exemptions Act (ch. 47, R.S.S. 1909), this land is exempt as long as it remains "homestead." [Gilmore v. Callies, 19 W.L.R. 545, followed; Fredericks v. North-West Thresher Company, 3 S.L.R. 280, 44 Can. S.C.R. 318, distinguished.]

Trottier v. National Manufacturing Company, Limited, 8 D.L.R. 138, 22 W.L.R. 615.

(§ III B—210)—CHATTELS.

Where, upon the rescission of a sale of a chattel for the default of the vendor, a judgment was given the vendee for part of the purchase money he had paid the vendor under the sale contract which did not provide for a lien therefor on the property, the vendee in an action brought after the vendor's insolvency to recover possession of the chattel from the vendee may be declared to have a lien thereon for the payments so made, and such lien may be realized by sale of the chattel after due notice.

Canadian Gas Power and Launches, Limited v. Orr Brothers, Limited, 4 D.L.R. 641, 3 O.W.N. 1362, 22 O.W.R. 351.

(§ III B—212)—LAND EQUITABLY OWNED.

Judgment Act (Man.)—Certificate of judgment—Prior unregistered equitable title—Contracts.

Fenson v. Shore (No. 2), 7 D.L.R. 812.

In an action for the sale of lands under a certificate of judgment for a sum of money, registered in the land titles office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, and, subsequent to the registration, conveyed to the purchaser pursuant to the agreement; the effect of the agreement and payment was to vest in the purchaser at once the beneficial ownership of the land, leaving in the judgment debtor no interest or estate that could be sold under a registered certificate of judgment. [Bank of Montreal v. Condon, 11 Man. L.R. 366; Entwisle v. Lenz, 9 W.L.R. 317, specially referred to.]

Fenson v. Shore, 6 D.L.R. 376, 22 W.L.R. 202.

Under the Judgments Act (Man.), which creates in favour of a registered certificate of judgment a charge upon "all the lands" of the judgment debtor, the judgment creditor's right depends entirely upon the statute, and while his registered certificate binds the judgment debtor's lands it does not bind such lands as have already been sold by the debtor, even when the purchaser's ownership is only equitable and unregistered. [Case v. Bartlett, 12 Man. L.R. 280, referred to; County Courts Act and Judgments Act of Manitoba, compared.]

Fenson v. Shore, 6 D.L.R. 376, 22 W.L.R. 202.

(§ III B—213)—PERSONAL JUDGMENT.

Where the Court awards damages for a contract of support of the plaintiff for life by the defendant which was part consideration of a deed from the plaintiff to the defendant, the plaintiff is not entitled to have the amount of such damages charged as a lien upon the land in addition to a personal judgment against the defendant. [Zdan v. Hruden, 1 D.L.R. 210, reversed on this point.]

Zdan v. Hruden (No. 2), 4 D.L.R. 255, 22 Man. L.R. 387, 21 W.L.R. 620.

IV. Foreign judgments.

A. Of foreign country.

(§ IV—220)—FOREIGN JUDGMENTS.

A judgment in personam of a foreign Court of competent jurisdiction may be sued upon in Saskatchewan where the

evidence sufficiently establishes the identity of the defendant in the action on the judgment with the defendant in the judgment sued upon, and that the Court which rendered the judgment had jurisdiction over the defendant in respect of the cause of action.

Read & Co. v. Ferguson et al., 8 D.L.R. 737, 22 W.L.R. 751.

(§ IV A—225)—Of foreign country.

In an action in a Provincial Court on a judgment in personam obtained in one of the United States, evidence that the defendant against whom judgment was rendered was a resident of the State in question when the action was begun, was personally served with the summons which was the first step in the action, and submitted to the jurisdiction of the State Court by entering an appearance in the action by his authorized attorney, is sufficient to establish the jurisdiction of the State Court over the defendant at the time of the rendition of judgment.

Read & Co. v. Ferguson et al., 8 D.L.R. 737, 22 W.L.R. 751.

In an action on a judgment in personam obtained in one of the United States, evidence that the defendant against whom the judgment was rendered was a resident of the State in question when the action was begun, and was personally served therein with the summons commencing the action is sufficient to shew that he was subject to the jurisdiction of the Court which rendered the judgment. [Carrick v. Hancock, 12 Times L.R. 59, and Rousillon v. Rousillon, L.R. 14 Ch.D. 351, referred to.]

Read & Co. v. Ferguson et al., 8 D.L.R. 737, 22 W.L.R. 751.

Plaintiff brought an action against defendant in the Court of King's Bench in Manitoba, in respect of a cause of action arising in Manitoba. At the time of action brought the defendant was residing in Saskatchewan, and had his domicile there, and was served there. He did not appear to the action, and judgment was recovered by default. The plaintiffs then brought action in Saskatchewan upon this judgment, and alternatively for relief in respect of the original cause of action. The defendant objected that the Manitoba Court had no jurisdiction:—Held (following Dakota Lumber Co. v. Rinderknecht (1905), 2 W.L.R. 275), the Manitoba Court having no jurisdiction over the defendant when the judgment was recovered, an action could not be maintained thereon, but such judgment, being invalid for the purpose of action, was invalid for all purposes, and, therefore, the plaintiff could maintain an action in respect of the original cause of action.

The British American Investment Co., Ltd. v. Flawse, 4 S.L.R. 372.

Defendant was born in and resided in different parts of Manitoba until the spring of 1904, when he came to Saskatchewan as a teacher. During the fall of that year he returned to Manitoba to complete his medical course, and, having graduated, returned to Saskatchewan, where he afterwards resided. In 1904, while residing in Saskatchewan, he was served with a process issued out of the Manitoba Court, and subsequently judgment was signed against him in default. In an action in Saskatchewan upon such judgment he pleaded that he was not at the time of service a resident of the Province of Manitoba, nor subject to its jurisdiction. His evidence was to the effect that he was a resident of Saskatchewan, and had ever since resided there, his subsequent domicile in Manitoba being merely temporary, and for the purpose of completing his course:—Held, in order to establish a change of domicile so as to oust the jurisdiction of the Manitoba Court the defendant must shew a physical removal from Manitoba to Saskatchewan, and that at the time the action was begun that he had the intention of establishing in Saskatchewan a residence of a permanent character, the onus of proving which was upon him. 2. The statement of the defendant that when he was served with the process he was a resident of Saskatchewan and that he had since then resided there except during the temporary absence referred to must be interpreted, in the absence of evidence of a contrary intention, as a declaration that he had not only his physical residence in Saskatchewan, but that he had also the intention of making it his permanent home, and this being the case, he must be deemed to have acquired a permanent domicile there, and the foreign judgment could not be enforced.

Fairchild v. McGillivray, 4 S.L.R. 237.

A foreign judgment, even if regularly obtained according to the practice and procedure of the foreign country, in order to create that duty or obligation to pay which English Courts will enforce, must come within one or the other of the five cases mentioned in Emanuel v. Symon, [1908] 1 K.B. 309. An agreement to submit to the jurisdiction of the Courts of a foreign country is not to be implied from the making of a promissory note payable in such foreign country. A foreign judgment does not in Nova Scotia, by reason of Order 35, rule 38, stand on a different footing from foreign judgments sought to be enforced in England. That rule was merely intended to give to a defendant another defence to an action on a foreign judgment, and was not intended to regulate or alter the law of the country as to when a foreign judgment can be enforced.

Gifford v. Calkin et al., 45 N.S.R. 277.

B. Of sister Province.

(§ IV B—230)—Of other Provinces.

Fraud, sufficient to permit a judgment

of a Territorial Court to be attacked in an action brought upon it in the Courts of Ontario, is not shewn by the fact that the plaintiff, who was in some doubt as to whether the defendant or another closely related company was his employer, in good faith brought his action against the defendant on a demand that was justly due him. [McDougall v. Occidental Syndicate (sub nom. Johnston v. Occidental Syndicate), 3 O.W.N. 60, affirmed on appeal; Jacobs v. Beaver, 17 O.L.R. 496, followed.]

McDougall v. Occidental Syndicate, Ltd., 4 D.L.R. 727, 3 O.W.N. 1384.

V. Discharge; assignment.

(No cases.)

VI. Revival; enforcement.

A. Enforcement.

(§ VI A—257)—JUDGMENT ORDERING DEMOLITION.

A judgment for the demolition of a fishery which is being maintained in infringement of the plaintiff's ownership of a salmon fishery on the Lower St. Lawrence river may further direct that in default of its removal to a distance of not less than 250 yards from the plaintiff's fishery (R.S.C. 1906, ch. 45, sec. 18), the plaintiff may cause the infringing fishery to be demolished and that the defendant in that event shall pay to the plaintiff the expense of demolition.

Robertson v. Grant, 3 D.L.R. 201.

(§ VI A—258)—DECREE AS TO EXHIBITS.

In an action on an endowment and life insurance policy in which the Court finds that, according to the terms thereof, only a lesser sum than the face of the policy is payable at the option of the insured on accepting cash at the termination of the expired tontine period, and that the insured had given notice of his election to take the accelerated cash payment plan under the option contained in the policy, a direction may be included in the judgment that in default of the plaintiff accepting the amount so found due, and on payment thereof into Court, the policy filed as an exhibit on the trial be declared satisfied and delivered up to the insurance company.

Labonté v. North America Life Assurance Co., 3 D.L.R. 177, 3 O.W.N. 585, 21 O.W.R. 93.

VII. Relief against; rehearing; actions to annul.

A. In general.

(§ VII—270)—RELIEF AGAINST; REHEARING.

Article 1177, C.P.Q., which enumerates the cases in which recourse may be had to a requête civile is not restrictive. Thus, a defendant subjected to judgment by the negligence of his attorney in failing to file his pleas has a right to attack the judgment by requête civile.

Dufresne v. Caisse, 13 Que. P.R. 193 (Sup. Ct.).

C. Grounds.

(§ VII C—282)—JUDGMENT BY DEFAULT.

A désistement from a judgment by default and from his action "sauf recours" will be refused the plaintiff in a civil action in the Province of Quebec, brought against a woman to whom he was married by a Protestant minister, for the purpose of having the marriage declared legally null and void, the plaintiff being encouraged to bring his action by his having secured a declaration from the Roman Catholic Archbishop of Montreal to the effect that the minister was incompetent to perform the marriage because of an article of the earlier "Ne Temere Decree" proclaimed by the congregation of the council of the Roman Catholic Church declaring that only those marriages of Catholics would be valid which had been contracted before the curé of the place, where the wife after the default judgment brought an opposition thereto on her own behalf and a tierce-opposition as tutrix of her minor child, on the grounds that her default had been caused by fraud, undue influence and threats from her husband and other persons, and asked that the judgment rendered be declared unfounded and set aside and that the principal action of her husband be dismissed.

Hebért v. Clouâtre, 6 D.L.R. 411, 40 Que. S.C. 249, 10 East. L.R. 366, 13 Que. P.R. 249.

Default of appearance—Irregularity in copy of summons served on defendant—Inclusion of interest—Unliquidated damages.

Brooks v. Brooks, 7 D.L.R. 781.

Default judgment entered prematurely—Grounds for relieving against—Laches of solicitor—Delay in moving to set aside—Consideration of the merits.

Hart, Parr Co. v. Worth, 8 D.L.R. 1035.

(§ VII C—289)—MISTAKE.

Motion to vary—Further evidence—Erroneous recital in judgment settled and entered—Motion to strike out, made after hearing of appeal.

Strong v. Crown Fire Insurance Co. (No. 2), 3 D.L.R. 882, 3 O.W.N. 1377, 22 O. W.R. 309.

JUDGMENT DEBTOR.

Assignment for creditors, see Assignment for Creditors.

Examination of judgment debtor as to assets, see Execution, II.

Writs of execution against, see Execution, I.

Attachment process against, see Attachment.

Supplementary proceedings in aid of execution, see Execution, II.

Garnishment of debt owing by third party to debtor, see Garnishment.

JUDICIAL GUARDIAN.

See Guardian.

JUDICIAL RECORDS.

See Records and Recording Laws, II.

JUDICIAL SALE.

I. THE SALE GENERALLY.
A. In general.
B. What may be sold.
C. Who bound by.
II. EFFECT; VALIDITY; DEED.
A. In general.
B. The deed.
III. PURCHASERS AND THEIR RIGHTS AND DUTIES.
A. In general.
B. Title acquired.
IV. CONFIRMATION; SETTING ASIDE; RESALE.
V. REDEMPTION.
VI. DISTRIBUTION AND CONTROL OF PROCEEDS.

I. The sale generally.

(No cases.)

II. Effect; validity; deed.

A. In general.

(§ II A—16)—EFFECT.

The judgment on an application to enforce the statutory lien created pursuant to sec. 35 of the Ontario Judicature Act in respect of an alimony judgment should provide for sale subject to prior incumbrancers unless the holders of these consent to sale free from their claims; subsequent incumbrancers must also be notified and allowed to prove their claims.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

The sale by judicial order of two adjoining parcels of land "with a common right of way between them" has the same effect as a sale by the execution debtor since the plaintiff exercises the latter's rights and acts as his agent and the sheriff is only the ministerial officer as a notary would be in a sale by private contract, therefore the adjudication under the above conditions constitute a servitude of passage by destination of the head of the family all the essential elements required by art. 551 C.C. being present.

Rosaire v. Grand Trunk R. Co., 42 Que. S.C. 517 (Sup. Ct.).

III. Purchasers and their rights and duties.

A. In general.

(§ III A—28)—PROTECTION AGAINST EQUITIES.

A transfer of assets in a liquidation proceedings under a warranty "free from incumbrances" applies only to the mortgage on the buildings and liens on the stock, but not to an unsatisfied account.

Dominion Linen Manufacturing Co. v. Langley, 46 Can. S.C.R. 633, affirming 19 O.W.R. 648; 14 O.W.R. 1163.

IV. Confirmation; setting aside; resale.

(No cases.)

V. Redemption.

(No cases.)

VI. Distribution and control of proceeds.

(§ VI—45)—DISTRIBUTION AND CONTROL OF PROCEEDS.

Where a purchaser at a judicial sale has paid a deposit on purchase-money into Court in conformity with the conditions of sale in a partition action, but the sale goes off without any fault on the purchaser's part, the interest, earned thereon and credited to the Court ledger account of the funds in that action while the money was in Court, belongs to the purchaser to be repaid to him with his deposit.

Welsh v. Harrison, 7 D.L.R. 116, 4 O.W.N. 139, 23 O.W.R. 120.

JURISDICTION.

In particular kinds of actions or proceedings, see Certiorari, I.; Cloud on Title; Divorce and Separation; Fraud and Deceit, III.; Fraudulent Conveyances, VII.; Garnishment; Injunction; Mandamus Prohibition; Quo Warranto; Specific Performance; Trespass.

Of Appellate Court, see Appeal.

Considering question of, on appeal, see Appeal, VII.

In general, see Courts, I.

Agreements to confer jurisdiction, see Courts, I.

Of Courts in respect of non-residents, limitations, see Courts, I.

Of Courts as to review of municipal by-laws, see Courts, I.

Of Court to remove case from another Court, see Removal of Causes, I.; Certiorari.

Causes of action arising in another Province or country, see Courts, I.

JURY.

I. RIGHT TO TRIAL BY.
A. In general.
B. When right exists.
C. Loss or waiver of right.
D. Denial or infringement of right.
II. IMPANELING; SELECTION; COMPETENCY.
A. In general.
B. Qualification; competency.
C. Examinations.
D. Peremptory challenges.
E. Exclusion; rejection.
III. NUMBER.
IV. SPECIAL JURY.

Prejudicial error in conduct of or interference with, see Appeal and Error, VII.
As to grand jury, see Grand Jury.
Function of, on trial, see Trial, II.
Instructions to, see Trial, III.
Verdict or findings of, see Trial, V.

I. Right to trial by.

B. When right exists.

(§ I B—6)—REFEREE'S INTERLOCUTORY ORDER FOR JURY.

The plaintiff is not precluded from applying for an interlocutory order for a trial by jury by reason of the service of a notice of trial on him by the defendant for a non-jury sittings of the Court, and the setting down of the case accordingly; such setting down does not fix the forum so as to prevent a jury being had except upon the trial Judge's order.

Moyer v. Jones, 8 D.L.R. 762, 22 W.L.R. 858.

The referee in chambers exercising certain judicial authority pursuant to the Manitoba King's Bench Act has the power to make an order granting a trial before a jury and setting aside the notice of trial served for a non-jury sittings.

Moyer v. Jones, 8 D.L.R. 762, 22 W.L.R. 858.

(§ I B 1—10)—IN CIVIL ACTIONS AND PROCEEDINGS.

It is discretionary, and not a matter of right, to order a trial by jury in cases of a class not specially designated for jury trial under the Manitoba King's Bench Act, R.S.M. 1902, sec. 59, where that statute provides that cases not so designated shall be tried by a Judge without a jury "unless otherwise ordered by a Judge."

Navarro v. Radford-Wright Co., 8 D. L.R. 253, 22 W.L.R. 665.

Where a plaintiff satisfies the Court by his material on a motion for a trial by jury that the personal injuries he suffered by being hit by something falling from defendant's building were of a serious character, an order for trial with a jury should be made under the Manitoba King's Bench Act, R.S.M. 1902, sec. 59, without requiring an affidavit also from the plaintiff's physician and thereby submitting the physician to cross-examination thereon before the trial.

Navarro v. Radford-Wright Co., 8 D. L.R. 253, 22 W.L.R. 665.

Where the option for a trial by jury should be made within three days after issue joined (423 C.P.) and the defendant after filing a plea of general denial is subsequently allowed to file a special detailed plea, then the plaintiff may move for a trial by jury on such special plea, although he did not do so on the plea of general denial.

Canadian Northern R. Co. v. Levine, 4 D.L.R. 233.

(§ I B 1—11)—ON DEFAULT.

British Columbia Supreme Court Rule 967, 1906, empowering the Court or Judge, save as otherwise provided by the rules or any Act, to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require and permitting any enlargement to be ordered though the application for the same is not made until after the expiration of the time appointed or allowed, gives a Judge the power to extend the time for serving a jury notice under British Columbia Supreme Court Rule 430, 1906, as amended 1908, which provides that in any other cause or matter than those in which the Court or Judge might direct the trial without a jury, upon the application within four days after notice has been given to any party thereto for a trial with a jury an order shall be made accordingly. [Moore v. Deakin (1886), 53 L.T.N.S. 858, and Clarke v. Ford McConnell, 16 B.C.R. 344, referred to.]

Williams v. B.C. Electric R. Co., 6 D. L.R. 7, 22 W.L.R. 4.

(§ I B 1—14)—LORD CAMPBELL'S ACT.

Section 3 of the Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, ch. 31, contemplates that an action by a representative of a person killed by accident against the person charged with negligence may be tried by a jury, and if a jury trial would have been ordered in case the person injured had brought the action, then the order should not be refused because the person died and the personal representative brings the action.

Marion v. Winnipeg Electric Railway Co., 21 Man. R. 757.

In an action brought under the Act respecting Compensation to the Families of Persons Killed by Accident, R.S.M. 1902, ch. 31, sec. 3, an order was made for trial of the issues by a jury.

Marion v. Winnipeg Electric R. Co., 20 W.L.R. 55.

(§ I B 1—17)—INJUNCTIONS.

The plaintiff in an action for damages for breach of an agreement to supply water for domestic and irrigation purposes, and for a mandatory injunction to compel performance thereof, is not entitled upon notice to a jury, under B.C. Rules, 1906, marginal rules 426-432.

McArthur v. Rogers, 2 D.L.R. 347, 17 B.C.R. 47.

(§ I B 1—18)—WILLS.

Whether a jury will be granted in a contest of the probate of a will transferred from the Surrogate Court to the High Court, is a matter within the discretion of the latter Court or a Judge thereof, under secs. 22 and 35, of ch. 59, R.S.O. (1897), as there is no vested or absolute right to have such an issue tried by jury. [Re

Lewis, 11 P.R. 107; White v. Wilson (1806), 13 Ves. 87, and Waters v. Waters (1848), 2 DeG. & Sm. 591, referred to.]

Jarrett v. Campbell, 3 D.L.R. 763, 3 O. W.N. 872 and 905, 21 O.W.R. 447, 26 O. L.R. 83.

(§ I B 2—20)—IN CRIMINAL PROSECUTIONS AND PROCEEDINGS.

The Criminal Code does not prescribe that an accused can elect to be tried without a jury when without a preliminary inquiry, or a committal, or an admission to bail, a bill of indictment has been preferred against him by the Crown Attorney with the written consent of a Judge of a Court of criminal jurisdiction. [The King v. Wener, 6 Can. Crim. Cas. 406, followed.]

Rex v. Sovereen, 4 D.L.R. 356, 3 O.W.N. 779, 21 O.W.R. 618, 26 O.L.R. 16, 20 Can. Cr. Cas. 103.

If no election has been made before an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury and avoid a trial on the indictment. [The King v. Wener, 6 Can. Cr. Cas. 406; Rex v. Thompson (1908), 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, dissented from.]

Rex v. Sovereen, 4 D.L.R. 356, 3 O.W.N. 779, 21 O.W.R. 618, 26 O.L.R. 16, 20 Can. Cr. Cas. 103.

C. Loss or waiver of right.

(§ I C—25)—LOSS OR WAIVER OF RIGHT.

When the statement of defence has been amended, an action is not at issue, under Rule 301 of the King's Bench Act, until the expiration of ten days from the delivery of the amended statement of defence and an application for a special jury may, under sec. 60 of the Jury Act, be made within six days after the expiration of such ten days.

Brown v. Telegram Printing Co., 21 Man. R. 775.

To avoid being deprived of his right to a trial by jury, the party who has obtained it must within thirty days after the time issue was joined, take not only some but all of the proceedings necessary to bring his case to trial. Otherwise an inscription at enquête and merits by the adverse party will be maintained. [Landrieux and Heard, 12 Q.P.R. 198, followed.]

Cianfagna v. Atlantic, Quebec and Western R. Co., 13 Que. P.R. 117.

If an amended defence is filed according to a previous agreement of the parties, no option for a jury trial can then be made, when there is already in the record an inscription for enquete and merits. [13 Que. P.R. 309.]

Canadian Northern R. Co. and Levine, 13 Que. P.R. 417 (Sup. Ct.).

D. Denial or infringement of right.

(§ I D—31)—JUDICIAL DISCRETION; MOTION TO STRIKE OUT NOTICE.

The granting of a motion by a Judge in Chambers to strike out a jury notice, under Con. Rule 1322, will not interfere with the discretion of the Judge who presides at the trial, in directing a trial by jury under Con. Rule 1322 (2). [Stavert v. McNaught, 18 O.L.R. 370, specially referred to.]

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

It is a proper exercise of discretion to deny a trial by jury in a cause that will require at least two weeks to try and in which many witnesses will be examined, in an action attacking the validity of a will.

Jarrett v. Campbell, 3 D.L.R. 763, 3 O. W.N. 872 and 905, 21 O.W.R. 447, 26 O. L.R. 83.

Upon a Chambers motion to strike out a jury notice, the Judge should proceed under Con. Rule (Ont.) 1322 (passed 23rd December, 1911), to determine the question whether the case is proper for trial with a jury or not, and should not merely direct that the question be left over to be determined by the Judge at the trial. [Bissett v. Knights of the Maccabees (1912), 3 D.L.R. 714, 3 O.W.N. 1280, followed.]

Gerbracht v. Bingham, 7 D.L.R. 259, 4 O.W.N. 117, 23 O.W.R. 82.

Upon a Chambers motion to strike out a jury notice, where the case turns upon whether a conveyance of land absolute in form is so in substance or merely an equitable mortgage, the relief sought comes within sec. 103 of the Ontario Judicature Act, and the case is one for trial without a jury. [See new Con. Rule (Ont.) 1322; also Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280.]

Roscoe v. McConnell, 7 D.L.R. 188, 4 O.W.N. 126, 23 O.W.R. 108.

Where issues of fact are raised upon the pleadings which must be settled before the question of liability or non-liability can be ascertained, it is a wrong exercise of his discretion on the part of a Judge in Chambers to strike out the jury notice, and such exercise of discretion is a proper subject for review. [Hunt v. Chambers, 20 Ch.D. 365, followed.]

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641.

Primâ facie a party who has given a jury notice has a right to a jury trial subject to deprivation of such right if a Judge so orders, but this order will not be made except upon good cause shewn by the party attacking the notice, as, for instance, that only questions of law are involved.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641.

Where important questions of fact proper to be determined by a jury are raised upon the pleadings, a party who has given a jury notice has a primâ facie right to have the case so determined, and an order made, notwithstanding such notice, setting the case down for trial without a jury, will be set aside. [Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641, 46 N.S.R. 272, followed.]

Carruthers v. The Nova Motor Co. (No. 1), 8 D.L.R. 689.

(§ I D—38)—MATTERS AS TO EVIDENCE.

Motion to strike out—Order—Rule 1322.

Scott v. Britton, 3 D.L.R. 873, 3 O.W.N. 568.

Where a statutory authority is conferred upon the Court to dispense with the jury in any cause "requiring local investigation," the discretion will be exercised in favour of a trial without a jury if the case is one in which the principal issue is the amount of fire damage occasioned to timber lands in proof of which a large number of experts upon the value of standing timber are to be called.

Clarkson v. Nelson and Fort Shepherd Railway Co., 1 D.L.R. 14, 19 W.L.R. 845, 17 B.C.R. 24.

Action against municipal corporation—Non-repair of highway.

James v. City of Toronto, 2 D.L.R. 893, 3 O.W.N. 1007.

II. Impanelling; selection; competency.

A. In general.

(§ II A—50) — IMPANELLING; SELECTION; COMPETENCY.

A sheriff may, in drawing a grand jury, without having before him the affidavit required by sec. 43 of ch. 162, R.S.N.S. (1900), strike from the panel the name of a juror, who, to the former's knowledge, by statute, was exempt from jury duty by reason of being a city official, or who, for some other reason, was exempt, and substitutes therefor the name of another duly qualified juror.

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

Upon the exhaustion of the jury panel with the swearing of the eleventh juror in a murder case, the Judge may, under art. 939 of the Criminal Code, direct the summoning of a number of persons by the sheriff, irrespective of their qualifications, from whom to select a twelfth juror.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

Where defendant's counsel, in a criminal action, makes a premature application that he be allowed to interrogate the jury on a question involving their eligibility to sit, a ruling by the Judge in these words: "We will see when the question arises," while it might give rise to a wrong impression on the part of counsel that the Court would later do the questioning, does not, however, amount to a refusal of the defendant's right to challenge for cause, where the defendant's counsel allowed the jury to be sworn before renewing his application.

Rex v. Pilgar, 8 D.L.R. 830, 4 O.W.N. 330, 23 O.W.R. 433.

B. Qualifications; competency.

(§ II B—55)—QUALIFICATION; COMPETENCY.

After a jury is empanelled and sworn it is too late to challenge for cause.

Rex v. Pilgar, 8 D.L.R. 830, 4 O.W.N. 330, 23 O.W.R. 433.

(§ II B—57)—IGNORANCE OF ENGLISH; FRENCH AND ENGLISH.

The only grounds upon which a challenge to the array can be made in a jury trial, in a civil case, are partiality, fraud or misconduct on the part of the officer by whom the panel is returned, or causes of nullity in the summoning of the jurors, or in the making up of the panel. The summoning of a juror whose name had been struck from the list, of a French juror, who does not understand English, as English-speaking, and the failure to summon one of the jurors on the list, are not grounds of that kind.

Montreal Street R. Co. (defendant), appellant v. Girard (plaintiff), respondent, 21 Que. K.B. 121.

(§ II B—58)—BIAS; INTEREST.

A request by defendant's counsel, in a criminal trial for arson, made at the opening of the trial, that before the jury was called he would like to ask each of the men who are called whether he is interested in a certain insurance company, which interest on his part would have made him ineligible to serve, is prematurely made.

Rex v. Pilgar, 8 D.L.R. 830, 4 O.W.N. 330, 23 O.W.R. 433.

(§ II B—59)—OPINIONS FORMED.

A juror in a criminal case who, after he has been sworn, without objection or challenge, states that he is prejudiced against the accused will not be discharged, as objection to his qualification comes too late. [Reg. v. Stewart (1845), 1 Cox C.C. 174; Rex v. Edmonds (1821), 4 B. & Ald. 471; Rex v. Sutton (1828), 8 B. & C. 417; Reg. v. Wardle (1842), Car. & M. 647, followed.]

Rex v. Mah Hung, 2 D.L.R. 568, 17 B.C.R. 56, 20 Can. Cr. Cas. 40.

III. Number.

(No cases.)

IV. Special jury.

(No cases.)

JUSTICE OF THE PEACE.

I. IN GENERAL; APPOINTMENT; REMOVAL.

II. LIABILITIES.

III. JURISDICTION; PROCEDURE.

IV. REVIEW; APPEAL.

Liability for false imprisonment, see False Imprisonment.

Summary conviction, see Summary Conviction.

Certiorari, see Certiorari.

Recorder's Court (Quebec practice), under same title.

I. In general; appointment; removal.

(§ I—2)—APPOINTMENT.

The stipendiary magistrate of an incorporated town in Nova Scotia is an independent judicial officer appointed by the Lieutenant-Governor-in-Council and in no wise subject to the control or direction of the town council, the only relation of which body towards the magistrate is that it is required to fix his salary.

Re Pelton, 7 D.L.R. 465.

(§ I—4b)—DISQUALIFICATION; BIAS.

In order to disqualify a magistrate from acting, on the ground of bias, it is not necessary to shew that he is in fact biased, but only that he is in such a position that he might be biased. [Reg. v. Gaisford, [1892] 1 Q.B. 383; and Reg. v. Huggins (No. 2), [1895] 1 Q.B. 563, followed.]

Rex v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17.

One who is appointed stipendiary magistrate by a municipality at an annual salary, on the condition that he shall try all cases under the Canada Temperance Act, and shall make monthly reports, returns and payments to and for the use of the municipality of all fines, penalties and forfeitures collected by him as such magistrate on account of such cases, is disqualified from hearing a prosecution under the Act, inasmuch as there is a reasonable apprehension that he may be biased.

Rex v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17.

II. Liabilities.

(§ II—5)—LIABILITIES.

Though a magistrate acts beyond his jurisdiction in bringing a case on before the hour fixed, such action will not be taken as indicative of a corrupt motive if it appears that the magistrate did not know the hour for which the trial of the case had been fixed and had taken the case at the earlier hour for the convenience of counsel for the accused, where the magistrate erroneously supposed that it was not necessary to have the prosecutor represented at the hearing, as defendant's counsel had informed the magistrate that the accused person would plead guilty and the accused did so plead at the hearing.

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

(§ II—6)—EXEMPTION FROM LIABILITY; PROTECTION ORDER.

Where a magistrate, a King's Counsel, with whom three informations were lodged charging a person with separate sales to different persons of liquor without a license, heard, at the same time, evidence tending to prove the three offences, if he fails to explain his conduct, upon one of the convictions being quashed, an order of protection will be granted him only upon payment by him of the costs.

Rex v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 22 O.W.R. 601, 20 Can. Cr. Cas. 98.

(§ II—7)—ILLEGAL FEES.

In an action against a justice of the peace under the provisions of the Criminal Code, sec. 1134, for wilfully exacting fees which he was not by law authorized to receive, the Judge of the County Court found that defendant received a small sum in excess of the amount to which he was by law entitled, and that after receiving notice of action he refused to make amends and pleaded justification and went to trial on that issue:—Held, by Sir Charles Townshend, C.J., and Drysdale, J., that the taking and retention of the money under the circumstances stated was a case of wilfully taking and keeping illegal fees such as the statute was intended to cover. Per Graham, E.J. (Meagher, J., concurring), that it was essential to the commission of the offence that the knowledge or wilfulness should exist at the time of the taking and the fact that restitution was not subsequently made could not be urged against defendant to shew the existence of knowledge or wilfulness at the time.

Aikens v. Simpson, 45 N.S.R. 368.

A justice of the peace who receives from a person convicted before him more costs than are legally authorized and afterwards upon notice that they were not authorized by law fails to return such excess of costs, wilfully retains the illegal fees within the meaning of sec. 1134, Criminal Code 1906, and therefore the penalty imposed by such section upon such officers for so retaining fees not authorized by law may be recovered by the party from whom he took the excess of costs. [Aikins v. Simpson (No. 1), 18 Can. Cr. Cas. 99, affirmed.]

Aikins v. Simpson (No. 2), 19 Can. Cr. Cas. 325, 9 E.L.R. 368 (N.S.).

III. Jurisdiction; procedure.

(§ III—10)—JURISDICTION.

A magistrate has only such jurisdiction as is given him by statute in respect of claims for wages due to workmen and labourers, and his authority to issue a warrant of arrest upon defendant's default of appearance to a summons depends upon there having been before him at the time of the issue of the warrant proper proof of the service of the summons under the Master and Servants Act, R.S.S., ch. 149.

Washburn v. Robertson, 8 D.L.R. 183.

Every police magistrate is ex officio a

justice of the peace for the whole county or district for which, or for a part of which, he is appointed, and such a justice of the peace need not hear both sides on the preliminary hearing, before committing the accused for trial before another magistrate.

Gardiner v. Ware, 7 D.L.R. 480.

(§ III—12)—In criminal cases.

The duties of a magistrate who undertakes to dispose of a matter brought before him are two-fold: first, to find if the party is guilty or not guilty of the charge, and secondly, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed. (Per Howell, C.J.M.)

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

A magistrate before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, even where the accused pleads guilty to the crime charged, has no right to hear evidence in mitigation of the punishment without giving the private prosecutor having charge of the prosecution an opportunity to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances. (Per Richards, J.A.)

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

A magistrate has no right to dispose of a case before the hour set for trial in the absence of the prosecutor, although the accused appears before him and pleads guilty.

Re McMicken, 8 D.L.R. 550, 22 W.L.R. 641.

Where an assault is committed upon a bailiff in the performance of his duties as a peace officer, viz., whilst attempting to effect a seizure in obedience to an order issued out of a Court of Justice, the accused cannot be tried before the Recorder's Court under the provisions of the Criminal Code, if no extraordinary violence resulting (e.g., in grievous bodily harm or murder) is used towards the complainant by the accused.

Desroches v. Foreman, 18 Rev. de Jur. 36.

A stipendiary magistrate has power to try and to convict for an offence committed before the date of his appointment. [Regina v. Bachelor, 15 O.R. 641, distinguished.]

The King v. Sweeney, 1 D.L.R. 476; 19 Can. Cr. Cas. 222, 45 N.S.R. 494.

Criminal law—Thief—Police magistrate—Jurisdiction—Regularity of proceedings—General principles governing—Police Magistrates Act, 10 Edw. VII. ch. 36, secs. 10, 18, 31, 34—When prohibition may be granted—Action of Crown Attorney.

Re Holman and Rea, 4 O.W.N. 434, allowing an appeal from 7 D.L.R. 481.

At the hearing of an information under the Canada Temperance Act the magistrate adjourned his Court from December 14, 1910, to January 5, 1911, at 10 a.m. Subsequently the counsel on both sides agreed, on account of convenience of train service, that the trial should not proceed until 2.30 p.m. When the Court met, at 10 a.m., the magistrate was informed of the agreement but he proceeded with the trial, counsel for prosecutor being present and the defendant and his counsel absent. The defendant's counsel refused to take further part in the proceedings and the defendant was convicted. Upon certiorari:—Held, the magistrate did not lose his jurisdiction by reason of the agreement between counsel.

The King v. Allen; Ex parte Gorman; the Same v. the Same; Ex parte the Same, 40 N.B.R. 459.

It is the duty of a magistrate to proceed with the trial of the accused when the accused is before him, when the accused has been committed for trial before him by another magistrate who is an ex officio justice of the peace for the same county; and this is so, even if the complainant does not appear at the trial, but has due notice of the time and place. [R. v. Burke, 5 Can. Cr. Cas. 29, referred to.]

Gardiner v. Ware, 7 D.L.R. 480.

IV. Review; appeal.

(No cases.)

KNOWLEDGE.

Of owner of animal causing injury of vicious disposition, see Animals.

Of rights of third persons in note taken by assignment, see Bills and Notes, V.

Evidence to shew, see Evidence, XI.

Of defective condition of highway, see Highways.

Effect of servant's knowledge of defect or danger, see Master and Servant, II.

Sufficiency of, to convict one of receiving stolen property, see Receiving Stolen Property.

As question for jury, see Trial.

See also Notice.

LABOUR.

Wages for, generally, see Master and Servant, I.

As to Sunday labour, see Sunday, II.

LABOUR ORGANIZATION.

Action against unincorporated labour union, see Associations.

Conspiracy by, see Conspiracy, III.

Picketing as conspiracy, see Conspiracy.

As unlawful combinations in restraint of trade, see Monopoly and Combinations.

Parties defendant in suits against unincorporated labour unions, see Parties.

(§ I—5)—USE OF TRADE LABEL.

The equitable relief granted to prevent unfair competition may reach far enough to afford redress to an unincorporated body from the unfair use and imitation of its union trade label by another union.

Rickart v. Britton Manufacturing Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

LACHES.

Estoppel by, see Estoppel, III.

In seeking relief from judgment, see Judgment, VII.

To bar action, see Limitation of Actions, I.

LAND CONTRACT.

Rights and liabilities under, see Vendor and Purchaser.

Nature and requisites of, see Contracts.

LANDLORD AND TENANT.

I. CREATION AND EXISTENCE OF RELATION.

II. LEASES.
- A. In general.
- B. Covenants.
- C. Terms; holding over; renewal.
- D. Termination; forfeiture.
- E. Assignment; sub-letting.

III. RIGHTS AND LIABILITIES OF PARTIES.
- A. In general.
- B. As to fixtures and property on premises.
- C. Liability of landlord for defective or dangerous premises.
- D. As to rent.
- E. Re-entry; recovery of possession.

Adverse possession of property held under lease, see Adverse Possession.

What constitutes a lease, see Contracts.

Oral lease for more than year, see Contracts.

Corporate power to make, see Company.

Of infant's property, see Infants.

Of wall space for sign, see License.

For oil or gas, see Mines, II.

Covenant in lease as one running with land, see Covenants and Conditions.

Double damages for wilful holding over by tenant, see Damages.

I. Creation and existence of relation.

(No cases.)

II. Leases.

A. In general.

(§ II A—5)—IN GENERAL.

A lease of an immovable for a period exceeding one year, creates, by registration, a real right in the same, and an opposition afin de charge lies in favour of the lessee.

Keegan v. Raymond, 13 Que. P.R. 371 (Sup. Ct.).

B. Covenants.

(§ II B 1—11)—"TO TURN OVER IN GOOD CONDITION."

Where a tenant in an informal lease was to receive the premises "in the best condition" and undertook "to give up the house in the same condition and repairs," the landlord is entitled to have included in his measure of damages upon the surrender of the premises all damages due to the loss attributed to ordinary wear and tear. [Lurcott v. Wakely, [1911] 1 K.B. 905, referred to.]

Bornstein v. Weinberg, 8 D.L.R. 752, 4 O.W.N. 534.

(§ II B 1—12)—AS TO REPAIRS.

Where a lessee, by mise-en-demeure, has demanded the execution of repairs by a lessor, and the lessor, in accordance therewith, has proceeded with the repairs, which, though still unfinished at the date of the commencement of the lessee's action for rescission under article 1641 of the Civil Code of Quebec, are yet completed before the trial thereof, the Court has a discretion to refuse rescission.

Consumers' Cordage Co. v. Bannerman, 2 D.L.R. 419.

A notice to repair purporting to be given under a lease, which contained a general covenant to repair and a covenant to repair according to notice with a proviso for re-entry in case of breach or non-performance of covenants may be sufficient, not only as a notice to repair under the lease, but as a notice of re-entry and forfeiture under sec. 13 of ch. 170 of R.S.O. 1897 (Landlord and Tenant Act), even if such notice does not require the lessee to make compensation in money for the breach.

Hébert v. Clouâtre, 6 D.L.R. 411, 40 Que. 745, 25 O.L.R. 588, 21 O.W.R. 325.

A covenant to repair which includes keeping the premises in repair is a continuing covenant and a notice to repair is not a waiver once and for all of its breach, but an election not to take advantage of it during the currency of the notice and after the expiry of the notice there is a right of re-entry if the premises continue out of repair. [Doe d. Morecraft v. Meux, 4 B. & C. 606, and Penton v. Barnett, [1898] 1 Q.B. 276, specially referred to.]

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 21 O.W.R. 325, 25 O.L.R. 588.

Making large openings in a wall, pulling down and removing part of same in an entire building so as to cause the premises to become a part of two buildings, to be thrown together and used as one, is a breach of the covenant to repair even where the lessee had the right "to maintain, continue, use, build and rebuild such wall," and is not only a continuing breach of the covenant to repair, but also waste. [Holderness v. Lang, 11 O.R. 1, and Rose v. Spicer, [1911] 2 K.B. 234, specially re-

ferred to; Doe d. Dalton v. Jones, 4 B. & Ald. 126, 2 L.J.N.S. Q.B. 11, distinguished.]

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

A lessor's notice to repair given on behalf of several trustees if signed by one and adopted by all is sufficient.

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 21 O.W.R. 325, 25 O.L.R. 588.

In considering whether a covenant by a lessee to surrender the premises at the end of his term "in the best repair" has been broken, that phrase must be taken in relation to the kind of house demised and the condition of repair in which it was at the time of the demise.

Bornstein v. Weinberg, 8 D.L.R. 752, 4 O.W.N. 534.

(§ II B 2—15)—IMPLIED COVENANTS.

One who leases land for a purpose which does not involve building, cannot build thereon, for the destination of the thing leased is agreed upon, and there is an implied prohibition against using it for any other purpose.

Audet v. Jolicoeur, 5 D.L.R. 68.

A landlord who leases stalls in a private market erected by him is not bound to obtain for his tenants municipal licenses allowing such tenants to carry on their trade therein in the absence of any stipulation to that effect in the leases, but the tenants may compel the municipal authorities by mandamus to grant them such licenses.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

C. Terms; holding over; renewal.

(§ II C—20)—TERMS; HOLDING OVER.

Occupation by tenant after expiry of lease—Acceptance of rent—Estoppel.

Scarborough Securities Co. v. Locke, 6 D.L.R. 897, 4 O.W.N. 228, 23 O.W.R. 239.

(§ II C—21)—YEARLY TENANCY.

In the case of a lease for one year certain, the tenancy expires by effluxion of time, and notice to quit is not necessary to determine it. [Johnston v. Huddlestone, 4 B. & C. 922, 937; Copp v. Stokes, 8 East. 358, referred to.] (2) A tenancy at will arises only where the letting is for no certain term, but is to continue during the joint will of both parties and no longer. A landlord cannot by a notice to quit during the currency of a term created by a written lease, convert a tenancy for one year into one at will.

Salesses v. Harrison, 10 East. L.R. 542.

(§ II C—24)—RENEWAL; HOLDING OVER.

The lessee is not entitled to a renewal in perpetuity unless the language used in the covenant therefor in the lease expressly or by clear implication shews that the party intended such renewal and, therefore, the provision in the lease permitting the renewal "at the same rental, upon the same terms and conditions in all respects" as provided in the old lease but saying nothing as to any further renewal gives the lessee no right to have inserted in the renewal lease any provision for a further renewal. [The King v. St. Catharines Hydraulic Co., 43 Can. S.C.R. 595, followed; 18 Halsbury's Laws of England 463, and Woodfall's Landlord and Tenant, 18th ed., 424, 425, specially referred to; see also annotation to this case.]

Wilson v. Kerner, 3 D.L.R. 11, 3 O.W.N. 769, 21 O.W.R. 477.

The provision in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do" does not make the lease renewable perpetually since the right can only continue while the lessee personally "cares so to do" and can be exercised only while the lessor lives and continues to own the property.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

A lease is not void because it provides for perpetual renewal. [Baynham v. Guy's Hospital, 3 Ves. 294, and Clinch v. Pernette, 24 Can. S.C.R. 385, specially referred to.]

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

A provision in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do," is not a covenant and does not bind the land or the heirs, assignees or personal representatives of either party, and is but a personal contract binding the parties alone.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

A notice by a lessee, purporting to exercise an option to renew the existing term, pursuant to a condition in the original lease for a "notice in writing" of exercising such option, is of no legal effect unless it is signed. (Per Irving, J.A.)

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816.

The provisions in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do" is not so indefinite as to call for the setting aside of the lease.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

D. Termination; forfeiture.

(§ II D—30)—TERMINATION; FORFEITURE.

A lease contained the following clause: "To have and to hold the said rooms and apartments for and during the term of three years to commence from the 7th day of January, 1903, at and for the monthly rental of seventeen dollars of lawful money of Canada, payable monthly, the first payment to be made on the 7th day of February next ensuing the date hereof, and it is further agreed that at the expiration of the said term of three years the

said R. D. Robertson may hold, occupy and enjoy the said rooms or apartments from month to month for so long a time as the said R. D. Robertson and Elaine Aylwin shall agree, at the rent above specified; and that each party be at liberty to quit possession on giving the other three months' notice in writing.'' Relying on this clause, the landlady, less than four months after the date of the lease, gave notice to quit. The tenant refused to vacate, holding that the provision for the three months' notice did not apply to the term of three years, and that the term could not be put an end to by notice before that period had elapsed: —Held, that upon the proper construction of the above clause, the landlady had the right to so terminate the tenancy. Held, also, per Wetmore, J., that in construing any instrument inter partes, regard may be had to punctuation.

Aylwin v. Robertson, 7 Terr. L.R. 164.

A yearly tenancy may be determined on whatever notice the parties agree on, and where a lease provided for its termination ''by giving one full month's notice,'' it was held immaterial on what date the notice was given so long as the notice was for a full month at least.

Osment v. Dundas, 7 Terr. L.R. 339.

Lease—Provision for forfeiture—For keeping intoxicating liquors for sale—Defendant landlord took possession—Judgment for plaintiff tenant for possession and $225 damages—Defendant failed to prove breach by plaintiff.

Walters v. Wylie, 3 O.W.N. 177, 20 O.W.R. 312.

A lease for a term of years in land in which the lessor had only a life estate is terminated by the death of the lessor.

Atkinson v. Farrell, 8 D.L.R. 582, 4 O.W.N. 73, 27 O.L.R. 204.

(§ II D—33)—FORFEITURE, AND WAIVER OF FORFEITURE.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and makes no re-entry, the breach of the covenant not to assign is waived.

Pigeon v. Preston (No. 3), 8 D.L.R. 126, 22 W.L.R. 894, 49 C.L.J. 76.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to sec. 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants. [Harman v. Ainslie, [1904] 1 K.B. 698, followed.]

Walters v. Wylie, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy, and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture. [Evans v. Davis (1878), 10 Ch. D. 747, and Moore v. Ullcoats Mining Co., [1908] 1 Ch. 575, approved.]

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

(§ II D—34)—RESILIATION.

Where the landlord does not comply with the covenant in the lease to heat the premises, and where the evidence shews that there was no undue interference on the part of the tenant with the heating apparatus, the lessee will be allowed to resiliate the lease.

Hoseason v. Lennon, 8 D.L.R. 475.

The assignment for benefit of creditors by the tenant is not, in itself, a ground for resiliation of the lease. The landlord has no lien on the proceeds of sale of an hotel license following the assignment. The Court cannot allow the sale en bloc of the movables, the license and the lease of the insolvent tenant as it would be impossible to make a precise allotment of the amount for which the landlord has the right to be collocated in preference to the other creditors.

Paul v. Mondon, 13 Que. P.R. 185 (Sup. Ct.).

An inscription in review suspends the delay for revision of taxation of a bill of costs. When two causes are joined for trial, enquête and argument in the Superior Court, and there is one inscription in review with a single deposit, only one bill of costs will be allowed in the Court of Review though the Superior Court pronounced separate judgments. In an action by the lessee for resiliation of the lease if the defendant consents to reduce the amount due or accruing due to him for rent from $500 to $200 and consents to the resiliation but with costs against the plaintiff which offer is refused, the cause then continues as commenced and the costs will be those of an action for $500 as well in the Superior Court as in the Court of Review.

Woodley v. Peloquin Hotel Co., 13 Que. P.R. 257 (Sup. Ct.).

E. Assignment; sub-letting.

(§ II E—36)—ASSIGNMENT.

If a lease contains a covenant not to assign the lease without the lessor's consent (and that in such event the lessor could re-enter) and such covenant is violated by the lessee, the proper remedy for the lessor is to enter and terminate the

lease; and notice to quit at a future date and a distraint made for the rent cannot be said to be evidence of a re-entry, as the lessee was thus recognized as a tenant by the lessor. [Woodfall on Landlord and Tenant, 15th ed., 337, referred to.]

Pigeon v. Preston (No. 3), 8 D.L.R. 126, 22 W.L.R. 894, 49 C.L.J. 76.

A covenant contained in a document separate from the mortgage given by the owner of the realty upon procuring a loan from a brewing company upon his hotel property whereby such owner and his tenant in occupation of the hotel severally agreed for valuable consideration with the brewing company that neither they nor their assigns would, during a specified period, sell or deal in or allow to be sold or dealt in upon the demised premises any brewing products other than those dealt in by the brewing company, is a covenant running with the land which may be enforced by injunction at the instance of the owner against a purchaser of the lessee's interests in the premises where such purchaser took with notice of such restrictive agreement, although the agreement was subsequent to the making of the lease itself; the benefit of which the purchaser had acquired, and although it did not appear that the making of such restrictive agreement was a condition upon which the lease was granted.

Rudd v. Manahan, 5 D.L.R. 565, 21 W.L.R. 929.

(§ II E—37)—SUB-LEASE.

When a lessee has reserved the right not to consent to a sub-leasing in whole or in part of the property leased for the purposes of living and manufacturing, unless the sub-lessee so offered should be acceptable to him and to his lessors, other parties in the house, the refusal by the lessor to accept the sub-lease for a laundry establishment, for the reason that different inconveniences may result from such an establishment will not be considered by a tribunal as an abuse of a discretional power thus reserved by the lessor.

Mayer v. David & Sing, 18 Rev. de Jur. 6.

III. Rights and liabilities of parties.

A. In general.

(§ III A—40)—RIGHTS AND LIABILITIES OF PARTIES.

The lease of a coach-house and yard, for instruction in gymnastics, at the rear of a dwelling-house, with a living-room in the latter, does not entitle the lessee to cause his pupils to pass through the house to reach the premises leased. Oral evidence of an agreement between the parties according such right of passage is not admissible. Per Bruneau, J., dissenting. If the lease is silent on the point the lessee has a right to enjoy the leased premises and use them as he had previously done, according to the necessities of his business when these were known to the lessor, and in the manner in which he had enjoyed them at the date of the lease, and oral evidence of these conditions was admissible.

Roumageon v. Chêne, Q.R. 41 S.C. 178 (Ct. Rev.).

In an action by a tenant against his landlord for damages for misrepresentations, made by the landlord in relation to the demised premises prior to the making of the lease, the evidence shewed that there was no fraud on the part of the landlord in making the representations. It also appeared that the tenancy had expired before any claim for damages was put forward:—Held, therefore, that the tenant could not recover.

Booth v. Beechey, 7 Terr. L.R. 435.

The obligation of the lessee to make improvements on the immovable lease is an essential condition of the emphyteutic lease. Hence, the lease of a lot for a term of 99 years with no other conditions than "to pay the rent and taxes, maintain the fences and refrain from cutting down the trees," is not emphyteutic especially if it contains a provision that either party may terminate it on giving to the other twelve months' notice. It cannot, then, give the lessee a right to bring an action negatoire nor to formulate conclusions accessoires for indemnity in such action. The offer or proposal by one party to an action to cease litigation, which is refused, involves no admission and is not binding on him.

Larue v. Chateau Frontenac Co., Q.R. 41 S.C. 193 (Sup. Ct.).

(§ III A—43)—AS TO REPAIRS.

A tenant who has not covenanted or agreed to make repairs is entitled to compensation for making repairs on demised premises only when made at the request of his landlord.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W.L.R. 566.

(§ III A—44)—AS TO POSSESSION.

The refusal of a lessee to make a cash payment for personal property purchased from a lessor under an agreement apart from a lease, as he agreed to do, does not justify the former's refusal to let the lessee into possession of the demised premises.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

(§ III A—44a)—AS TO IMPROVEMENTS.

Where a lease of a coal mining property provides that, at the expiration of the term, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances and other betterments, shall be appraised with reference to the amount and character of the work which they were intended to perform and will be able to perform when and after the appraisement is made, and, upon the expiration of the term, a new lease is made, whereby that appraisement

is waived, and it is provided that, upon the expiration of the term granted by the new lease, the lessor shall pay to the lessee, on appraisement, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances and other betterments, etc., during the period of the former lease as well as of the new lease, but that no stope, shaft, tunnel, gangway, breast, manway, airway, support, work or fixed apparatus, constructed, made or used underground, shall be considered improvements or betterments so as to be subject to valuation and payment as aforesaid, except such as shall be of actual value to the lessor in the future operation of any such stope, etc., at the expiration of this lease, the word "operation" must be taken to mean the operation of the mine by the use of such stope, etc., so that all stopes, etc., which are of use for the future operation of the mine, are to be considered as improvements and to be appraised at their value as improvements added to the property, which means the property as leased, and not as returned to the lessor, so that those stopes, etc., which are simply the result of taking out coal, will probably have added nothing to the value of the property, but will rather have depreciated it, by reason of the removal of coal of greater value than the cost of their construction; and for the purpose of the appraisement the two terms of the tenancy may be treated as one continuous term, and the property to be considered as being affected by improvements may be taken as it existed at the commencement of the first lease.

Re Canadian Anthracite Coal Co. and McNeill, 4 D.L.R. 784, 21 W.L.R. 682.

B. As to fixtures and property on premises.

(§ III B—46)—FIXTURES.

The plaintiff had been the lessee of the defendant. The defendant having given notice to quit and the plaintiff still continuing in possession, the defendant took proceedings by way of originating summons, and obtained an order for the immediate delivery up of the premises. From this order the plaintiff appealed, but did not prosecute his appeal with effect, and it was dismissed and the sheriff ejected the plaintiff. In an action by plaintiff to recover the value of fixtures left by him in the premises when the sheriff ejected him: —Held, that a tenant's right to remove fixtures exists only during the tenancy and for such further time as the tenant holds the premises under a right still to consider himself as a tenant, but no right of removal exists after the termination of the lease where the tenant retains possession wrongfully. Held, also, that the previous order for delivery having been proven and put in evidence, it was competent for the trial Judge to inspect the written reasons given by the Judge for making such order for the purpose of ascertaining the questions then raised and having regard thereto, and also to the abortive appeal taken by the plaintiff, that the plaintiff's holding over was wilful and contumacious, and that plaintiff was, under 4 Geo. II. ch. 28, sec. 1, liable to the defendant for double the yearly value of the premises. Stair pads merely tacked on to keep them in place are not fixtures. A notice to quit is a sufficient demand of possession under 4 Geo. II. ch. 28, sec. 1.

Dundas v. Osment, 7 Terr. L.R. 342.

(§ III B—47)—BUILDINGS.

A covenant in a lease of a water lot that the lessor should, at its expiration, pay the lessee the value of "buildings and erections put up for manufacturing purposes" by the latter, includes not only a building erected thereon but earth and stone used to support and stiffen a crib work foundation upon which the buildings stood, in order to prevent vibration incident to the use of machinery therein. [Sleeth v. St. John, 38 N.B.R. 542 and 39 N.B.R. 56, specially referred to.]

City of St. John v. Gordon, 3 D.L.R. 1, 46 Can. S.C.R. 101, 11 E.L.R. 177.

A sub-structure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them is itself an "erection" or "building" for the purpose of compensation by the landlord under the provisions of a ground lease whereby the landlord on electing not to renew is obliged to compensate the lessee for the "buildings and erections" placed by the latter on the land demised.

City of St. John v. Gordon, 3 D.L.R. 1, 46 Can. S.C.R. 101, 11 E.L.R. 177.

(§ III B—49)—CROPS.

A lease for five years of land in which the lessor had a life estate only was held to have been put an end to by the death of the lessor during the term; but the wheat then sown and in the ground became emblements belonging to the lessee; and these being purchased from the lessee by the plaintiffs, the executors of the lessor, the defendant, the remainderman, became liable to them for their conversion. Not so, however, the straw and manure on the farm at the determination of the lease. By the terms of the lessee's covenant, these were to be kept and utilized on and for the land, and were not the property of or removable by the lessee: the straw and manure, as "accessories of the soil," passed to the remainderman with the land freed from the demise. Review of the authorities. Gardner v. Perry (1903), 2 O.W.R. 681, not followed. Judgment of the County Court of the County of Simcoe varied.

Atkinson v. Farrell, 8 D.L.R. 582, 27 O.L.R. 204, 4 O.W.N. 73.

Interpleader issue as to the crops grown on the lands of Stevenson, the execution debtor, which had been seized by the sheriff

under the defendant's writ of execution. The plaintiff was a mortgagee of the land and had taken from Stevenson, the mortgagor in possession, a lease reserving a rent of two-thirds of the crops to secure past indebtedness and a further advance, and he claimed the right, under 8 Anne, ch. 14, sec. 1, to have the year's rent paid by the sheriff out of the crops seized:—Held, that to entitle a landlord to such right there must be a real lease and the rent reserved must be a real bonâ fide rent and not an excessive one and there should be shewn an intention of the parties to create a real tenancy at a real rent and not merely, under colour and pretence of a lease, to give the mortgagee additional security, and that the verdict should be against the plaintiff on the issue in this case. [Hobbs v. Ontario Loan and Debenture Co. (1890), 18 S.C.R. 483, and Imperial Loan v. Clement (1896), 11 M.R. 428, followed.]

Stikeman v. Fummerton, 21 Man. R. 754.

Where a tenant is to pay as rent a one-third interest in the crops, the property in such one-third interest is in the tenant until the division of the crops is made.

Anderson v. Scott, 8 D.L.R. 816, 22 W.L.R. 876.

(§ III B—51)—MANURE.

Where a lessee of a term for years in land in which the lessor had only a life estate, covenants not to remove from the premises, but to use and spend thereon, the straw and manure made upon the land, the straw and manure do not become emblements on the death of the lessor and the consequent termination of the lease, but belong to the remainderman, as "accessories of the soil." [Gardner v. Perry, 6 O.L.R. 269, disapproved.]

Atkinson v. Farrell, 8 D.L.R. 582, 4 O.W.N. 73, 27 O.L.R. 204.

In a farm lease there is an implied provision, unless the contrary is expressed, that the tenant will till and manure in a good husbandlike and proper manner, and will spend, use and employ in a proper husbandlike manner, all the straw and manure which shall grow, arise or be made thereon, and will not remove or permit to be removed from the premises any straw or manure. [Brown v. Crump (1815), 1 Marsh 567, 569, referred to.]

Atkinson v. Farrell, 8 D.L.R. 582, 4 O.W.N. 73, 27 O.L.R. 204.

(§ III B—53)—PERSONAL PROPERTY.

A collusive sale will not put an end to a tenancy under a lease under a stipulation whereby the lease was to terminate upon a sale of the demised premises.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

C. Liability of landlord for defective or dangerous premises.

(§ III C—55)—LIABILITY OF LANDLORD FOR DEFECTIVE OR DANGEROUS PREMISES.

The proprietor of a building which burns down owing to a defect in construction (e.g., a single brick chimney, one side of which is placed right along wood), which by law he is bound to know, is responsible in damages to his boarders for the value of their effects destroyed as a result of such fire.

Gervais v. Costello, 8 D.L.R. 510.

Responsibility of lessor for accident resulting from decay and falling down of buildings—C.C. 1055, 1612, 1614—Want of repairs—Original defect in construction.

Dubreuil Veuve Desormeau v. Aboud, 18 Rev. de Jur. 301.

(§ III C—60)—TO THIRD PERSONS GENERALLY.

Breach by a tenant of a municipal by-law, requiring all wells to be fence-guarded or kept covered except when in use, by the "owner or occupant," does not render the equitable owner of the fee liable either for the penalty under the by-law or for damages for the tenant's neglect to comply therewith.

Love v. Machray, 1 D.L.R. 674, 20 W.L.R. 505, 22 Man. L.R. 52.

D. As to rent.

(§ III D—95)—AS TO RENT.

Where there is a proviso in a lease that if any of the goods of the lessee shall be at any time during the term seized and taken in execution by any creditor of the said lessee, the then current and next ensuing year's rent shall immediately become due, the landlord cannot give himself any rights under the proviso by procuring the seizure of the tenant's goods either by an execution of his own or that of another.

Jarvis v. Hall, 8 D.L.R. 412, 4 O.W.N. 232, 23 O.W.R. 282.

(§ III D 1—98a)—RESERVATION OF RIGHT TO SELL; TERMINATION.

A right reserved to the lessor in a lease "to sell the demised premises at any time, subject to the right of the lessee to the crops sown prior to sale," includes by implication the right to terminate the lease on a sale being made although the lease itself did not expressly declare that a sale should have that effect.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

(§ III D 1—99)—AFTER RETAKING POSSESSION; AFTER SURRENDER BY TENANT.

A tenant who surrendered demised premises at the middle of a month, and at the same time gave notice of the termination of the tenancy, is liable for a full month's rent.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W.L.R. 566.

A tenant is not liable for rent of demised premises after he has been evicted therefrom by his landlord.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

(§ III D 1—100)—PART OF CROPS.

A tenant is not in default in the payment, as rent, of part of the crops raised on demised premises, because of his failure to deliver them, on demand of his landlord, in a manner different from that specified in the lease.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

Plaintiff leased certain land to one Jack under lease providing that the rent was to be one-third of the crop grown upon the land during the term, to be delivered on the day of threshing, the threshing to be done on or before the 1st of November in every year. The defendant as execution creditor of Jack having seized the crop after the same had been threshed, an interpleader issue was directed on the trial of which judgment was given for the defendant. On appeal:—Held, under the terms of the lease the rent was due when threshed, and the crop having been seized after threshing the landlord's share had been vested in him. (2) The rent being expressed to be one-third the crop, this was a certainty, because the amount threshed could be ascertained, and there being a fixed standard and prices for grain, the amount of rent could easily be ascertained. (3) That the protection afforded to landlords by the provisions of 8 Anne, ch. 14, applies to rent payable otherwise than in money, it being well recognized that while rent must always be a profit, it need not be payable in money.

Foster v. Moss, 4 S.L.R. 421.

(§ III D 2—105)—LANDLORD'S LIEN.

Where a sheriff's sale under a writ of execution against the tenant, with the assent of the landlord, is held upon the demised premises, the landlord himself becoming the purchaser, he is entitled, notwithstanding such assent, to off-set his claim for rent against the claim for the purchase price of the goods, and is not driven to an action on the case against the sheriff. [Green v. Austin, 3 Camp. 260, distinguished.]

Ingraham v. McKay, 8 D.L.R. 132, 49 C.L.J. 76.

(§ III D 3—110)—DISTRESS.

Under R.S.S. ch. 51, sec. 4, providing that a landlord shall not distrain for rent on the goods and chattels of any person, except the "tenant or person who is liable for the rent," the landlord cannot distrain upon the goods of a sub-tenant for rent due from the original lessee.

Anderson v. Scott, 8 D.L.R. 816, 22 W.L.R. 876.

E. Re-entry; recovery of possession.

(§ III E—115)—RE-ENTRY; RECOVERY OF POSSESSION.

Alberta Rule 469 (Judicature Ordinance Rules), under which summary proceedings by way of originating summons may be taken to recover possession from an overholding tenant, does not authorize the Court to fix or order payment of a sum to be paid for use and occupation of the premises during the overholding period.

Wallace v. Day, 6 D.L.R. 281, 22 W.L.R. 22.

It is the statutory duty of a County Court Judge to determine whether or not a tenant is wrongfully holding against the landlord upon an application under Part III. of the Landlord and Tenant Act, 1 Geo. V. ch. 37 (overholding tenants) and such duty is not fulfilled by dismissing the application without any specific finding of fact. [Re St. David's Co. and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, approved.]

Re Dickson & Co. and Graham, 8 D.L.R. 928, 27 O.L.R. 239, 4 O.W.N. 100.

If upon an appeal by the landlord from the dismissal of his summary application for an order of possession against an alleged overholding tenant under the Landlord and Tenant Act (Ont.), the Appellate Court is of opinion that the matters in question shall be disposed of in an action and not summarily, it may vacate the order of dismissal and leave the plaintiff to his remedy by action and direct that the costs of the summary proceedings and appeal be costs in the action if brought within a time limited by the order.

Re Dickson & Co. and Graham, 8 D.L.R. 928, 27 O.L.R. 239, 4 O.W.N. 100.

(§ III E—116)—RE-ENTRY.

In an action to enforce a forfeiture, the Court will upon proper terms grant relief even in the case of intentional breach of covenants, and substitute money compensation for forfeiture. [See Rose v. Spicer, [1911] 2 K.B. 234.]

Walters v. Wylie, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

(§ III E—117)—NOTICE TO QUIT.

In the absence of a statutory requirement as to the length of notice for the termination of a tenancy from month to month, only a reasonable notice of intention to terminate the tenancy is necessary. [Jones v. Mills, 10 C.B.N.S. 788, followed.]

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W.L.R. 566.

A half month's notice of termination of a tenancy from month to month is reasonable, where the landlord knew the tenant was looking for a cheaper place because he could not afford to pay the rent the former demanded, and will be sufficient in the absence of a statutory requirement of a longer notice.

Burgoyne v. Mallett, 5 D.L.R. 62, 21 W.L.R. 566.

(§ III E—118)—CROPS.

Plaintiffs leased land to a tenant under lease requiring delivery of a portion of crop annually by way of rent. The tenant, with plaintiff's consent, sub-let to de-

fendant. The defendant made default in delivery of plaintiffs' share of the crop for the year 1910, and such default having continued for two months, the plaintiffs brought action for possession, the lease providing for re-entry and forfeiture if default continued for two months. On the trial of this action, the tenant alleged an agreement for sale of the land to him by the plaintiffs, which they denied, and as one fact shewing that no sale had been made shewed that, after the date of the alleged sale, one of the plaintiffs had estimated with the defendant the amount of plaintiffs' share in the crop for the previous year on the basis of the terms of the lease, and also a statement had been made by plaintiffs in defendant's presence, after the date of the alleged sale, that the plaintiffs were going to sell to defendant and that the defendant made no remark:—Held, that where the cause of forfeiture of the term is complete, as here, the bringing of an action places the landlord in the position of having made a re-entry upon the date when the action was commenced, and, therefore, the plaintiffs having re-entered, the term was at an end, and the defendant had no longer any right to remain on the land. 2. The defendant having remained on the land after action brought, he was liable in damages as for holding over. 3. In connection with the determination of the question of whether there was any sale of the land to defendant (which on the facts was decided adversely to the defendant), the actions of the defendant in the preparation of a statement of the rent due, and failing to make any comment on the plaintiffs' statement as to their intention to sell the land to him at a time when he claimed to be the owner, should be taken as strong evidence that in fact no sale had at that time been made.

Nichol v. Nelson, 4 S.L.R. 315.

Where a lease for a term of years of land in which the lessor had only a life estate has terminated by the death of the lessor, the wheat previously sown by the tenant and in the ground at the time of death of lessor becomes emblements and belongs to the tenant or his assignee, as against the remainderman.

Atkinson v. Farrell, 8 D.L.R. 582, 4 O.W.N. 73, 27 O.L.R. 204.

LAND TITLES (Torrens system).

I. GENERALLY.
II. FIRST REGISTRATION.
III. TRANSFERS; MORTGAGES, LEASES, ETC.
IV. CAUTION; CAVEATS AND ADVERSE CLAIMS.
V. LAND CERTIFICATES.
VI. PLANS.
VII. PROCEDURE.
VIII. ASSURANCE FUND.

Pleading implied covenant to pay prior mortgage on taking land titles transfer, see Pleading.

I. Generally.

(No cases.)

II. First registration.

(No cases.)

III. Transfers; mortgages, leases, etc.

(§ III—30) — TRANSFERS; MORTGAGES; LEASES.

Where real property is mortgaged by an instrument executed in accordance with the Real Property Act, R.S.M. 1902, ch. 148, known as the Torrens or "New System" registry law it can be transferred by the mortgagee to a purchaser from him only in the manner prescribed by statute. [National Bank of Australia v. United Hand-in-Hand Co., 4 A.C. 391, applied; Greig v. Watson, 7 V.L.R. 79, specially referred to.]

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

Mortgages of land which is subject to the Torrens or "New System" form of registration in the Province of Manitoba are permitted only in the form specified by the registration statute (the Real Property Act, R.S.M. 1902, ch. 148), and the direction in the statutory form which permits of "special covenants" being added thereto is insufficient to cover an added power of sale or other stipulation whereby the mortgagor authorizes the mortgagee to execute an assurance or transfer of the mortgaged property and extinguish the mortgagor's title thereto; such a power of sale or stipulation is not in strictness a "covenant" even if framed as a covenant, and is not within the scope of the statutory form or consistent with the statutory provisions.

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

One who gave her husband an unregistered transfer of her land duly executed by her and duly attested for registration in order that he could deposit the same with a third person as security for the price of certain property purchased by the husband from such third person, but retained her duplicate certificate of title, cannot afterwards be permitted to shew to the prejudice of such third person, that she had no intention of parting with her title to the land and she will be required at the suit of such third person, after the husband has transferred the land to him in part payment of the debt so secured, to deliver up the certificate in order to complete the record of title in favour of such transferee. Per Harvey, C.J., and Scott, J., dismissing the appeal on an equal division of the Court. [Rimmer v. Webster, [1902] 2 Ch.D. 163, applied.]

Acme Co. v. Huxley, 1 D.L.R. 860, 20 W.L.R. 133.

Where a certificate of title was issued under Land Titles Act of the Province of Saskatchewan to the administrator or executor as such, and he is one of the parties beneficially interested in the property, the practice for passing the administrator's interest to him when he is entitled to be clothed with it absolutely in his own name is to file in the land titles office a transfer from the administrator or executor as such to himself personally. [Re Galloway, 3 Terr. L.R. 88, considered.]

Re Lockhart, 1 D.L.R. 754, 20 W.L.R. 413.

The effect of sec. 135 of the Alberta Land Titles Act, 6 Edw. VII., ch. 24, is that a person dealing with a registered owner is not affected by any outstanding interest of which he has no notice, nor of any interest of which he has notice, unless, with such notice, he does something which constitutes fraud.

Arnot v. Peterson, 4 D.L.R. 861, 21 W. L.R. 153.

There is no reason in law why a transfer under the Alberta Land Titles Act, 6 Edw. VII. ch. 24, should not be executed in blank, with authority to the person to whom it is handed, or to anyone else, to fill in, under certain instructions, the name of the so-called transferee, who, in reality, is the person to whom the registrar is to be requested to issue a new certificate of title.

Arnot v. Peterson, 4 D.L.R. 861, 21 W. L.R. 153.

Where one has advanced money on the security of an agreement to give a transfer of land registered under the Alberta Land Titles Act, 6 Edw. VII., ch. 24, and the transfer is executed and delivered, and the transferee then receives notice of an agreement of sale made by the transferor after the execution and delivery of the transfer, he is nevertheless entitled to register his transfer, and obtains thereby a good title as against the holder of the agreement of sale.

Arnot v. Peterson, 4 D.L.R. 861, 21 W. L.R. 153.

A transfer under the Alberta Land Titles Act, 6 Edw. VII., ch. 24, is not a deed of grant. It does not pass the title, and its practical effect is little or nothing more than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else.

Arnot v. Peterson, 4 D.L.R. 861, 21 W. L.R. 153.

IV. Cautions; caveats and adverse claims.

(§ IV—40)—CAUTIONS; CAVEATS AND ADVERSE CLAIMS.

A person to whom the owner of land has agreed to give a mortgage has such "interest" in the land within the meaning of sec. 130 of the Real Property Act (Man.) as to give him the right to file a caveat against the land notwithstanding the provisions of sec. 100 of the Act to the effect that a mortgage shall have effect as a security, but shall not operate as a transfer of land thereby charged or of any estate or interest thereon.

Thompson v. Yockney, 8 D.L.R. 776, 22 W.L.R. 863.

Under the Torrens system of land titles any right conferred by contract relating to land against the registered proprietor is a sufficient "interest" to support a caveat.

Thompson v. Yockney, 8 D.L.R. 776, 22 W.L.R. 863.

In order that the seller of land may file a caveat against it under sec. 125 of the Saskatchewan Land Titles Act, the interest claimed by him must be derived through the document on which the caveat is founded, and must be an interest different from that held by him as owner of the land; and a right acquired through a restrictive covenant on the part of the purchaser of the land, contained in a contract of sale, is not sufficient to sustain a caveat. [But see annotation to this case.]

Re Grand Trunk Pacific Development Co., Ltd., 7 D.L.R. 611, 22 W.L.R. 193.

The seller of land does not acquire the right to lodge and continue a caveat against it under sec. 125 of the Saskatchewan Land Titles Act, by a condition inserted by him in the contract for the sale of the land prohibiting the purchaser from erecting any buildings thereon other than a church, since such condition amounts only to the retention by the vendor of an interest already possessed by him, and did not confer upon him any new or different interest in the land, which is essential to sustain the filing of a caveat. [But see annotation to this case.]

Re Grand Trunk Pacific Development Co., Ltd., 7 D.L.R. 611, 22 W.L.R. 193.

A caveat is an "instrument" within the meaning of the Land Titles Act of Saskatchewan and when properly lodged prevents the acquisition or bettering or increasing of any interest in the land legal or equitable, adverse to or in derogation of the claim of the caveator, at all events as it exists at the time the caveat is lodged. [Sask. Land Titles Act, R.S.S. 1909, ch. 41, secs. 2 (former 2), 125 (former 136), and 128 (former 139), considered.]

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551.

A caveat which describes the lands against which it is filed with reasonable certainty which enables the registrar to identify the land, but omits to give the number of the certificate of title as required in the statutory form is a sufficient compliance with the Land Titles Act, R.

S.S. 1909, ch. 41, sec. 126 (6 Edw. VII., ch. 24, sec. 137), which is intended for the guidance of registrars and should be construed as directory only. [Wilkie v. Jellett, 2 Terr. L.R. 133, on appeal; Jellett v. Wilkie, 26 Can. S.C.R. 282, specially referred to.]

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551.

One who first acquires the right to purchase land and files a caveat in the land titles office, is entitled to priority over a person claiming to be a subsequent purchaser.

Edgar v. Caskey, 4 D.L.R. 460, 21 W. L.R. 444.

A caveat registered in respect of an option for the purchase of land which was executed on the Lord's Day, contrary to C.O. (N.W.T.) 1898, ch. 91, sec. 3, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, may be vacated and set aside.

Fallis v. Dalthaser, 4 D.L.R. 705, 21 W. L.R. 171.

Priority is not acquired by the filing of a caveat by one who became interested in land under an agreement for its purchase after an execution had been lodged and registered against it in the land titles office. [Wilkie v. Jellett, 26 Can. S.C.R. 282, distinguished.]

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

A caveat will not lapse where the notice given for that purpose by the registrar to the caveator recited that it was sent out under the provisions of sec. 141 of the Land Titles Act, which, however, did not relate to caveats, since the notice was not such as was required by sec. 130 of the Act in order to terminate a caveat.

In re Caveat, 3 D.L.R. 590, 21 W.L.R. 575.

Section 97 of the Alberta Land Titles Act, 6 Edw. VII., ch. 24, dealing with registration by way of caveat, applies only as between persons claiming under the same root of title, and, for this purpose, each fresh certificate of title constitutes a new root of title.

Arnot v. Peterson, 4 D.L.R. 861, 21 W. L.R. 153.

The plan filed by a railway company pursuant to the Railway Act (Can.) as a preliminary to expropriation proceedings for a right-of-way, is an instrument under which the railway company claim to be interested in the property within sec. 125 of the Land Titles Act, R.S.S. 1909, ch. 41, and although itself not registrable under that statute, it will support the registration of a caveat by the company. [As to caveats generally under the Torrens land title system, see annotation to this case.]

Re Moosecana Subdivision, and G.T.P. Branch Lines, 7 D.L.R. 674.

Section 84 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, providing among other things that any person claiming to be interested under certain instruments specifically mentioned, "or otherwise howsoever in any land," may cause to be filed with the registrar a caveat against the registration of any person as transferee does not restrict the registration of a caveat only to claims founded upon some written document, and the words "or otherwise howsoever" in the section aforesaid which follow the descriptions of interests which may be protected by the recording of caveat are broad enough to cover a claim by a member of a partnership composed of himself and the owners of certain land in which he claimed an interest in as an asset of the partnership, though the partnership was not evidenced by any writing.

Re MacCullough and Graham, 5 D.L.R. 834, 21 W.L.R. 349.

The intention of sec. 132 of the Manitoba Real Property Act, R.S.M. 1902, ch. 148, is that a transfer or other dealing with land may be put through by the district registrar subject to any existing caveat filed after the first certificate of title has been issued, and in such case the rights of the caveator, whatever they may be, are preserved, but no additional force should be given to the claim set out in the caveat, by making a new certificate of title, subject to it.

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

(§ IV—42)—CONTINUATION OF CAVEAT.

A caveat under the Land Titles Act (Sask.) by a railway company in respect of their location plan for a right-of-way filed under the Railway Act (Can.) will be continued only upon the company proceeding under the Railway Act with the expropriation of the lands.

Re Moosecana Subdivision, and G.T.P. Branch Lines, 7 D.L.R. 674.

A caveat will lapse where the caveator, after proper lapsing notice had been given the caveator by the registrar, obtained a void order under sec. 130 of the Land Titles Act from a Judge of the District Court acting as a Local Master, which he was without jurisdiction to grant, extending for more than thirty days the time for the lapsing of the caveat.

In re Caveat, 3 D.L.R. 590, 21 W.L.R. 575.

As an application for the continuance of a caveat under sec. 130 of the Land Titles Act is neither an action nor a proposed action, therefore power to grant an order for that purpose cannot be delegated by the Judges of the Supreme Court to Local Masters, as it does not come within the authority conferred upon the former to make rules delegating their powers to Local Masters in respect to action brought

or proposed to be brought in their respective districts.

In re Caveat, 3 D.L.R. 590, 21 W.L.R. 575.

V. Land certificates.

(§ V—50)—Land certificates.

The word "interests" in a land titles certificate in Manitoba, includes interests merely claimed, as well as those established or admitted and a certificate under the Manitoba Real Property Act, R.S.M. 1902, ch. 148, is evidence that the person named in the certificate is entitled to the land for the estate or interest therein specified subject to the right to prove fraud or the exceptions stated in that statute. [Re Moore and Confederation Life Association, 9 Man. L.R. 453, distinguished.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

Though a mortgage in proper form is handed in for registration at the same moment as the transfer of title to the mortgagor under the Land Titles Act (Sask.), it cannot be actually registered until after the title has been officially transferred of record under that Act (Torrens title system), and therefore it must be received subject to executions already on file in the land titles office.

Rogers Lumber Co. v. Smith et al., 8 D.L.R. 871, 22 W.L.R. 899.

VI. Plans.

(§ VI—60)—Plans.

A plan registered under sec. 79 of the Saskatchewan Land Titles Act is the official description of the property and cannot be altered or amended, after registration, except by a Judge's order under subsec. 2 of sec. 80 of that Act.

Re Application of the Moose Jaw Securities, Ltd., 8 D.L.R. 322, 22 W.L.R. 463.

A plan required under sec. 79 of the Land Titles Act (Sask.) is for the purpose of shewing the boundaries of lots staked out in town plots and to provide a short and convenient description of the same, and is for registration, so that thereafter the lots are described according to that plan, and it becomes the official description of the property.

Re Application of the Moose Jaw Securities, Ltd., 8 D.L.R. 322, 22 W.L.R. 463.

The plan provided for under sec. 76 of the Saskatchewan Land Titles Act, to the effect that the registrar may require anyone transferring land to furnish him with a plan having the several measurements of the land to be transferred marked thereon and certified by a Saskatchewan land surveyor, is only for the information of the registrar, to enable him to see upon the plan how the piece of property in question is laid out and that its boundaries do not conflict with any other parcel of land, but is not for registration.

Re Application of the Moose Jaw Securities, Ltd., 8 D.L.R. 322, 22 W.L.R. 463.

A transfer of a part of a lot, for which lot a plan has been already registered with the registrar as required by sec. 79 of the Land Titles Act, does not of itself constitute an alteration of the plan and does not require an alteration of the plan by a Judge's order under sub-sec. 2 of sec. 80 of that Act.

Re Application of the Moose Jaw Securities, Ltd., 8 D.L.R. 322, 22 W.L.R. 463.

Where land is subdivided by a registered plan under sec. 79 of the Saskatchewan Land Titles Act, R.S.S. 1909, ch. 41, and a corner lot is shewn as fronting on a certain street with a side street as one of its lateral boundaries, a new plan of subdivision of such lot is not required on a sale of the middle portion thereof fronting upon the side street only, but a conveyance or transfer may be recorded as of such part of the lot, with or without an easement of right-of-way over the remaining portions.

Re Application of the Moose Jaw Securities, Ltd., 8 D.L.R. 322, 22 W.L.R. 463.

VII. Procedure.

(§ VII—70)—Procedure.

Where a municipal corporation, instead of proceeding by way of by-law, attempts to close a highway by mere resolutions of the council, and applies under the Land Titles Act (Alta.) for an order for the registration thereof as a by-law, the application will be refused. [Sub-sec. 7, sec. 26, Land Titles Act, 6 Edw. VII. (Man.), ch. 24, as enacted by sec. 19, ch. 5, Alberta Statutes 1907, construed.]

Re Bassano, 7 D.L.R. 601.

Where an application by the registered owners of certain land for an order vacating the registration of a caveat against it which application was refused upon the hearing and instead the Court, upon the ground that the owners' title should not remain subject to the caveat for any longer time than was actually necessary, ordered the caveator to commence an action to establish his claim to set it down for trial at the sitting of the next month following that in which the order was given and to proceed to trial at such sittings and further directed that if the caveator made default in complying with this order in any respect, the owners might apply ex parte for an order for the removal of the caveat which would be granted by the Court upon satisfactory proof of such default.

Re MacCullough and Graham, 5 D.L.R. 834, 21 W.L.R. 349.

The Land Titles Act, 1 Geo. V. (Ont.), ch. 28, sec. 88, requiring that the practice or procedure on, and incidental to, a case stated or on an issue directed for the determination of a question arising in the

office of the Master of Titles shall be the same as on a special case or on an issue directed in an action, makes a respondent a necessary party and an applicant for registration as the owner of land is not entitled on an ex parte motion to obtain an order of the Court to determine a question of such character.

Re Hewitt, 3 D.L.R. 156, 3 O.W.N. 902.

A registrar cannot under sec. 124 of the Land Titles Act, R.S.S. 1909, ch. 41, register a tax transfer and issue a certificate of title upon a tax sale that was confirmed by a Judge of the District Court.

Nicholson v. Drew, 3 D.L.R. 748, 21 W. L.R. 189.

A reference in a certificate of title to city lots, issued under the Land Titles Act, to a plan recorded in the land titles office, thereby incorporates such plans into the description contained in the certificate so as to make it a part thereof. [Grasett v. Carter, 10 Can. S.C.R. 105, followed.]

Smith v. City of Saskatoon, 4 D.L.R. 521, 21 W.L.R. 868.

Where, by reason of a misdescription of the land, a mortgage given by a vendee under an executory contract could not be validly deposited in the land titles office for record on the completion of the mortgagor's title by the issue of a certificate of title, and the mortgagees consequently filed a caveat against the mortgagor's property as correctly described claiming to charge the same upon such defective mortgage, such mortgagees have lost priority over executions filed thereafter and before the issue of the certificate of title if they voluntarily discharged the caveat and accepted a new mortgage at the time when the transfer was made from the registered owner to their mortgagor; the mortgagees' proper recourse was to have taken action to have their original mortgage reformed and recorded in conformity with their caveat instead of discharging the same.

Rogers Lumber Co. v. Smith et al., 8 D.L.R. 871, 22 W.L.R. 899.

Where an application under sec. 91 of the Land Titles Act, 1906, was made by A. B., the registered owner of certain land, for an order discharging a caveat registered against it by one C. B., who claimed to be entitled to a transfer of the lot under an agreement for sale from A. B.:—Held, that sec. 91 provided a means of reaching a speedy decision upon the merits of a dispute as to the sale of real property where a caveat has been filed which ties up the property. Held, further, that where the Court, acting under that section, finds as a fact that no agreement for sale has been entered into, it has power to direct the removal of the caveat. Although a memorandum was signed, which would satisfy the Statute of Frauds, if the memorandum is equivocal as to whether or not an agreement was entered into, the agreement must be proved by extrinsic evidence.

Babbitt v. Boileau, 7 Terr. L.R. 481.

VIII. Assurance fund.

(§ VIII—80)—Assurance fund.

Where, on the faith of an abstract of title which, by reason of the failure of the registrar to note on the certificate of title the filing of a seed grain lien under the Seed Grain Act of 1908, shewed a clear title, the plaintiff purchased land at a mortgage foreclosure sale and received from the Court a clear certificate of title thereto, the fact that he did not make a special search for liens of such nature, which became binding on the land from the time they were filed, does not amount to negligence sufficient to prevent him recovering from the assurance fund the amount he was compelled to pay to free the land from such lien.

The Canada Life Assurance Co. v. The Registrar of the Assiniboia Land Registration District, 3 D.L.R. 810, 21 W.L.R. 469.

Under sub-sec. 3 of sec. 137 of the Land Titles Act, R.S.S. 1909, ch. 41, damages for the registration of a void tax transfer may be recovered out of the assurance fund by the owner of the property, but not against the tax purchaser who had obtained registration of such tax title and had taken out a certificate of ownership which was transferred bonâ fide for value to a third party to whom a certificate of title had been issued.

Nicholson v. Drew, 3 D.L.R. 748, 21 W.L.R. 189.

Plaintiff, having secured a mortgage from one H., caused it to be transmitted to the registrar for registration, but did not produce the certificate of title; in fact, none then existed. Subsequently H. gave another mortgage upon the land, and the mortgagee, having secured the certificate of title, caused the latter mortgage to be registered in priority to the former, which although then in the possession of the registrar, was not registered until some time later. At the time of the last registration the registrar gave plaintiff an abstract which did not shew the other mortgage registered in priority, whereby the plaintiff alleged he was misled and suffered damage, being under the impression that he had ample security, and neglected to endeavour to collect, as he would have done had he known the actual position of the mortgage. The land having been sold and realizing an amount insufficient to pay the prior mortgage, the plaintiff sued the registrar for damage for omitting to register and furnishing a false abstract:—Held, that the registrar, being forbidden to receive and register any instrument not accompanied by a certificate of title, the plaintiff's mortgage was never properly produced for registration until long after the registration of the previous mortgage, and though it may have been in the office at the time the title was received it was improperly there and could not be deemed to be so in the possession

of the registrar as to place any obligation upon him to register it upon receipt of the title unless actually produced and placed for registration by the plaintiff or his agent. 2. That the plaintiff was entitled to recover for any damage he could shew to have been sustained by him by reason of the false security created by reason of the defective abstract furnished.

Hall v. The Registrar of Land Titles, 4 S.L.R. 244.

LANES.

Public lanes, see Highway.

Private lanes and rights of way, see Easements.

LARCENY.

See Theft.

LATERAL SUPPORT.

I. LAND IN NATURAL STATE.
II. BUILDINGS.
(No cases.)

LEASE.

What constitutes, see Contracts.
As evidence, see Evidence.
Of infant's property, see Infants.
In general, see Landlord and Tenant, II.
Covenants in, see Landlord and Tenant, II.
As to oil or gas lease, see Mines, II.

LEGACY.

See Wills, III.

LEGAL PROFESSION.

See Solicitor.

LEGAL REPRESENTATIVES.

See Executors and Administrators.

LETTER.

Admissibility in evidence, generally, see Evidence.
As subject of forgery, see Forgery, Stealing, see Theft.
Evidence of mailing, see Evidence, IV.

LEVY AND SEIZURE.

I. WHAT PROPERTY SUBJECT.
A. In general.
B. Property in custody of law.
II. MODE AND SUFFICIENCY; RETURN.
III. RIGHTS AND LIABILITIES GROWING OUT OF LEVY.
A. Of officer levying.
B. Of others.
C. Priorities.
IV. BOND FOR RELEASE OF.

Levy of distress warrant, see Landlord and Tenant.
Exemption of homestead from levy, see Homestead.
As to exemptions, see Exemptions.

I. What property subject.
A. In general.

(§ I A—7)—LIFE TENANT'S INTEREST; TENANT AT WILL.

A tenancy at will not being exigible at common law and this particular interest not having been covered by legislation in Ontario, a fi. fa. issued against a judgment debtor who is a tenant at will under the Ontario Mining Act (8 Edw. VII., ch. 21) is not enforceable. (Per Riddell, J.) [For the history of the legislation, see Universal Skirt Manufacturing Co. v. Gormley, 17 O.L.R. 114, 136, and "Memorandum of Legislation," by Riddell, J., 17 O.L.R. 139; also 9 Edw. VII. (Ont.), ch. 47.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

While a tenancy from year to year is, a tenancy at will is not, exigible under a fi. fa. in the sheriff's hands. (Per Riddell, J.) [Mann v. Lovejoy (1826), 1 Ry. & Moo. 355, and Hamerton v. Stead (1824), 3 B. & C. 478, specially referred to.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

The better rule seems to be that the interest which a tenant at will has in another's real estate is not such an interest in land as can be sold on execution. (Per Riddell, J.) [17 Cyc. 954; Bigelow v. Finch (1851), 11 Barb. (N.Y.) 498, S.C. (1853), 17 Barb. (N.Y.) 394; Colvin v. Baker (1848), 2 Barb. (N.Y.) 296, referred to.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

While a profit à prendre arising from a privilege for a fixed term has been held to be exigible, a profit à prendre at the will of the Crown is not exigible in like manner because the paramount right of the Crown prevails. (Per Riddell, J.) [Canadian Railway Accident Co. v. Williams, 21 O.L.R. 472, distinguished.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

(§ I A—10a)—MINING CLAIMS; PATENTED.

The interest which a judgment debtor has under the Mining Act (Ont.), 8 Edw. VII., ch. 21, as the holder of an undivided interest in a mining claim, for which a certificate of record had issued, but for which no patent had issued or been applied for nor payment made of the purchase money is not exigible under a writ of fi. fa. [The Mining Act, 8 Edw. VII. (Ont.), ch. 21, sec. 73, and 2 Geo. V. (Ont.), ch. 8, sec. 7, considered.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

Under a writ of fi. fa. a sheriff cannot seize what he cannot sell. (Per Riddell, J.) [Legg v. Evans, 6 M. & W. 36; Universal Skirt Manufacturing Co. v. Gormley (1908), 17 O.L.R. 114, 136; see also under last case "Memorandum of Legislation," by Riddell, J.; see also sec. 73 of Mining Act.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

The intention of the Ontario Mining Act (8 Edw. VII., ch. 21) is to leave the paramount power of dealing with the land in the Crown until the issue of the patent, and meanwhile the certificate-holder is not liable to have his position attacked, and although the minerals when taken out become the personal property of the exploiter and so subject to a fi. fa. goods, the same cannot be said of the mere right to take out such minerals under the Mining Act, because such right may be terminated at any moment by the lord paramount and such a right to get minerals does not come within the class covered by the Execution Act, R.S.O. 1897, ch. 119, sec. 8.

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

(§ I A—15)—IMMOVABLES.

A seizure made on a defendant of immovables under sequestration is a seizure on the possessor thereof animo domini and as such is valid.

Savoie-Guay v. Deslauriers and De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

Failure to publish in the newspapers of the locality within which the immovables are situated the legal notices of the sale of such immovables does not per se justify the annulling of the sale but only makes the sheriff responsible for the damages resulting therefrom; nevertheless such omission may be evidence of fraudulent connivance between the parties which the Court will carefully consider on an allegation of fraud.

Savoie-Guay v. Deslauriers and De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

(§ I A—20)—REGISTERED LETTERS.

A registered letter addressed to the debtor can be seized under a writ of saisie-gagerie. The Court may order the letter to be opened and if it contains a cheque payable to the defendant or to bearer will permit it to be indorsed by the plaintiff's attorney. The bank at which the cheque is payable may safely pay it with such indorsement if a copy of the order authorizing the payment is attached.

Gallant v. Grayson, 13 Que. P.R. 339 (Civ. Ct.).

II. Mode and sufficiency; return.

(§ II—30)—RETURN.

Where an execution creditor duly placed his execution in the hands of the sheriff, who, instead of proceeding regularly to sell under the execution the effects of a liquor business belonging to the execution debtor, placed his bailiff in possession of the business itself with directions to take over the daily receipts thereof as a going concern, and where such receipts were actually turned over by the cashier every day to the sheriff, the legal construction of the daily taking over of the money by the sheriff is that each such taking over was a levy thereon under the execution.

Re Hunter, 8 D.L.R. 102, 4 O.W.N. 451, 23 O.W.R. 692, 49 C.L.J. 72.

(§ II—32)—SUFFICIENCY OF RETURN.

A sheriff's return of nulla bona to an execution is a sufficient compliance with Rule 365, of the Judicature Ordinance (C.O. 1898, ch. 21, Sask.), to permit a levy upon and sale of land under the writ.

Re F. H. Price, 4 D.L.R. 407, 21 W. L.R. 299.

III. Rights and liabilities growing out of levy.

B. Of others.

(§ III B—45)—OF OTHERS.

An opposition to the writ of execution itself, before any seizure is effected, is premature and will be dismissed.

Courchesne v. Talbot, 4 D.L.R. 668, 41 Que. S.C. 241.

An opposition to annul only lies after the seizure has been actually effected.

Courchesne v. Talbot, 4 D.L.R. 668, 41 Que. S.C. 241.

(§ III B—46)—EXECUTION OR ATTACHMENT CREDITORS.

Where the defendant, an alleged absconding debtor, moves summarily under the Supreme Court Rules (N.S.) to set aside a process issued against him, if originally the circumstances of the case at the time the process was issued were such as to warrant the bonâ fide belief that the defendant was absconding from the Province, the process will not, under the summary jurisdiction of the Court, be set aside even though the defendant has returned to the Province and shews that

he had had no intention of remaining out of it, but if the defendant's property has been attached unwarrantably he will be left to his action therefor. [Hunt v. Soule, 1 N.S.R. 206 (ed. 2), followed; Starr v. Muncey, 3 N.S.R. 244, referred to.]

Ernst v. Slawenwhite (No. 1), 7 D.L.R. 238.

(§ III B—49)—PURCHASER AT SHERIFF'S SALE.

The failure to shew, on an application to confirm a sale of land by the sheriff under an execution, that the sale was held at the hour specified in the notice of sale, vitiates the proceedings.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

An unpaid vendor of immovables sold at sheriff's sale is an interested party and has the right to have such sale set aside if the due formalities have not been complied with.

Savoie-Guay Co. v. Deslauriers & De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

The formalities required by law regarding proceedings at sheriff's sale are of public order and the violation thereof entails the annulling of such sale at the instance of any interested party.

Savoie-Guay Co. v. Deslauriers & De-Briére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

C. Priorities.

(§ III C—50)—PRIORITIES.

Where the goods of a tenant are seized upon the demised premises and sold under execution, the sheriff, in order to give a good title, must first apply the proceeds in satisfaction of the landlord's claim for rent, by virtue of the Creditors' Relief Act, R.S.N.S. 1900, ch. 172.

Ingraham v. McKay, 8 D.L.R. 132, 49 C.L.J. 76.

IV. Bond for release of.

(No cases.)

LIBEL AND SLANDER.

I. WHO LIABLE.
II. WHAT ACTIONABLE.
- A. In general.
- B. Charging lewdness, bad character, crime, etc.
- C. Damaging business; social standing.
- D. Words about officials or candidates.
- E. Privileged communications.
- F. What constitutes a publication.
- G. Slander of title.

III. ACTIONS; DEFENCES.
- A. In general.
- B. Who may recover.
- C. Defences; justification.

I. Who liable.

(No cases.)

II. What actionable.

B. Charging lewdness, bad character, crime, etc.

(§ II B—15)—CHARGING LEWDNESS, BAD CHARACTER, CRIME.

Where the words of an alleged libel are capable of the criminal meaning charged in the innuendo, although the words would not be libellous per se, the action brought thereon "involves" a criminal charge within the meaning of a statute (9 Edw. VII., ch. 40, sec. 12 (2)), restricting the class of cases in which security for costs may be ordered against the plaintiff in favour of a newspaper publisher.

Duval v. O'Beirne, 1 D.L.R. 78, 3 O.W.N. 513, 20 O.W.R. 884.

(§ II B—18)—CHARGE OF BASTARDY.

A statement published in a newspaper to the effect that a deceased man and woman were not legally married and that the woman was the concubine of the man is a libel under Quebec law upon the child or children born of such union for which they have an action at law to recover damages from the writer and publishers of the article.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

C. Damaging business; social standing.

(§ II C—29)—AS TO CHATTEL MORTGAGE.

A statement that a man has given a chattel mortgage is not libellous per se, and no action will lie for the publication of such a statement without an innuendo to bring out some injurious meaning to be attached to the words: Odgers on Libel and Slander, 4th ed., pp. 110, 123. Special damage caused by the publication would also have to be alleged and proved in evidence, as actual damage is the very gist of such an action. Ratcliffe v. Evans, [1892] 2 Q.B. 527, followed:—Held, also, per Mathers, C.J., in the Court below. The publication without malice, by a mercantile agency to its subscribers, of a true extract from a register kept by virtue of an Act of a Provincial Legislature, which was open to inspection by the public, for the purpose of giving to the subscribers information which the agency bonâ fide believed to be true, is privileged and an action for libel in respect of such publication will not lie, although the extract purported to shew that the plaintiff had given a chattel mortgage when it should have shewn only a lien note given on the purchase of chattels. Fleming v. Newton (1848), 1 H.L.C. 363; Searles v. Scarlett, [1892] 2 Q.B. 56; and Annaly v. Trade Auxiliary Co. (1890), 26 L.R.Ir. 11, 394, followed. Williams v. Smith (1888), 22 Q.B.D. 134, and Macintosh v. Dun, [1908] A.C. 390, distinguished. If what is published is not a true extract from the public record, even although it is furnished by the Government official in charge, it is

not privileged: Reis v. Perry (1895), 64 L.J.Q.B. 566.
Smith v. Dun, 21 Man. R. 583.

D. Words about officials or candidates.

(§ II D—40)—WORDS ABOUT OFFICIALS OR CANDIDATES.

Plaintiff was a member of the municipal council of Qu'Appelle, and defendant the editor and proprietor of a newspaper published there. Dissatisfaction having arisen over the manner in which the electric light company supplying light to the town was fulfilling the contract, the defendant wrote and published in his newspaper an article charging the plaintiff with neglect of duty as a councillor in not remedying the situation, and alleging that such neglect was due to the fact that he was interested financially in the company. It appeared that this newspaper circulated not only in the town but was also circulated elsewhere. In an action for libel in respect of the article referred to, the defendant pleaded justification, fair comment and privilege. It was found that there was absolutely no justification for the statements published: —Held, that while fair and honest criticism is no tort, yet criticism, if it imputes base and sordid motives unwarranted by the facts, even if the writer bonâ fide believes them to be true, is not fair comment. (2) There was nothing shewn which would entitle the defendant to claim privilege, but even if such privilege existed it had been abused, in that the communication was made to persons not interested in the matter in question.

Caswell v. Law, 4 S.L.R. 265.

(§ II D—46)—CANDIDATES.

A charge that a candidate for the office of municipal councillor appealed from an assessment of his property on the ground that it was excessive, and that he afterwards sold it for an amount greater than for what it was assessed, which was described as "another of his hold-up games," is not actionable per se.

Holland v. Hall, 3 D.L.R. 722, 22 O.W.R. 209, 3 O.W.N. 1304.

A charge that a candidate for the office of municipal councillor had "held the town up for an exorbitant price" for property required by the town for a public street, does not imply a criminal act, and is not actionable per se.

Holland v. Hall, 3 D.L.R. 72, 22 O.W.R. 209, 3 O.W.N. 1304.

E. Privileged communications.

(§ II E 1—55)—EXCESS OF PRIVILEGE.

Where in an action for libel, the occasion is privileged, and there is evidence to go to the jury on the question of malice, if the jury simply finds that the statement was in excess of the privilege only, there must be judgment for the defendant, since a mere excess of privilege is not necessarily evidence of malice.

Winnipeg Steel Granary and Culvert Co., Ltd. v. Canada Ingot Iron Culvert Co., Ltd., 7 D.L.R. 707, 22 W.L.R. 387.

(§ II E 1—58)—AS TO MAGISTRATE OR OFFICER WITHOUT INTENDING TO BASE A CHARGE.

Where the jury finds that defamatory words were spoken to a magistrate without intention of basing a criminal charge on the facts disclosed, the communication is not privileged. [See Odgers' Libel and Slander, 5th ed., pp. 273-276, and p. 306 (1); and compare Byers v. McDonald (1911), 4 Sask. R. 58, 16 W.L.R. 370, to same effect.]

Sonier v. Breau, 3 D.L.R. 184, 10 E.L.R. 391.

(§ II E 1—59) — RECKLESS STATEMENTS; ABSENCE OF BELIEF IN TRUTH OF.

Where slanderous statements are known by the defamer to be untrue, or he makes them recklessly not caring whether they were true or false, the qualified privilege which would otherwise attach because of a common interest in the subject-matter of the inquiry, is not available as a defence in slander.

Rudd v. Cameron, 4 D.L.R. 567, 3 O.W.N. 1003, 21 O.W.R. 860, 26 O.L.R. 154.

(§ II E 3—65)—IN COURSE OF DUTIES OR BUSINESS.

A physician has the privilege of prescribing to his patients remedies which he deems proper and also of advising them to have them made preferably in one drug store than in another, as long as he acts in good faith, without malicious intent, and if he gives such advice only because he is convinced that his prescriptions will be better filled in the drug store which he designates. The presumption of malice which arises from words apparently injurious, disappears before a proof of circumstances which establish good faith and justification of the one who has maintained them.

Aumont v. Cousineau, 18 Rev. de Jur. 271.

(§ II E 3—74a)—LANDLORD AND TENANT.

Where it appeared in a proceeding permitted by sec. 5 of the Collection Act, R.S.N.S. 1902, ch. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of the judgment debtor, the debtor being in this case one against whom judgment had been rendered in an action of slander, that the debtor had called at a house owned by him for the purpose of collecting the rent then due and of giving the tenant notice to quit because he had heard that the conduct of the inmates was giving the house a bad name and he told the tenant what he had heard and demanded an explanation and in the altercation that followed between the parties in the presence of the tenant's wife and daughters, the debtor uttered the slander for which the judgment was entered

against him against one of the tenant's daughters, but in all the discussion, he made no statement irrelevant to the subject he demanded to be explained, the occasion is a privileged one, and if no ill-will or malice in fact on the part of the debtor is shewn and no issue as to privilege or malice was raised in the action in which the judgment was recovered, an order for the committal of the debtor is not warranted as for a wilful and malicious tort under sub-sec. 1 (f) of sec. 27 of the Collection Act, R.S.N.S. 1900, ch. 182, enacting that if in cases of tort it appears to the officer charged with the examination of the judgment debtor that the tort was wilful, he may commit the debtor to gaol.

Henn v. Smith, 6 D.L.R. 48, 11 East. L.R. 1.

(§ II E 4—77)—WORDS USED BY WITNESS.

The privilege, invoked by the defendant in an action claiming damages for libel, that the alleged libellous expressions were spoken or written by him in his capacity of witness at a trial, is not absolute and depends on circumstances which should be pleaded and proved. Therefore, preuve avant faire droit will be ordered on the claim of such privilege.

Honan v. Parsons, 13 Que. P.R. 363 (Sup. Ct.).

A witness summoned and examined before the Superior Court of this Province does not enjoy an absolute immunity and, if he abuses his privilege to the injury of another he is guilty of a fault for which he is civilly liable under the provisions of article 1053, Criminal Code.

Carrington v. Russell, 42 Que. S.C. 71 (Sup. Ct.).

If a witness abuses his position as such in order to injure the parties to the case or third parties, either by perjuring himself or by making statements which do not relate to the matter in issue or to the questions which are put to him, he commits a fault provided against by art. 1053 of the Quebec Civil Code.

Carrington v. Russell, 4 D.L.R. 675.

(§ II E 4—78)—WORDS USED IN PLEADINGS.

Where allegations in a written pleading are relevant to the issues of the case and are made with reasonable and probable cause and without malice and are relied on in good faith and under the belief that they are true, and the correctness thereof can only be ascertained at the trial, such allegations are privileged, and even should the Court come to the conclusion that they have not been proven, no action will lie against the party making such allegations. [Scott v. McCaffrey, 1 Que. Q.B. 523, specially referred to.]

Martin v. Madore, 3 D.L.R. 441.

(§ II E 5—82)—MUNICIPAL OFFICERS.

Where the defendant company, who were engaged in manufacturing and selling certain articles used principally by municipalities, finding their business interests imperilled by the unlawful acts of plaintiff company, their rivals, who had issued a circular and sent it to municipal secretary-treasurers, reeves, and councillors in various provinces, calling their attention to the fact that it was unlawful for the company to pay commissions directly to these officers on any future sales to their municipalities but leaving it to these officers to select local agents to represent the company in making sales to the municipalities, sends out a circular letter to the same officers and to others calling attention to plaintiff's circular and intimating that it would be difficult for an honest rival to compete with one who used such a circular or did the acts which the circular suggests and that hundreds of honourable secretary-treasurers and councillors have spurned the graft, the sending of such circular by defendants is a privileged communication. [Hill v. Durham, 79 Hun. (N.Y.) 335, referred to.]

Winnipeg Steel Granary and Culvert Co., Ltd. v. Canada Ingot Iron Culvert Co., Ltd., 7 D.L.R. 707, 22 W.L.R. 387.

F. What constitutes a publication.

(§ II F—85)—WHAT CONSTITUTES PUBLICATION.

One who, finding that slanders concerning him are being circulated, and not knowing who is responsible, places the matter in the hands of a detective agency, but does not tell or ask them to go to any particular person, may recover damages for a publication of the slanderous statements to employees of the detective agency. [King v. Waring, 5 Esp. 15, and Smith v. Wood, 3 Camp. 323, distinguished; Rudd v. Cameron, 4 D.L.R. 567, affirmed on appeal on different grounds; see also annotation, 4 D.L.R. 572.]

Rudd v. Cameron (No. 2), 8 D.L.R. 622, 4 O.W.N. 321, 23 O.W.R. 469.

The question as to whether a slander has been published or not is one of fact, and where the trial takes places without a jury, the trial Judge's finding will not be reversed on appeal unless the Appellate Court has a "firm conviction of error." [Decisions of Supreme Court of Alberta affirmed on appeal without opinion.]

Wickens v. McConkey, 7 D.L.R. 602.

The fact that the slanderous utterance was spoken by the procurement of the plaintiff is not material to the question of publication or no publication. [Duke of Brunswick v. Harmer (1849), 14 Q.B. 185, applied; and see Odgers on Libel and Slander, 5th ed., pp. 179, 180.]

Rudd v. Cameron, 4 D.L.R. 567, 3 O.W.N. 1003, 21 O.W.R. 860, 26 O.L.R. 154, affirmed on appeal on different grounds Rudd v. Cameron (No. 2), 8 D.L.R. 622, 4 O.W.N. 321, 23 O.W.R. 469.

III. Actions, defences.

A. In general.

(§ III A—96)—Necessity of proving malice.

Plaintiff brought action against defendant for slander, and defendant pleaded privilege. Particular cases of the utterance of alleged slander were stated in particulars delivered. The defendant was examined for discovery, and was questioned as to publication to persons other than those named in the particulars. He was also asked questions as to his belief in the plaintiff's guilt of the matters alleged so framed that they would tend to establish his present belief, not his belief at the time of utterance. He refused to answer these questions, and a summons was taken out returnable before the local Master for an order compelling him to answer. No evidence was adduced before the local Master to indicate the plaintiff's intention in asking the questions and to negative an improper purpose, and the local Master dismissed the application. On appeal it was:—Held, that it must be assumed, no evidence being adduced before the local Master to negative any improper purpose on the part of the plaintiff in asking the questions complained of, that he exercised his discretion under the circumstances of the case, and that discretion should not be interfered with. 2. While the plaintiff might, to remove privilege, and establish malice, on the trial give evidence of publications of the alleged slander, not mentioned in the particulars, yet it did not follow that an affirmative answer to the questions put to him would have established malice; but they might have been intended to secure information as to publications on occasions not privileged, on which the plaintiff might bring another action, and such questions will not be permitted. 3. In determining the question of malice the matter in question is the defendant's belief in the truth of the matters alleged at the time of the publication, and not at the time of the examination, so questions so framed as to cover present belief are not proper questions relevant to the issue.

Klenman v. Schmidt, 4 S.L.R. 366.

If the statement complained of as libel is a privileged communication, then, to make it libellous, there must be actual as distinguished from legal malice. [Clarke v. Molyneux, 3 Q.B.D. 237, referred to.]

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

In an action for libel where the occasion is privileged in order to justify a verdict for plaintiff the jury must expressly find malice.

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

In an action for libel, it seems that even the demeanour of a party on the witness stand is an element for consideration on the question of the existence of malice. (Per Cameron, J.A.) [Thomas v. Bradbury, [1906] 2 K.B. 627, referred to.]

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

(§ III A—98)—Necessity of disclosing names of parties present.

The plaintiff in an action claiming damages for defamation is not obliged to disclose the names of the persons present if he states that such persons will be used as witnesses. If the plaintiff claims both actual and exemplary damages he may be directed to give the particulars as to each class.

McPartland v. Russell, 13 Que. P.R. 306 (Sup. Ct.).

C. Defences; justification.

(§ III C—105)—Justification.

It is no justification to plead to an action for libel that the deceased was a Roman Catholic priest and that according to the Roman Catholic religion he could never marry and any marriage contracted by him was null and void; attacks on the deceased's theories and opinions might be matters of public interest, but statements as to his private life are not.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ III C—106)—Lack of consent or knowledge.

The fact that the writer did not know that the deceased he has libelled had left children still living is an aggravation and not a mitigation of a libel charging that the deceased had not been legally married.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ III C—108)—Absence of malice.

Where the occasion is privileged, in an action for libel, the presumption is in favour of the absence of malice. [Spill v. Maul, L.R. 4 Ex. 232, referred to.]

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

Pleading justification is not, by itself, evidence of malice in a libel action but it will tend to aggravate the damages if the defendant either abandons the plea at the trial or fails to prove it. [See also Odgers on Libel and Slander, 5th ed., 192a, 393; Patterson v. Plaindealer Co., 2 A.L.R. 29.]

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ III C—110)—Fair comment.

Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable.

(Per Cameron, J.A. [Odgers on Libel and Slander, 5th ed., 194, referred to.]

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

Even a personal attack may, under certain circumstances, form part of a fair comment upon giving "facts" truly stated, if it be a reasonable inference from them. [Peter Walker v. Hodgson, [1909] 1 K.B. 239, 257; Dakhyl v. Labouchere, [1908] 2 K.B. 325, 329, referred to.]

Brown v. Orde (No. 2), 6 D.L.R. 297, 4 O.W.N. 18 and 36, 22 O.W.R. 1002.

(§ III C—111)—BELIEF IN TRUTH; MOTIVE.

Inasmuch as the rule of law is that the motive or intention of the writer is immaterial to the right of action, the fact that the writer wrote as a Roman Catholic addressing himself to Roman Catholic readers is not a ground of justification for the publication of an absolute statement that two persons were not legally married when the fact was merely that their marriage was not recognized as valid by the Roman Catholic Church.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ III C—113)—TRUTH.

Where an alleged libellous statement is true, if it be a privileged communication, there can be no recovery no matter what amount of malice may exist.

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

LICENSE.

I. FROM PRIVATE PERSONS.
- A. In general.
- B. Revocation.

II. FROM PUBLIC; OF RIGHT TO DO BUSINESS.
- A. In general.
- B. Power as to, generally.
- C. On what business.
- D. Uniformity and equality; discrimination.
- E. Reasonableness; amount.
- F. Enforcement of license tax.

Negligence as to licensees, generally, see Negligence, I.

On automobiles, see Automobiles.

Of license to sell liquors, see Intoxicating Liquors, II.

Of teacher's license, see Schools.

See Intoxicating Liquors; Municipal Corporations, III.; Company, VII.

I. From private persons.

A. In general.

(§ I A—1)—IN GENERAL.

An agreement on the part of the owner of land to grant the use of his land for one or the other of two specified days for picnic purposes, including the right to take wood and water to be used on the grounds, is not an agreement for an interest in land within the meaning of the Statute of Frauds, but is a mere license to go upon the land.

Gray v. Hurley, 45 N.S.R. 353.

The owner of premises which another person is permitted to use under a license which is paid for, is under a duty to keep the premises fit for the purpose for which it was intended to be used. [Brown v. Trustees of Toronto General Hospital, 23 O.R. 599, distinguished; Marshall v. Industrial Exhibition, 1 O.L.R. 319, 2 O.L.R. 62, referred to.]

Wood v. City of Hamilton, 8 D.L.R. 824, 23 O.W.R. 627, 4 O.W.N. 427.

A licensee has no right to make repairs on premises occupied by him and treat the costs of such repair as damages against the owner. (Per Clute, J.)

Wood v. City of Hamilton, 8 D.L.R. 824, 23 O.W.R. 627, 4 O.W.N. 427.

II. From public; of right to do business.

B. Power as to, generally.

(§ II B—20)—POWER AS TO, GENERALLY.

Sec. 932 of the License Law of Quebec, R.S.Q. 1909, requires a municipal council to give the reasons upon which it refused to confirm the certificates of license of the existing holder, when it confirms that of a new license holder; and this law being one of public order, a resolution by the municipal council which is passed under breach of its provisions is null.

Bourassa v. City of Salaberry, 18 Rev. de Jur. 474.

C. On what business.

(§ II C—46)—PLANTERS AND FARMERS; MARKETS.

Leases of private market stalls are not invalid as based on an illegal consideration by reason of the fact that the municipal authorities have refused to grant the licenses for the stalls, and such leases will not be cancelled because the tenants allege they have been deprived of the enjoyment of the premises leased as a result of the city's refusal to grant them such license.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

Once an applicant for a butcher's license establishes that the locality where he proposes to open a private stall is at the required distance from any public market, that it is a proper place for such private stall, and that he is ready to pay the necessary license, the municipal authorities are bound, in the absence of any by-law limiting the number of such private stalls, to issue this license and have no discretion in the matter; and they will be compelled to fulfil this duty by mandamus.

Rosenfelt v. Biron and City of Montreal, 8 D.L.R. 481.

LIEN NOTES.

On sale of goods, see Sale.

LIENS.

I. In general.

II. Priorities.

III. Loss; waiver; discharge.

Of mechanic or materialman, see Mechanics' Liens.

Of mortgage, see Mortgage.

Lien note on sale of goods, see Sale, I.; Sale, III.

Reliance upon record to establish title to realty, and relieve from knowledge of secret liens, see Recording Laws, 10.

Of mechanics or materialmen, see Mechanics' Liens.

Of seller on conditional sale of goods, see Sale.

Of vendor on sale of lands, see Vendor and Purchaser.

Statutory, for keep of cattle, see Bailment.

I. In general.

(§ I—1)—In general.

R. had purchased a quantity of furniture from the plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. Grant, County Judge, at the trial, was of opinion that defendant had a lien on the goods at common law for his charges, and, in the absence of any tender by plaintiffs for same, dismissed the action. Plaintiffs appealed. Held, on appeal, that defendant was not entitled to retain the goods until his charges were paid. (Irving, J.A., dissenting.)

D. A. Smith, Limited v. Campbell, 16 B.C.R. 505.

(§ I—2a)—Threshers' lien.

The owner of a threshing outfit cannot claim a lien on grain threshed under the Threshers' Lien Act, for compensation for threshing it at a certain rate per bushel, where there was no definite agreement thereto, but the rate was to be determined by the yield per acre.

Delbridge v. Pickersgill, 3 D.L.R. 586, 21 W.L.R. 285.

Plaintiff agreed to thresh defendant's crop at a specified rate per bushel. After he had threshed the greater portion of the crop his men refused to work and he was unable to complete the contract, and by reason of this breach the defendant was unable to get the balance threshed. Within sixty days after operations ceased plaintiff rendered an account in writing for the work done, and therein notified the defendant that interest at the rate of eight per cent. per annum would be charged after December 1st until paid. The notice also stated that the grain would be held under thresher's lien until the account was paid. A few days after the parties met and discussed the account, and defendant objected to paying the full amount by reason of plaintiff's failure to complete, and thereupon plaintiff agreed to throw off the sum of $39.10, and it was found that the defendant accepted the account as correct after such allowance and shortly after made a payment on account. The balance not being paid, the plaintiff on two occasions, but after the expiry of sixty days from the completion of operations, visited the defendant's farm for the purpose of removing a portion of the crop under the provisions of the Threshers' Lien Act, but was unable to do so, the defendant preventing him. He now sued for the amount of his account, interest, the expenses of endeavouring to exercise his lien, and a declaration that he was entitled to a lien on the grain. The defendant objected that the contract was an entire one, and that the plaintiff had never completed it, and counterclaimed for general damages but not for special damage:—Held, that the contract was not an indivisible one and payment was not conditional upon completion, and the plaintiff was therefore entitled to recover. 2. But the defendant was entitled to complete performance and upon breach to damages. 3. But the defendant, not having pleaded special damage, could not now be allowed to shew special damage, and the amount agreed upon when settlement was discussed fixed the basis upon which damages should be assessed. 4. That the notice of intention to charge interest was sufficient compliance with the provisions of sub-sec. 2 of sec. 37 of the Judicature Act, and the plaintiff was entitled to recover interest at legal rate. 5. Any right to a lien which the plaintiff had under the Act respecting threshers' liens, and that Act being in derogation of the common law must be stricty complied with before the plaintiff could avail himself of its provisions. 6. That the right of lien to be effective must be exercised within sixty days and by the actual taking of the grain, and a notice of intention to exercise not accompanied by an actual taking is not effective for that purpose, and the plaintiff had therefore no right of lien.

Elsom v. Ellis, 4 S.L.R. 294.

(§ I—4a)—EQUITABLE LIENS.

A general lien asserted by one party upon the property of another, for the balance owing by the latter upon the accounts between them, depends upon possession of the property by the party asserting the lien.

Northern Sulphite Mills, Limited v. Craig, 4 D.L.R. 82, 3 O.W.N. 1388, 22 O.W.R. 563.

II. Priorities.

(No cases.)

III. Loss; waiver; discharge.

(§ III—10)—DISCHARGE.

The discharge of a mortgage debt by a chirographic creditor of the mortgagor in consideration of the undertaking by the mortgagee to facilitate the purchase by the creditor, at the lowest possible price, of immovables of the debtor levied on under execution, does not create an obligation which entitles him who has paid to recover the sum from the mortgagee on the ground that the latter received it a second time, by another title, under a judgment rendered subsequent to their agreement.

Gagnon v. Bédard, Q.R. 21 K.B. 172, affirming 39 S.C. 368.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

I. IN GENERAL.
II. POSSESSION, ENJOYMENT, AND USE OF PROPERTY.
A. In general.
B. Corporate stock and bonds; dividends.
C. Mines and oil lands.
III. LIABILITY FOR EXPENSES, ETC.

I. In general.

(No cases.)

II. Possession, enjoyment, and use of property.

(No cases.)

III. Liability for expenses, etc.

(§ III—25)—LIABILITY FOR EXPENSES, ETC.

While the life tenant is entitled to the use of the land during his term and to the receipt of all the income and profits, he is in such fiduciary relationship to the remainderman that he is not allowed to injure or deal with the estate to the latter's detriment.

Atkinson v. Farrell, 8 D.L.R. 582, 4 O.W.N. 73, 27 O.L.R. 204.

LIGHT.

Easement of, see Easements.

Power of city as to generally, see Municipal Corporation, II.

LIMITATION OF ACTIONS.

I. LIMITATION IN GENERAL.
A. In general; statutes.
B. Equitable remedy; laches.
C. Bar of prior or other claim, or of portion of claim or defence.
D. By and against whom available.
E. To what claims applicable.
II. WHEN STATUTE RUNS.
A. In general.
B. Contracts; mortgages.
C. Corporations, officers and stockholders.
D. Trusts; bailment.
E. Fraud.
F. Torts; negligence; injuries to person or property; crimes.
G. Suits relating to real property.
H. Municipal indebtedness.
I. Taxes, assessments and tax sales.
J. Decedent's estate; executors and administrators.
K. Judgment.
L. Absence from Province.
M. Coverture, infancy or other disability.
III. WHEN ACTION IS BARRED.
A. Penalty; statutory liability.
B. Contracts; contribution.
C. Corporations; officers and stockholders.
D. Trusts.
E. Fraud.
F. Torts; negligence.
G. Suits relating to real property.
H. Taxes.
I. Judgment.
J. Miscellaneous.
IV. INTERRUPTION OF STATUTE; REMOVAL OF BAR.
A. In general.
B. By suit.
C. By payment or promise.

As to adverse possession, see Adverse Possession.

Easement by prescription, see Easements, II.

Descriptive rights in waters, see Waters, II.

Contractual limitation, see Carriers, III.

Time for giving notice of injury by defective highway, see Highways.

Estoppel by laches, see Estoppel, III.

Necessity of pleading, see Pleading.

I. Limitation in general.

A. In general; statutes.

(No cases.)

B. Equitable remedy; laches.

(§ I B 2—10)—AS TO LAND.

The right of the Harbour Board of Montreal to sue for the rescission of a contract alienating land contingent to harbour is limited to a period of ten years.

Harbour Commissioners of Montreal (plaintiffs, appellants) v. Foundry and Machine Company et al. (defendants, respondents), 21 Que. K.B. 241.

C. Bar of prior or other claim, or of portion of claim or defence.

(§ I C—20)—BAR OF PRIOR OR OTHER CLAIM, OR OF PORTION OF CLAIM OR DEFENCE.

A counterclaim for a simple contract debt cannot be successfully pleaded as such, where it could be met by the Statute of Limitations. [Pollock on Contracts, 8th ed., p. 685, referred to.]

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 373, 23 O.W.R. 489.

D. By and against whom available.

(§ I D—25)—BY AND AGAINST WHOM AVAILABLE.

Where a person becomes tenant at will of another's lands without paying rent therefor, the Statute of Limitations, 10 Edw. VII. (Ont.) ch. 34, sec. 6, begins to run in his favour as against the owner only at the expiration of one year after being let into possession; but a new tenancy at will may be implied from the acts and conduct of the parties if there has been a definite acknowledgment by the occupant that he holds by the permission of the owner. [Jarman v. Hale, [1899] 1 Q.B. 994, and Foster v. Emerson, 5 Gr. 135, applied; Keffer v. Keffer, 27 U.C.C.P. 257, distinguished.]

Noble v. Noble, 1 D.L.R. 516, 3 O.W.N. 519, 20 O.W.R. 889, 25 O.L.R. 379, reversed on appeal to Divisional Court, see 4 O.W.N. 359.

(§ I D—27)—MUNICIPALITY.

A cause of action against a municipality in British Columbia for damages accruing in July, 1897, in respect of alleged deviations from certain dyking and drainage works constructed by it under the authority of municipal by-laws was subject to the provisions for limitation of actions contained in the B.C. Municipal Act, 1892, and of the Municipal Clauses Act, R.S.B.C. 1897 (see subsequent Revised Municipal Act, R.S.B.C. 1911).

Wilson v. Municipality of Delta, 8 D.L.R. 881, 22 W.L.R. 931.

An action against a municipality in British Columbia claiming damages by reason of the construction of certain municipal dyking works would be barred in so far as the claim was based upon the contention that the works were not justified by the by-laws relied upon as authorizing the same, after the expiry of the periods of limitation specified in secs. 243 and 244 of the B.C. Municipal Clauses Act 1897 (see subsequent Revised Municipal Act, R.S.B.C. 1911, ch. 170, secs. 512 and 514.)

Wilson v. Municipality of Delta, 8 D.L.R. 881, 22 W.L.R. 931.

(§ I D—29)—ATTACHING CREDITOR.

Under the provisions of Nova Scotia Practice Order 46, rule 6, which provides that a subsequent attacher may dispute the validity and effect of a previous writ of attachment on the ground that the sum claimed was not justly due, or was not payable when the action was commenced, the subsequent attacher may take the ground that the debt was barred by the Statute of Limitations as an answer to the claim of the previous attacher.

Gormley v. DeBlois, 8 D.L.R. 109.

II. When statute runs.

B. Contracts; mortgage.

(§ II B—42)—MORTGAGE.

The covenant to repay mortgage moneys implied by the Land Titles Act, even though imported into an instrument not under seal, is a specialty debt, and the applicable period of the Statute of Limitations is twenty years, by virtue of 1 Geo. V. ch. 28, sec. 102, Ontario, being an amendment to the Ontario Land Titles Act, providing that any charge or transfer not under seal, shall operate the same as if they were under seal, being the substance of sec. 107 of the former Act, R.S.O. (1897) ch. 138.

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145, 3 O.W.N. 990.

The obligation to pay the mortgage moneys, imposed by a covenant implied by statute, is a specialty, and is not barred by lapse of time less than twenty years from the date of default. [Essery v. Grand Trunk R. Co., 21 O.R. 224.]

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145, 3 O.W.N. 990.

D. Trust; bailment.

(§ II D—51)—POSSESSION UNDER VOID DEED.

One who is in possession of land under a conveyance, which is void by reason of the insanity of the grantor, is a trustee for the lunatic and his representatives, and the Statute of Limitations does not run in his favour as against them.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

E. Fraud.

(§ II E—55)—FRAUD.

Where the contesting party only becomes aware of the existence of a deed in fraud of his rights when it is produced in Court, he has one year from that moment, and not one year from the making of the deed, within which to contest under C.C. 1040.

Banque Nationale v. Godbout et al., 8 D.L.R. 668.

F. Torts; negligence; injuries to person or property; crimes.

(§ II F—60)—TORTS; NEGLIGENCE.

The limitation period for commencing an action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle

is six years from the time when the cause of action arose, under 10 Edw. VII. (Ont.) ch. 34, sec. 49 (g) as an action "upon the case." [Corporation of Peterborough v. Edwards (1880), 31 C.P. 231; Thomson v. Lord Clanmorris, [1900] 1 Ch. 718, referred to.]

Maitland v. MacKenzie and Toronto R. Co., 6 D.L.R. 336, 4 O.W.N. 109, 23 O.W. R. 80.

The members of a civilian rifle association in an action for injuries, alleged to have been received by reason of their negligence, while acting in pursuance of the Militia Act, are entitled to the benefit of the provision of that Act, requiring an action to be commenced within six months from the time the act complained of was committed.

Webster v. Leard, 7 D.L.R. 429, 11 East. L.R. 203.

G. Suits relating to real property.

(§ II G—66)—INJURY TO PROPERTY; NUISANCE; TRESPASS.

Where an injury or damage caused by the construction or operation of a railway is continuous, the limitation of one year for bringing an action therefor, as prescribed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not apply.

Carr v. Canadian Pacific R. Co., 5 D.L. R. 208.

An action against a railway company for a trespass committed by laying sidetracks on the plaintiff's land, is not an action for injuries sustained by reason of the construction or operation of a railway, which must, under sec. 306 of ch. 37, of the Railway Act, R.S.C. 1906, be brought within one year after the cause of action arose.

Carr v. Canadian Pacific R. Co., 5 D.L. R. 208.

(§ II G—67)—RIPARIAN RIGHTS.

The statutory period of prescription for the use of a stream to deposit sawdust and mill refuse in, begins to run from the date of the first substantial injury causing damage to the mill-owner, lower down the stream. [Crossley & Sons, Limited v. Lightowler, L.R. 2 Ch. 478, 481; Goldsmid v. Tunbridge Wells Improvement Commissioners, L.R. 1 Eq. 161; Attorney-General v. Acton Local Board, 22 Ch. D. 221, referred to.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

J. Decedent's estate; executors and administrators.

(§ II J—80)—EXECUTORS AND ADMINISTRATORS.

Executors may retain from the distributive share of the estate to which a beneficiary is entitled an amount in which such beneficiary was indebted to the testator although, at the time of the testator's death, the indebtedness was barred by the Statute of Limitations. [Re Akerman, [1891] 3 Ch. 212, followed.]

Re DeBlois Trusts (No. 2), 8 D.L.R. 68, 11 East. L.R. 578.

Action to enforce charge on land—Will — Legacy — Executors — Devise — Trust—Devolution of Estates Act.

McKinley v. Graham, 2 D.L.R. 916, 3 O.W.N. 645, 21 O.W.R. 222.

M. Coverture, infancy, lunacy or other disability.

(§ II M—95)—COVERTURE, INFANCY, LUNACY OR OTHER DISABILITY.

Possession of a lunatic's land by the Inspector of Asylums acting as such, is possession by the lunatic, and will interrupt the operation of the Statute of Limitations against the lunatic.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

III. When action is barred.

F. Torts; negligence; injuries to person or property.

(§ III F—130)—TORTS; NEGLIGENCE.

If the land proprietor is under any direct liability to the injured party for neglect to keep adjacent sidewalks on the public street in repair, or free from snow or ice, by virtue of a municipal by-law (R.S.Q. 1909, art. 5641, sub-secs. 3 and 20), the neglect of such duty would, at most, be only a quasi-delit of omission on the part of the municipality, and the land proprietor jointly and severally, and the latter may set up the same defences as would be available to the municipal corporation, including the prescriptive limitation by which action against the municipality must be taken within a period of six months after the accident (R.S.Q. 1909, art. 5684, C.C. Que., arts. 1106, 1112 and 2231).

Batsford v. Laurentian Paper Co., 5 D. L.R. 306, 41 Que. S.C. 367, 18 La Rev. de Jur. 70.

(§ III F—131) — WORKMEN'S COMPENSATION.

The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. [Canadian Northern R. Co. v. Robinson, [1911] A.C. 739, applied; judgment of the Court of Appeal for Manitoba, Anderson v. Canadian Northern R. Co., 21 Man. L.R. 121, 18 W.L.R. 124, varied.]

Canadian Northern R. Co. v. Anderson, 20 W.L.R. 416.

Injuries suffered through the refusal of a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act to and from shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in sec. 242 of the Railway Act, 3 Edw. VII. ch. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity. [Judgment appealed from (19 Man. L.R. 300) affirmed, Girouard and Davies, JJ., dissenting. The judgment of the Supreme Court of Canada, Canadian Northern R. Co. v. Robinson, 43 Can. S.C.R. 387, affirmed.]

Canadian Northern R. Co. v. Robinson, [1911] A.C. 739, 21 W.L.R. 624.

Under the Alberta Workmen's Compensation Act, providing that a claim for compensation thereunder must be made within six months from the occurrence of the accident causing the injury and permitting the injured person notwithstanding his failure in an action for negligence to ask for compensation provided the action is brought within the time limited by the Act for taking proceedings, no compensation can be fixed by the Court in an action begun more than six months after the accident. [Cribb v. Kynoch, Limited (No. 2), [1908] 2 K.B. 551, followed.]

Smolik v. Walters, 1 D.L.R. 891, 20 W. L.R. 57.

IV. Interruption of statute; removal of bar.

C. By payment or promise.

(§ IV C—166)—PAYMENT.

The Statute of Limitations is not a bar to an action for the balance due on a grocer's account incurred by the wife of the defendant where it appeared that, during the lifetime of the grocer it was the practice of the defendant's wife to buy groceries and make monthly payments therefor, generally precisely the amount of the month's purchases, but sometimes a little more or a little less, so that at the death of the grocer there was a balance left unpaid, a statement of which was sent by the executrix of his estate to the wife of the defendant who promised to pay the bill, and payments were made by her from time to time until her death and then were continued by her daughter until the defendant put a stop to it, and, therefore, the executrix is not debarred from recovering the balance remaining unpaid from the defendant.

Scott v. Allen, 5 D.L.R. 767, 3 O.W.N. 1484, 22 O.W.R. 597, 26 O.L.R. 571.

In an action on a promissory note where the limitation period under the statute would be held to have run but for a part payment made within the period of the fact that the Alberta Statute of Limitations is silent as to a part payment interrupting the statute and that the English statute, 9 Geo. IV. ch. 14, sec. 1, provides as regards the original English statute from which the Alberta statute was taken that nothing contained therein shall alter, take away or lessen the effect of any payment of any principal or interest, may properly be invoked in support of the long series of judicial interpretations fixing the law in relation thereto.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 22 W.L.R. 150.

In an action on a simple contract, where a six-year Statute of Limitations is pleaded, a part payment made even after the expiration of the six years is sufficient in general to revive the cause of action, and therefore raise the implication of a promise to pay the balance and of an acknowledgment of the existence of a larger debt. [Re Lane, ex parte Gaze, 23 Q.B.D. 74, referred to.]

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 22 W.L.R. 150.

(§ IV C—167)—PROMISE OR ACKNOWLEDGMENT.

A letter written by a client to his solicitor requesting him to look after his affairs once more and enquiring as to the amount of his (the client's) past indebtedness, constitutes an interruption of prescription as regards such indebtedness, but does not constitute a renunciation to prescription acquired.

Bernard v. Pelissier et al., 8 D.L.R. 545.

LIMITATIONS.

In estates, see Deeds, II.; Wills, III.

LINE FENCES.

See Boundary; Fences.

LIQUIDATED DAMAGES.

See Damages, III.

LIQUIDATION.

Of company, see Company, VI.
Of bank, see Banks, V.
Of partnership, see Partnership, VI.

LIQUOR LAWS.

See Intoxicating Liquors.

LIS PENDENS.

I. IN GENERAL.
II. PURCHASERS PENDING SUIT.

I. In general.

(§ I—1)—In general.

Defective endorsement—Statement of claim—Refusal to sign "option" of purchase of land—Vacating registry of certificate.

Jenkins v. McWhinney, 5 D.L.R. 883, 4 O.W.N. 90, 23 O.W.R. 29.

(§ I—2)—Effect of laches; wrongful issuance.

The delivery of an amended statement of claim will not validate a certificate of lis pendens wrongfully issued by a clerk of the Court, pursuant to sec. 35 of the Alberta Mechanics' Lien Act when the original statement of claim filed with him as a condition to the issuing of the certificate was defective in not setting out the statutory allegations and claims for relief. [25 Cyc. 1473, applied.]

Horne v. Jenkyn, 6 D.L.R. 54.

The filing of an amended statement of claim in an action wherein the original statement of claim did not authorize the registration of a lis pendens certificate will not validate such certificate. [25 Cyc. 1473, approved.]

Horne v. Jenkyn, 6 D.L.R. 54.

II. Purchasers pending suit.

(§ II—9)—Caveat in land titles.

The filing of a caveat, under the Manitoba Real Property Act, R.S.M. 1902, ch. 148, has no greater effect, so far as the rights or interests of the caveator are concerned, than a certificate of lis pendens.

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 20 W.L.R. 510, 22 Man. L.R. 175.

(§ II—10)—Setting aside lis pendens.

Certificate of—Motion to vacate registration—Abuse of process of Court—Endorsement on writ—Cause of action—No right to appeal.

Salter v. McCaffrey, 4 O.W.N. 478, 23 O. W.R. 611.

Where the plaintiff, to whom a certificate of title was issued and land transferred as security for a debt from the grantor, gave his grantor a power of attorney, and afterwards alleged that the latter, as the result of a conspiracy, transferred the land, in trust for himself, to another, and that a certificate of title was issued to the transferee, who, in turn, transferred the land in fee simple to a trust company, without consideration, in trust for the grantor and others, one not a party to the alleged conspiracy, who acquired from the trust company an interest in the land under an agreement for its purchase, obtained under secs. 71 and 91 of the Real Property Act (Man.), a good title as against the plaintiff, since he secured it from its registered owner, and a lis pendens filed by the plaintiff will be vacated on motion of such contract purchaser in an action brought by the plaintiff to set aside all of such transfers.

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

Where a writ of summons has been issued and a lis pendens filed, but no valid service of the writ is made on the defendant, the latter must enter an appearance gratis before launching a motion to dismiss the action and for the discharge of the lis pendens.

Peat v. Sexton, 8 D.L.R. 761, 22 W.L.R. 736.

LITTORAL RIGHTS.

See Waters.

LIVE STOCK.

In general, see Animals.

Transportation of, see Carriers.

LOCAL IMPROVEMENTS.

See Public Improvements; Taxes.

LOCAL OPTION.

In general, see Intoxicating Liquors, I.

Voting on by-laws for, see Intoxicating Liquors, I.

Offences against local option by-law in force, see Intoxicating Liquors, III.

LOCOMOTIVE.

Fire set by sparks from, see Railways, II.

LOGS AND LOGGING.

(§ I—1)—Booms.

Obstructing navigation—Rights and liabilities of party removing obstruction—Public highway—Nuisance.

Johnston & Carrswell v. Despard, 7 D. L.R. 837, 19 W.L.R. 802.

(§ I—2)—Compensation for driving.

Setting aside arbitrator—Timber Slide Company's Act.

Re Little Sturgeon River Slides Co. and Mackie Estate, 6 D.L.R. 895, 4 O.W.N. 262.

Where a lumber company in the course of its logging operations banked its logs on the ice during the winter season, and in the spring the logs were floated down to a river and then driven down the river to the mills where they were to be sawn, the character of the river being such that it would be impracticable to float or drive the logs in cribs or boomed together, the fact that the lumber company, in common with other operators, floating and driving their logs in single pieces allowed them to become intermixed and in this intermixed condition to pass into certain works erected in the river, which did not in any way improve its floatable character, by a boom company incorporated

under the laws of a foreign country, does not constitute an implied request to separate the logs; and the lumber company, deriving no benefit from the interference with the logs by the boom company, and having forbidden the boom company from so interfering, a contract will not be implied to pay the tolls fixed by the boom company, although under its powers as amended, the boom company had authority to construct the works and to collect tolls and charges for such services.

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

(§ I—8)—Compensation for sorting.

Where as the result of common action, logs of different log owners become intermixed in their course down a floatable stream, the cost and expense of separating and securing the same, shall be paid by each individual log owner, and if one log owner requests a boom company to separate his logs from the intermixed logs, no implied contract with another log owner can be presumed on the part of the boom company to entitle it to recover for services rendered in connection with this separation of the logs especially where such last-mentioned log owner had forbidden the boom company from interfering or meddling with his logs. [See the Saw Logs Driving Act, R.S.O. 1897, ch. 143, secs. 9 and 10.]

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

Sorting — Expense of—Apportionment —Damages.

Tremblay v. Pigeon River Lumber Co., 2 D.L.R. 882, 3 O.W.N. 894, 21 O.W.R. 698.

(§ I—9)—Culling and measuring.

A party alleging error of calculation by a culler or measurer does not need to pray for the cancellation of the contract; on the contrary, his prayer for a reformation is a demand for the complete execution of the contract. It will be necessary, however, to bring conclusive proof of error in such measurements, and measurements taken ex parte when the logs were in the water in the early spring and when many of them were hidden from view, cannot be accepted as against the measurements of the culler chosen by the parties under the contract.

Church v. Racicot, 2 D.L.R. 528, 21 Que. K.B. 471.

Under a contract for the cutting of logs in timber limits where it is stipulated that the culling and measuring will be done by a culler appointed by the party who undertakes the cutting, the calculations of such culler will be accepted by the Court and such clause given effect to although mere errors of calculation may be reformed.

Church v. Racicot, 2 D.L.R. 528, 21 Que. K.B. 471.

(§ I—15)—Miner's lien for cutting and sawing.

A lien on a mining claim, under the provisions of the Miners' Lien Ordinance, for cutting and sawing logs, will not be defeated by the fact that, without the knowledge of the plaintiff, the owner of the claim sold a small portion of the lumber for use elsewhere than on his own claim.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

LORD CAMPBELL'S ACT.

Fatal accidents, liability for, generally, see Death.

Fatal accidents to servants through employers' negligence, see Master and Servant.

By electric shock, see Electric Light and Power.

Damages for fatal accidents, amount of, see Damages, III.

LORD'S DAY.

See Sunday.

LOSS.

Of property in hands of bailee, see Bailment.

By forged bank cheques or indorsement, see Banks, III.

Of profits, see Damages, III.

Of insured property, see Insurance, VI.

Who must bear loss of article sold, see Sale.

Liability of trustee for, see Trusts.

LOTTERY.

I. In general.

II. What constitutes.

I. In general.

(§ I—2)—Business by mode of chance.

Upon a charge of carrying on a business by modes of chance contrary to the lottery clauses of the Criminal Code (Cr. Code, 1906, sec. 236), evidence of persons who had canvassed for business on her behalf with which the lottery features were proposed, is not admissible evidence against the accused where not connected by evidence that the accused did in fact hold the lottery drawings suggested by the canvassers.

The King v. Lumgair, 19 Can. Cr. Cas. 123, 3 O.W.N. 309.

II. What constitutes.

(§ II—5)—What constitutes.

A deed of sale intended as a blind for the purpose of running a lottery in subdivision lots, is illegal and null and cannot be opposed to a subsequent bonâ fide pur-

chaser of these lots from the original owner, although it has been registered.

Bedard v. Phœnix Land and Improvement Co. and Drolet, 8 D.L.R. 686.

The sale of immovables with the intention, agreed upon between vendor and purchaser, of organizing a lottery and disposing of it by public drawings, is radically null, being simulated between the parties as accessory to the main design of committing an act prohibited by law. It cannot, therefore, be relied on in opposition to a subsequent legal sale to a third party.

Bédard v. Phœnix Land Improvement Co., Q.R. 42 S.C. 1 (Sup. Ct.).

LUMBER.

Contract for cutting, see Contract.

Negligence to employee, see Master and Servant.

Lien on, see Lien.

MACHINERY.

As fixtures, see Fixtures.

Injury to employee by, see Master and Servant, II.

Servant's assumption of risk of danger of, see Master and Servant.

Contributory negligence of servant as to, see Master and Servant.

MAGISTRATE.

Summary conviction by, see Summary Conviction.

Liability for false imprisonment, see False Imprisonment.

Mandamus to, see Mandamus, II.

See also Justice of the Peace.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

Maliciously inducing breach of contract, see Contract, VIII.

In conspiring to injure another's business, see Conspiracy, II.

Evidence to shew, see Evidence.

Malicious arrest, see False Imprisonment.

As element of murder, see Homicide.

Absence of, as defence to libel or slander, see Libel and Slander.

In action or prosecution, civil liability for, see Malicious Prosecution, II.

MALICIOUS ARREST.

See False Imprisonment.

MALICIOUS MISCHIEF.

See Mischief.

MALICIOUS PROSECUTION.

I. In general.

II. Want of probable cause; malice.
A. In criminal prosecution.
B. Of civil action.

III. Termination of prosecution.

Measure of damages for, see Damages, III.

As to false imprisonment, see False Imprisonment.

I. In general.

(§ I—2)—Advice of counsel.

Advice of counsel before charging a person with an offence, while evidence in the defendant's favour in an action for malicious prosecution, does not constitute a complete answer to a claim of want of probable cause, especially where it appears that the defendants tried to rely on their solicitor without forming an opinion of their own as to the guilt or innocence of the plaintiff. [Prentiss v. Anderson Logging Co. (1911), 16 B.C.R. 289, referred to.]

Harris v. Hickey & Co., 2 D.L.R. 356, 17 B.C.R. 21, 19 W.L.R. 948.

(§ I—3)—Of civil action.

The principles of the French law as laid down in art. 1053 of the Civil Code of the Province of Quebec and not the principles of the English law govern in such a case. [Copeland v. Leclerc (1886), M.L.R. 22 B.R. 365, disapproved.]

Canadian Pacific Railway Co. (appellant, defendant) v. Waller (respondent, plaintiff), 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

II. Want of probable cause; malice.

A. In criminal prosecution.

(§ II A—5)—Want of probable cause; malice.

Reasonable and probable cause, as well as want of malice, in preferring a charge of theft and of aiding and abetting another to obtain money from a municipal corporation by false pretences, is shewn where it appears that the plaintiff, a girl of sixteen years of age, who was able to read and write, presented money orders drawn by her father, a sectional foreman employed by the city, in which she was fictitiously named, at the city hall, all of which were in unsealed envelopes, for the payment to her of wages of city labourers her father had fraudulently carried on his pay rolls, and that the plaintiff delivered to her father the money she obtained thereon, as, under such circumstances, the inference was warranted that she was aiding her father to defraud the city.

Provost es qual. v. City of Montreal, 3 D.L.R. 128.

Want of probable cause on the part of the defendants is sufficiently shewn in an action for malicious prosecution where the

circumstances disclose that, in preferring a charge of theft against the plaintiff, they acted rashly, and the question whether they really believed that the plaintiff intended to steal from them was open to doubt, as honesty and reality of belief in his guilt was essential to the defendant's protection.

Harris v. Hickey & Co., 2 D.L.R. 356, 17 B.C.R. 21, 19 W.L.R. 948.

(§ II A—6)—ADMISSION OF NON-BELIEF.

A belief upon which the private prosecutor has acted is essential to the existence of reasonable and probable cause as it affects an action against him for malicious prosecution; so, where the prosecutor, when examined at the trial in the latter action, denied ever having had a belief that the plaintiff was guilty and also denied having laid any charge against the plaintiff, but is proved to have laid the charge, his denial of belief in the plaintiff's guilt is conclusive proof of want of reasonable and probable cause in favour of the plaintiff who had been acquitted on the criminal trial and who also denied his guilt on the civil trial, although it may further appear that there were grounds of suspicion which would have sustained a defence of reasonable and probable cause had the defendant admitted that he had believed them. [Haddrick v. Heslop (1848), 12 Q.B. 267, and Shrosbery v. Osmaston (1877), 37 L.T. 793, applied; see also Chapman v. Heslop (1853), 2 C.L.R. 139; Johnson v. Emerson (1871), L.R. 6 Ex. 351.]

Geers v. Nestman, 1 D.L.R. 312, 20 W. L.R. 212.

B. Of civil action.

(§ II B—16)—WANT OF PROBABLE CAUSE.

Reasonable and probable cause for the arrest of the plaintiff, a watchmaker, on a charge of having converted to his own use a watch left with him for repairs, is not shewn, in an action for malicious prosecution, where the only thing tending to shew any improper dealing with the watch was his statement to the defendant that he was leaving town and would leave all repair work with another person, and that he omitted to leave with him the watch in question.

Wood v. Newby, 5 D.L.R. 486, 21 W.L. R. 438.

In an action for malicious prosecution, a formal finding by the Judge of absence of reasonable and probable cause may be unnecessary, if such a finding can be necessarily inferred from what took place at the trial.

Connors v. Reid, 3 D.L.R. 636, 3 O.W.N. 1137.

(§ II B—17)—MALICE.

Malice, in an action for malicious prosecution, may be found from the facts that the defendant, without reasonable or probable cause, procured the arrest of the plaintiff on the ground that the latter, a watchmaker, who had removed from the town, had in his possession a valuable watch belonging to the defendant, and the latter did not take a summons for the plaintiff, as suggested by the magistrate, as he stated that he feared that if a summons was issued it would give the plaintiff an opportunity to escape, since, from such circumstances, it appeared that the defendant's desire was to recover the watch and not to punish the plaintiff.

Wood v. Newby, 5 D.L.R. 486, 21 W.L. R. 438.

Malice may be implied in an action for malicious prosecution, where there was not reasonable and probable cause for the arrest of the plaintiff. [Quartz Hill Gold Mining Co. v. Eyre, 11 Q.B.D. 674, specially referred to.]

Wood v. Newby, 5 D.L.R. 486, 21 W.L. R. 438.

The entire absence of reasonable and probable cause constitutes malice in law which entitles the plaintiff to recover damages.

Canadian Pacific Railway Co. (appellant, defendant) v. Waller (respondent, plaintiff), 1 D.L.R. 47, 19 Can. Crim. Cas. 190.

III. Termination of prosecution.

(§ III—20)—TERMINATION OF PROSECUTION.

The termination of criminal proceedings before a magistrate is sufficiently shewn in an action for malicious prosecution where the records of such officer shewed that the charge against the plaintiff was dismissed with costs, and the testimony of the magistrate was to the same effect.

Wood v. Newby, 5 D.L.R. 486, 21 W.L. R. 438.

An action for damages for malicious accusation of a criminal act and for false arrest, cannot be maintained until the prosecution for such accusation is at an end; such prosecution may not be considered as terminated by the fact that the complaint, after a preliminary hearing, has been declared by a magistrate not well founded, if it appears that the complainant, the defendant in action for damages, has given a recognizance required by art. 688 Cr. C. to the effect that he will prosecute his accusation before the Court of King's Bench.

Ducharme v. Bazinet, 18 Rev. de Jur. 255.

MALPRACTICE.

Liability for, see Physicians and Surgeons, II.

MALT LIQUORS.

Statute prohibiting sale of, see Intoxicating Liquors.

MANDAMUS.

I. When may issue.
A. In general.
B. To Court or Judge.
C. To Province or Federal officers.
D. To county, town or municipal officers.
E. To corporations.
F. Concerning elections; to determine title to office.
G. To school officers.
H. To excise officers.
II. Procedure; hearing; determination.
A. In general; prerequisites.
B. Parties.
C. Pleading; writ and return.
D. Hearing and determination; defences.

I. When may issue.

A. In general.

(§ I A—3)—Making or enforcing contracts.

A mandatory order to restore a wall may be granted under the prayer for general relief although not specifically asked for where a proper case is made on the pleadings and evidence. [Ganghan v. Sharpe (1881), 6 A.R. (Ont.) 417, and Gunn v. Trust and Loan Co., 2 O.R. 393, specially referred to.]

Holman v. Knox, 3 D.L.R. 207, 3 O.W.N. 745, 21 O.W.R. 325, 25 O.L.R. 588.

(§ I A—4)—Existence of other remedies.

To entitle an applicant to a mandamus he must have a legal right to the performance of some duty of a public and not merely of a private character, and there must be no other effective, lawful method of enforcing the right. [8 Encyc. Laws of England, 526, 529, 546, referred to.]

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

C. To Provincial or Federal officers.

(§ I C—10)—To Provincial or Federal authorities; post office authorities.

The Superior Court has no jurisdiction to enjoin by mandamus the post office authorities or any other public department from doing anything or to order any Crown officer to do something.

The Linde Canadian Refrigerator Co. v. Hon. L. O. Taillon and The Linde British Co., Ltd., mis-en-cause, 13 Que. P.R. 182.

(§ I C—15)—To taxing officer.

Where, under an order by a Court for a prosecutor to pay the accused person his costs of the criminal proceedings which was made under sec. 689 of the Criminal Code, 1906, and therefore by the provision of such section included the costs of the accused's appearance on the preliminary inquiry, though made in general terms and not specially referring to such costs, the taxing officer acting upon the theory that the Judge in his order did not intend to award such costs, declined to tax them, the Ontario High Court has jurisdiction to issue a mandatory order to the officer directing him to tax and to allow to an accused person such costs.

Re Constantineau and Jones, 5 D.L.R. 483, 3 O.W.N. 1030, 26 O.L.R. 160, 21 O. W.R. 880.

D. To county, town or municipal officers.

(§ I D—25)—To county, town or municipal officers.

Where the term of office of a board of commissioners of sewers, appointed under ch. 159 of the Consolidated Statutes of New Brunswick, 1903, had expired between the date of argument of a motion for a mandamus against the board, to compel them to make an assessment upon certain marsh lands, and the date of judgment upon such motion, it was held that the writ might go against their successors in office.

Ex parte Thomas F. Dixon et al., 10 E.L.R. 383.

(§ I D—29)—To board of health.

Although a board of health appointed under the Ontario Public Health Act, R. 50, 1897, ch. 248, is not constituted a corporation, neither the board as a whole nor its members individually are to be held liable for the recovery of medical claims as for a private debt, but the remedy is to be sought against the board as a public body by the prerogative writ of mandamus requiring the board to issue an order upon the municipality for payment. [Ross v. Township of London, 23 O.L.R. 74, and Mayor of Salford v. Lancashire, 25 Q.B.D. 384, specially referred to.]

Rich v. Melancthon Board of Health, 2 D.L.R. 866, 3 O.W.N. 826, 21 O.W.R. 516, 26 O.L.R. 48.

(§ I D—31)—To town officers.

The right of mandamus to compel a municipal corporation to do a certain act is not accorded to taxpayers as such; and in order to establish ground for the claim accruing from the misfeasance of the corporation, it is not sufficient to shew that the plaintiff is a stockholder in a company affected by the misfeasance complained of, such not being equivalent to a private claim by the plaintiff himself.

Gourdeau v. City of Quebec and Bernier, 13 Que. P.R. 388.

A mandamus to a municipal council should be directed to the corporate body and not to the individuals composing it, although it is proper to notify the individuals. [See also Re Bolton and County of Wentworth, 23 O.L.R. 390.]

Re West Nissouri School, 1 D.L.R. 252, 3 O.W.N. 478, 21 O.W.R. 533, 25 O.L.R. 550.

Where after a written demand had been made on it for funds for the maintenance of a continuation school by the chairman

and secretary-treasurer of the school board, followed by a personal demand for the money by the chairman and other members of the school board but the council did nothing to fulfil its statutory obligation to furnish the money, this inaction is a sufficient refusal, to indicate that it did not intend to do what was required, and a mandamus will lie to compel the council to supply the money. [Re West Nissouri Continuation School, 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478, affirmed; Rex v. Brecknock, etc., Canal Co. (1835), 3 A. & E. 217; Rex v. Ford (1835), 2 A. & E. 588; Regina v. Conservators of Thames (1839), 8 A. & E. 901, 904, and Halsbury's Laws of England, vol. 10, p. 101, sec. 199, specially referred to.]

Re West Nissouri Continuation School (No. 2), 3 D.L.R. 195, 3 O.W.N. 726, 21 O.W.R. 533, 25 O.L.R. 550.

Mandamus will not lie against a municipal corporation at the instance of a school board where there has not been a sufficient demand for the providing of funds by the school board under the High Schools Act, 9 Edw. VII. (Ont.), ch. 91, sec. 38, but the application for the mandamus may be dismissed without prejudice to another application to be made after formal demand. [Regina v. Mayor, etc., of Bodmin, [1892] 2 Q.B. 21, specially referred to.]

Re West Nissouri Continuation School (No. 2), 3 D.L.R. 195, 3 O.W.N. 726, 21 O.W.R. 533, 25 O.L.R. 550.

(§ I D 2—37)—To compel tax levy.

Under sec. 263 of Public Schools Act, R.S.M. 1902, ch. 143, for the purpose of realizing on the execution placed in his hands in this action, the sheriff caused the treasurer of the rural municipality of St. Clements, W. R. Young, to be served on 23rd August, 1906, with a precept to levy the necessary rate upon the lands situated in the defendant school district. On 29th October following, Mr. Young resigned and Thomas Bunn was appointed treasurer. Mr. Bunn thereafter made out the general tax roll without including the levy directed by the sheriff. He said he had no knowledge of the proceedings against the municipality until March, 1907, but admitted knowing of the judgment. He had been a member of the municipal council during 1906:—Held, by Macdonald, J., on application for a mandamus to compel Mr. Bunn to levy the rate: 1. That, as a member of the council, he should have had knowledge of the proceedings taken, and the plaintiffs were entitled to the order asked for, as the duties of the treasurer upon whom the precept had been served devolved upon his successor in the office. 2. That the inability of the treasurer to obey the mandamus for lack of some preliminary steps required by law to be attended to by other officers of the municipality, over whom he had no control, was not a sufficient answer to the application. [London and Canadian v. Morris (1893), 9 M.R. 377, followed.] On appeal to the Court of Appeal:—Held, that the omission of the words "by rate" in the directions to the sheriff to levy indorsed on the execution was fatal to the proceeding and that the application for a mandamus should be dismissed.

Canada Permanent Mortgage Corporation v. School District of East Selkirk, No. 99, 21 Man. R. 750.

E. To corporations.

(§ I E—41)—To compel transfer of stock.

To compel delivery of shares.

Mason v. Goldfields, 6 D.L.R. 909, 4 O. W.N. 300.

Mandamus is the proper remedy to require the board of directors to register a transfer of shares of stock on the books of the company issuing them. [Crawford v. Provincial Insurance Co., 8 U.C.C.P. 268, and Rich v. Melancthon Board of Health, 2 D.L.R. 866, 26 O.L.R. 48, 3 O.W.N. 826.]

Re Polson Iron Works, Ltd., 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

G. To school officers.

(§ I G—65)—To school officers.

An order for mandamus will be granted at the suit of ratepayers of a township directing the continuation school board of such township and the several members thereof, forthwith to take such proceedings as may be necessary in order that the school may be established and made available to such persons as may desire and be entitled to attend the same and further directing the school board to make a demand upon the council of the township for such money as the school board may, in its discretion, deem necessary in order to open and maintain the school, where it appears that it has already been determined by the proper Court that the continuation school district had been validly established; that a mandatory order had been granted at the instance of the school board directing the payment by the township corporation to the board of a certain sum for maintenance purposes; that a motion for a mandamus to compel the payment of a sum by the council for the purpose of erecting a school building failed solely because of the insufficiency of the demand made by the school board; and that all resolutions offered thereafter in the school board looking to the establishment of the school, were blocked by one-half of the members thereof voting against them because they were determined not to permit the continuation school to be established. [Re West Nissouri Continuation School, 1 D.L.R. 252, 25 O. L.R. 550, specially referred to.]

Re West Nissouri Continuation School,

4 D.L.R. 847, 3 O.W.N. 1623, 22 O.W.R. 842. [Affirmed, 4 O.W.N. 497, 23 O.W.R. 601.]

A mandamus will lie to compel the trustees of a school district to allow the children of a parent whose permanent and principal place of residence is within the school district, to attend the school without the payment of a fee.

Inkster v. Minitonka School District, 6 D.L.R. 57, 22 W.L.R. 57.

H. To excise officers.

(§ I H—70)—To EXCISE OFFICERS.

On the 17th of October, 1910, P. was granted a liquor license for his hotel for a period ending on the 15th of January, 1911. On the 14th of December following, at the next regular meeting of the board, he applied for a renewal. There was no objection lodged nor was there any charge against the applicant as a licensee. After a number of adjournments, the application was eventually refused, on the 11th of January, 1911. The composition of the board was changed on the 15th of January, 1911. P. applied to the new board for a renewal, or, in the alternative, for a fresh license. These applications were also finally refused on the 28th of March, 1911. On application to Clement, J., a writ of mandamus was issued to the new board ordering the granting of a license unconditionally. On appeal from this order the Court was evenly divided. Per Macdonald, C.J.A., and Galliher, J.A. (applying and following the Mayor and Assessors of Rochester, in re the Parish of St. Nicholas v. The Queen (1858), 27 L.J. Q.B. 434), that the successors of the old board, who ought to have renewed the license, could be compelled to perform the duty which they refused to perform, and the change in the by-law, subsequently effected, making it discretionary with the new board to grant or refuse a renewal, does not affect the position, as at the time of the commission of the wrong complained of no discretion was required, but simply a ministerial act. Per Irving, J.A.:—P. had no vested right to a renewal under the by-law in force at the time he obtained his license, and that the Court had no power to order the new board to consider P.'s application according to such by-law. Per Martin, J.A.:—As there was no evidence of mala fides on the part of the commissioners in refusing the application, the writ of mandamus could not be supported.

Prudhomme v. The Board of License Commissioners for the City of Prince Rupert, 16 B.C.R. 487.

II. Procedure; hearing; determination.

A. In general; prerequisites.

(§ II A—75)—PROCEDURE; HEARING; DETERMINATION.

Where an inferior Court decides a matter within its jurisdiction on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie to compel a reconsideration, but it must be clear that the point upon which the decision rested was in reality preliminary and not one upon the merits.

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

On an appeal to a Division Court under sec. 749 (a) of the Criminal Code (Ont.) from a conviction by a police magistrate, a decision by the Appellate Court allowing the appeal on the sole ground that the information on which the conviction was based was insufficient though this point was not raised before the magistrate, while it may be erroneous under sec. 753 of the Criminal Code, is nevertheless a decision on the merits and not on a matter preliminary, and hence mandamus will not lie to compel the Division Court to re-open the appeal. [The Queen v. Justices of Middlesex, 2 Q.B.D. 516, referred to.]

Re McLeod v. Amiro, 8 D.L.R. 726, 4 O.W.N. 97, 27 O.L.R. 232.

(§ II A—76)—CONDITION PRECEDENT.

A motion for a mandamus should be made on behalf of the Sovereign ex rel. the prosecutor.

Frankel v. City of Winnipeg et al., 8 D.L.R. 219, 22 W.L.R. 597.

C. Pleadings; writ and return.

(§ II C—88)—THE WRIT.

The high prerogative writ of mandamus originally confined to the King's Bench alone may now be issued out of any of the divisions of the High Court of Justice in Ontario. [Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329, approved.]

Rich v. Melancthon Board of Health, 2 D.L.R. 866, 3 O.W.N. 826, 21 O.W.R. 516, 26 O.L.R. 48.

MANDATORY.

Under Quebec law, see Principal and Agent.

MANSLAUGHTER.

In general, see Homicide.

MARITIME LIENS.

See Admiralty.

MARKETS.

(§ I—1)—PUBLIC MARKET.

A public market is a place to which any one having goods to sell, which may be properly sold upon such market-place, may go, provided he pays the fees imposed by the municipality for such privilege.

Rosenfelt v. Biron and City of Montreal, 8 D.L.R. 481.

A public market is one to which any person whosoever may bring and offer for sale marketable articles subject only to municipal and police regulations.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

(§ I—4)—PRIVATE MARKETS.

A building containing under one roof different shops or stalls, all of which are rented to different persons carrying on the trade of butchers, is not a public market. [Wallenberg v. Merson, 1 D.L.R. 212, followed.]

Rosenfelt v. Biron and City of Montreal, 8 D.L.R. 481.

An aggregation of private stalls does not constitute a public market so long as the individual tenants only may carry on their trade therein.

Wallenberg v. Merson, 1 D.L.R. 212, 21 Que. K.B. 310.

A huckster, who, for a limited time on certain days of the week, occupies a stall in a market-place conducted by a municipality and pays dues therefor, is not a tenant of the premises, but a licensee. [Flynn v. The Toronto Industrial Exhibition, 9 O.L.R. 582, applied.]

Wood v. City of Hamilton, 8 D.L.R. 824, 23 O.W.R. 627, 4 O.W.N. 427.

MARKING OF GOODS.

A. In general.

(§ I—5)—GOLD AND SILVER.

In an offence under the Gold and Silver Marking Act, 1908 (Can.), to have in possession with intent to sell the same, rings marked as of nine karat gold unless nine twenty-fourths of the weight of the ring, including that of the cement inclosed in the inner part of the ring, is of gold; and the nine twenty-fourths proportion does not apply to the gold and alloy only in the article but to all that part of the article which has the appearance of and is likely to be the subject of fraudulent sales on the representation that it is throughout of the quality indicated by the mark.

The King v. Austin, 19 Can. Cr. Cas. 70, 25 O.L.R. 69.

MARRIAGE.

I. IN GENERAL.
II. MODE OR FORM; VALIDITY GENERALLY.
A. In general.
B. Common-law marriage.
C. Effect of cohabitation or conduct.
III. CAPACITY OF PARTIES; WHO MAY MARRY.
A. In general.
B. Validation of marriage void when entered into.
C. Miscegenation.
IV. ANNULMENT; TERMINATION.
A. In general.
B. For lack of capacity to marry.

As to bigamy, see Bigamy.

Breach of promise to marry, see Breach of Promise.

Separation and alimony, see Divorce and Separation, IV.

Effect on foreign divorce, see Divorce and Separation, I.

Custody and support of children on judicial separation, see Divorce and Separation, VI.

I. In general.

(§ I A—2)—LEGISLATIVE POWER OVER.

Section 92 of the B.N.A. Act, which enacts that the Legislature of each Province may exclusively make laws relating to matters within an enumerated class, among them being "property and civil rights," "solemnization of marriage," and "generally matters of a local or private nature in the Province," operates by way of an exception to the powers conferred by sub-sec. 16 of sec. 91 of the B.N.A. Act as regards "marriage," and the Provincial Legislatures therefore have jurisdiction to enact conditions as to solemnization which may affect the validity of the marriage contract.

Re the Marriage Law of Canada, 7 D.L.R. 629, 11 East. L.R. 255.

The law of the Province of Quebec governing marriage does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would be otherwise legally binding, which takes place in such Province between persons, who are both Roman Catholics, or, between persons one of whom only is a Roman Catholic.

In re Marriage Laws, 6 D.L.R. 588, 46 Can. S.C.R. 132.

The provisions of the Manitoba Marriage Act validating (under the limitations of that section) all marriages after two years between persons not under legal disqualification notwithstanding irregularities, "so far as respects the civil rights in Manitoba of the parties or their issue, and in respect of all matters within the jurisdiction of the Legislature of Manitoba," apply to persons whether married within the Province or in foreign countries. (Per Haggart, J.A.) [Sec. 30 of Marriage Act, 5 and 6 Edw. VII. (Man.), ch. 41, construed.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 W.L.R. 336.

II. Mode or form; validity generally.

(§ II A—6)—OMISSION OF PUBLICATION OF BANNS.

Two Roman Catholics on presenting a license from the Crown which dispenses with previous publication of banns can be validly married before a minister of a Protestant religion.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

Article 59 (a) of the Civil Code (Que.), 1904, providing that as to the solemniza-

tion of marriage by Protestant ministers of the gospel, marriage licenses are to be issued by the Department of the Provincial Secretary under the hand and seal of the Lieutenant-Governor, who for the purposes thereof is the competent authority under art. 59 of such Code, permitting the marriage ceremony to be performed without a certificate of the publication of banns under art. 57 C.C., if the parties to the ceremony have obtained and produce a dispensation or license from a competent authority, is not limited in its effect to marriages of Protestants, but is applicable to the marriages celebrated by Protestant ministers of the gospel, whatever may be the religious belief of the parties to the marriage.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

A marriage of two Roman Catholics performed by a Protestant minister of the Methodist Church, under the authority of a license, sealed with the great seal of the Province of Quebec and signed by the Lieutenant-Governor of that Province authorizing the omission of a previous publication of the banns, as permitted by arts. 59 and 59a, Civil Code, was declared to be valid and binding in law in proceedings by opposition in a civil action in the Province of Quebec brought by the man to declare its invalidity in conformity with an ecclesiastical decree made by the Roman Catholic Archbishop of Montreal declaring the marriage null and void upon the ground that the Methodist minister was incompetent to perform the marriage in view of a decree known as the Ne Temere Decree proclaimed by the congregation of the council of the Roman Catholic Church that only those marriages of Roman Catholics could be valid which had been contracted before the curé of the place, where in such civil action the Court maintained her claim made upon an opposition on her own behalf and upon a tierce-opposition in her capacity of tutrix to her minor child to vacate the default judgment entered therein upon the husband's claim on the ground of fraud and undue influence. [Laramée v. Evans (upon demurrer), 24 L.C.J. 235 (on the merits), 25 L.C.J. 261, not followed.]

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

The Crown has, under the Civil Code (Que.), 1904 (respectively providing as shewn below under each number), the undoubted right to exempt from the publication of banns for marriages where both parties are Roman Catholics, its license for that purpose having universal effect as to all publications of banns, and concurrent effect with the dispensation of a bishop as to publication of banns for Roman Catholics; such result following from art. 57, which enacts that before solemnizing a marriage, the officiating person must be furnished with a certificate that the publication of banns required by law has been duly made unless such person has published them himself; art. 130 that the publication of banns, required by the above article is to be made by the priest, minister or other officer in the church to which the parties belong or if they belong to different churches, to be made in each of the churches; art. 59 that the marriage ceremony may be performed without this certificate if the parties have obtained and produced a dispensation or license from a competent authority, authorizing the omission or publication of the banns; and art. 134 that the authority that had hitherto held the right to grant licenses or dispensations for marriage may exempt from such publication, and from the further circumstance that, at the time of the codification as well as afterwards, the bishop granted dispensations and the Crown issued licenses.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ II A—9)—Foreign marriage.

An agreement to marry, followed by cohabitation which constitutes a valid marriage in a foreign country where it was made by two residents of Ontario not forbidden by the law of that Province to enter into such contract will be recognized as a valid marriage in Ontario. [Robb v. Robb, 20 Ont. R. 591, specially referred to.]

Forbes v. Forbes, 3 D.L.R. 243, 3 O. W.N. 557, 20 O.W.R. 924.

On a prosecution for bigamy the admission of his first marriage made by the accused after his arrest, and the testimony of witnesses to that marriage which took place in a foreign country affirming that the same took place in the ecclesiastical form usual there, and was followed by cohabitation of the parties, will, if believed, be sufficient proof of the first marriage to support a conviction without expert evidence of the foreign marriage law. [Reg. v. Creamer (1860), 10 Lower Can. R. 404; R. v. Newton, 2 Moo. & Rob. 503; R. v. Simmonsto, 1 C. & K. 164, 1 Cox C.C. 30; and Reg. v. Ray, 20 O.R. 212; specially referred to.]

The King v. Naoum, 19 Can. Cr. Cas. 102, 24 O.L.R. 306.

(§ II A—9a)—Place of solemnization.

Article 63, Civil Code (Que.), 1904, enacting that a marriage must be solemnized at the place of the domicile of one or other of the parties and that "if solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties," shews clearly that the marriage need not necessarily be celebrated by the curé of the parish and in the church of that parish, but that, within the territory of the domicile, all functionaries entitled to keep registers of civil status are competent to receive a declara-

tion of marriage, the only thing essential to the formation of the contract, and that marriage may be celebrated outside the domicile by any officer of civil status whatsoever in all cases without distinction as to religious belief.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ II A—9c)—WHO MAY PERFORM CEREMONY.

The incompetence of the functionary performing the ceremony of marriage, or the non-observance of the required formalities in the solemnization of the marriage, is not one of the impediments provided for by the words "from other causes" used in art. 127 of the Civil Code (Que.) whereby certain invalidating impediments to marriage are declared and whereby it is provided that other impediments, recognized by the different religious persuasions as resulting from relationship or affinity, or "from other causes," remain subject to the rules hitherto followed in the different churches and religious communities.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

The result of the Civil Code (Que.) as to the competency of the functionary, legally authorized to solemnize marriages, is not to create a jurisdiction which is special, respective and inclusive, but rather to confer a general jurisdiction common to all such functionaries and concurrent in its nature, that is to say, the competency of Roman Catholic priests, under the law is not restricted to the solemnization of the marriage of Roman Catholics, nor is the competency of Protestant ministers restricted to the solemnization of the marriage of Protestants, but that all priests, curés, ministers and other functionaries are collectively and concurrently competent to celebrate marriage. [Civil Code (Que.), 1904, arts. 42-48, 63, 128 and 129, specially considered.]

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

In order that any marriage should be considered publicly celebrated it is sufficient if celebrated by any officer of registers of civil status under the authority of a license dispensing with the previous publication of banns issued by the Crown as permitted by arts. 59 and 59 (a) of the Civil Code (Que.), 1904.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

All officers of registers of civil status, without distinction of religious belief, can validly celebrate the marriage of two Roman Catholics as well as of two Protestants and of two persons belonging to different religious denominations as well as those of the same belief.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ II A—9d)—MARRIAGE REGISTER.

The jurisdiction of all functionaries authorized to keep registers of civil status is not particular and limited in each case to the co-religionists of each functionary, but is a general jurisdiction embracing every person without distinction and a license may be granted by the Crown for the purpose of dispensing with the publication of banns for the marriage of Roman Catholics as well as for the marriage of members of other religious denominations.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ III A—27)—CONSANGUINITY OF AFFINITY; CAPACITY TO MARRY.

Kinship, under canon law, between the third and the fourth degree in collateral line, between Catholics, creates an invalidating impediment to their marriage, and the absence of a valid dispensation renders such marriage null in law, and, in the circumstances, the Court will give civil effect to the decree of the bishop of the diocese annulling such marriage.

Manegre v. Laferriere, 18 Rev. de Jur. 405.

The Civil Code of the Province of Quebec, independently of and in addition to the absolute invalidating impediments decreed in articles 124, 125 and 126 of the Code, recognizes equally, in article 127 of the Code, all other acknowledged impediments, at the time of the promulgation of the marriage, in accordance with the different religious beliefs, whether due to consanguinity or affinity, subject to the right of dispensation under such causes as formerly recognized in the different churches and religious societies; and kinship between the third and the fourth degree in collateral line constitutes, under canon law, between Catholics, an invalidating impediment to such marriage, and, in the absence of a dispensation from a competent ecclesiastical authority, such marriage is null in law; and it is the duty of the Courts to ratify the impediments recognized at the time of the promulgation of the Civil Code by the different religious bodies whether owing to consanguinity or affinity or due to other causes; in the circumstances, when a marriage, between Catholics, has been annulled by the bishop of the diocese, the Court in sustaining an action to annul such marriage can only ratify and give civil effect to the decree issued under Episcopal authority.

Lorange v. Lauzon, 18 Rev. de Jur. 407.

III. Capacity of parties; who may marry.

(No cases.)

IV. Annulment; termination.

A. In general.

(§ IV A—46)—ANNULMENT OF MARRIAGE FOR FRAUD IN PROCURING.

The wide discretion left to the Court

by art. 156, Civil Code (Que.), 1904, whereby it is enacted that every marriage which has not been contracted openly or solemnized before a competent functionary may be contested by the parties themselves and by all those who have an existing and actual interest, "saving the right of the Court to decide according to the circumstances," must be applied only to facts constituting clandestinity or to certain irregularities, which, while absolutely disqualifying the functionary, leave him, nevertheless, a colour of office and give him a de facto authority which would prevent either consort from having the marriage declared of no effect against the other who had contracted it in good faith, and this discretion cannot be extended so far as to deprive any functionary of the authority incontestably conferred upon him, or as so far as to do away with the force which the law accedes to a dispensation or a license exempting from the publication of banns.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ IV A—50)—ANNULMENT; CIVIL EFFECT.

Under art. 163, Civil Code (Que.), 1904, which provides that a marriage, though declared null, produces civil effects with regard to the husband and wife as well as with regard to the children if the contract of marriage is made in good faith and under art. 164 of the Civil Code which provides that if good faith exists on the part of one spouse only, marriage produces civil effects in favour of such spouse alone and in favour of the children born to the marriage, a marriage cannot be annulled as to its civil effects in the absence of any evidence of bad faith on the part of the defendant. [Tremblay v. Déspâtie, R.J.Q. 40 S.C. 429; De Grandmont v. Société des Artisans, R.J.Q. 16 S.C. 532, referred to.]

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

The effect of ch. 4 of title V., "Of Marriage," Civil Code (Que.), 1904, where everything recognized as a cause of nullity by law should be found, is not to treat as a cause of nullity an irregularity in, or even an omission of, the publication of the banns or the failure to obtain the issue of the license or dispensation, the Legislature having limited itself by art. 157 of the Code to imposing a fine upon the officer celebrating a marriage under such circumstances.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

B. For lack of capacity to marry.

(§ IV B—56)—PHYSICAL INCAPACITY.

The High Court of Justice for Ontario has no jurisdiction to entertain an action to have a marriage declared invalid by reason of the alleged physical incapacity to consummate the same on the part of one of the parties thereto. [T. v. B., 15 O.L.R. 224.]

Leakim v. Leakim, 2 D.L.R. 278, 21 O. W.R. 855, 3 O.W.N. 994.

Action for declaration of invalidity—Incapacity of wife—Jurisdiction of High Court—Motion to strike out statement of claim and dismiss action—Con. Rules 261, 617—Judgment.

Leakim v. Leakim (No. 2), 6 D.L.R. 875, 4 O.W.N. 214, 23 O.W.R. 227.

(§ IV B—59)—OTHER EXISTING MARRIAGE.

A marriage will not be held invalid upon an agreement between the parties filed in the action that the pretended marriage between them should be adjudged and declared a nullity on the grounds set forth in the plaintiff's statement of claim, that she was induced to go through a marriage ceremony with the defendant on the false representations that he had obtained a divorce from a woman to whom he had been formerly married. [Lawless v. Chamberlain, 18 O.R. 296, specially referred to.]

Dilts v. Warden, 5 D.L.R. 186, 3 O.W.N. 1319, 22 O.W.R. 228.

MARRIED WOMEN.

See Husband and Wife.

MASTER.

Review of findings, see Appeal, VII.
Powers of on reference, see Reference.

MASTER AND SERVANT.

I. RIGHTS AND RELATIONS GENERALLY.
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C. Compensation; wages.
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I. Rights and relations generally.

A. In general; authority to employ servant or physician.

(§ I A—4a)—RIGHTS OF, IN PATENTS OBTAINED BY SERVANT WHILE EMPLOYED BY MASTER.

The question of the respective rights of master and servant in patents obtained by the servant must be decided in each particular case upon the facts of that case.

Imperial Supply Co. v. Grand Trunk R. Co., 7 D.L.R. 504, 11 East. L.R. 340.

(§ I A—4b)—EMPLOYMENT OF INFANT.

A contract for hire of services between a boy twelve years of age and an industrial company is absolutely void and can have no legal existence as it contravenes a law of public order. If the boy meets with an accident in the course of his work his father may recover damages at common law but not under the Workmen's Compensation Act.

Boutin v. Corona Rubber Co., 13 Que. P.R. 282 (Sup. Ct.).

B. When relation exists.

(§ I B—7)—FOR PURPOSE OF FIXING MASTER'S LIABILITY TO SERVANT.

An employee is shewn to have been injured during and in consequence of his employment with the railway where it appeared that he, with others, was hired by the conductor to dig out a freight train stalled in snow, and was told at the time of the hiring that he would be carried to the place and back and after the train was dug out the men, at the invitation of the conductor, went into the caboose to warm themselves and to wait to go back and, while they were there waiting, another train collided with the caboose and caused the injuries complained of. [Holmes v. Great Northern R. Co., [1900] 2 Q.B. 409, approved.]

Gordon v. Canadian Northern R. Co., 2 D.L.R. 183, 20 W.L.R. 705.

That a gang of labourers working on the construction of an irrigation ditch early in the winter season should lay off work during an extremely cold day by reason of their not yet having prepared themselves with suitable clothing for severe weather does not ipso facto constitute an abandonment of the employment nor terminate their status as employees.

Wakuryk v. McArthur, 6 D.L.R. 66, 21 W.L.R. 160.

A chief engineer of a vessel, even though in receipt of regular wages during the off season, and prior to the date fixed for his actively commencing work, under the terms of his hiring and while not engaged in work, for his employer, is in the same position in respect to injuries sustained by him by reason of the defective condition of his employer's premises upon which he went voluntarily for his own purposes as a stranger would be, and an action based upon the relationship of master and servant and of the Workmen's Compensation Act utterly fails.

King v. Northern Navigation Co., 6 D. L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

One who contracts to take coal from a mine, and over whom the mine owner has no control, is not a workman within the meaning of the Alberta Workmen's Compensation Act, 1908. [Vamplew v. Parkgate Iron and Steel Co., [1903] 1 K.B. 851, and Ruegg's Employers' Liability, 7th ed., 224, referred to.]

Re Reid and the Leitch Collieries, Ltd., 5 D.L.R. 50, 21 W.L.R. 689.

(§ I B—8)—UNDER SUPERVISION OF ENGINEERS; FIXED SCALE.

A man who agrees to do work on a fixed scale of prices at so much per yard, etc., or furnishes materials and work at so much per foot under the supervision of engineers, surveyors, etc., is not a builder nor even a sub-contractor within the meaning of art. 1688 C.C.; he is merely a workman.

Stilwell-Bierce and Smith-Vale Co. v. Lyall, 3 D.L.R. 369.

C. Compensation; wages.

(§ I C—10)—WAGES.

Where the statute (R.S.C., ch. 113) fixed the salary of a harbour master, whom the Crown could dismiss at any time, "at the rate of" $600 per annum, and provided that he should, on December 31 of each year, pay to the Crown all harbour fees collected during the year, less his compensation, and that if the amount of fees should be less than $600, the lesser amount would constitute his salary, he can, upon his discharge after serving the first month of a year, retain as remuneration $50 only, the proportionate share of his annual salary he had actually earned, and not $229 in fees collected during the previous month, as his compensation will be determined by the contract of employment, and not by the manner and time of accounting for the fees received by him. [Boston Deep Sea Fishing Co. v. Ansell, L.R. 39 Ch.D. 339, referred to.]

The King v. McLeod, 4 D.L.R. 491, 17 B.C.R. 189, 21 W.L.R. 517 and 804.

Plaintiff brought action for two months' wages. Defendant in his defence alleged a contract in writing whereby the plaintiff agreed to work the entire season at a wage of $35 per month. Plaintiff left the employment at the end of two months without cause. Judgment having been given for plaintiff, defendant appealed:—Held, that while the plaintiff contracted to work for the entire season and left

without cause before the end of the season, yet, as the wages were reserved monthly, he was entitled to recover for the time he worked. 2. While the contract might be susceptible of a construction that the wages were not to be paid until the end of the season, yet the form of the defendant's defence in alleging that "the defendant agreed to employ the plaintiff" for the season "at $35 per month" precluded the defendant from now contending that the contract was otherwise than as so alleged.

Grant v. Bradley, 4 S.L.R. 505.

Architect—Preparation of plans and specifications — Remuneration — Evidence —Agency—Ratification.

Armes v. Mancil, 5 D.L.R. 885, 4 O. W.N. 93, 23 O.W.R. 50.

A hiring at "$25 a month for eight months" entitles the employee to payment of his wages at the end of each month. [Taylor v. Kinsey, 4 Terr. L.R. 178, followed and approved.]

Mosseau v. Tone, 7 Terr. L.R. 369.

(§ I C—11)—MEDIUM OF PAYMENT.

An engagement of an engineer at a salary of $3,000 a year payable monthly is a contract for the term of one year and the words "payable monthly" are a mere indication of the manner in which such remuneration is to be paid.

Silver v. Standard Gold Mines, Ltd., 3 D.L.R. 103.

(§ I C—13)—WHERE SERVANT LEAVES BEFORE CONTRACT PERFORMED.

A contract for service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract, and where that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on condition that he had fulfilled his duty as a faithful servant down to that later date. (Dictum per Irving, J.A.)

Murray v. Coast Steamship Co., 8 D.L.R. 378, 22 W.L.R. 572.

D. Hours of labour.

(§ I D—15)—HOURS OF LABOUR.

It is the duty of an able-bodied seaman in service on a ship to obey the master of the ship, and he cannot refuse to work at cargo on Sundays simply to vindicate a principle against Sunday work. [Lord's Day Act, R.S.C. 1906, ch. 153, sec. 6, referred to.]

Murray v. Coast Steamship Co., 8 D.L.R. 378, 22 W.L.R. 572.

E. Termination of relation; discharge; enticing.

(§ I E—22)—GROUNDS FOR DISMISSAL.

No wrongful dismissal of an employee hired to travel for his employers and to assist their local agents in selling goods, is shewn where the reason for the dismissal was the employee's receipt of a bonus from the agents for his assistance to them. [Pearce v. Foster, L.R. 17 Q. B.D. 536, 542; Marshall v. Central Ontario R. Co., 28 O.R. 241, and McIntyre v. Hoskin, 16 A.R. 498, specially referred to.]

Tebb v. Baird; Tebb v. Hobberlin Bros. and Co.; Hobberlin Bros. and Co. v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

(§ I E—23)—LIABILITY FOR WRONGFUL DISCHARGE.

Liability for wrongful dismissal—Amendment of pleading—Disobedience of lawful commands—Statute of Frauds—Part performance.

Smith v. Mills, 8 D.L.R. 1041.

When a contract which can be validly proved by oral evidence is made in writing oral testimony of variations made to it by the parties is admissible. An employee engaged for a term and dismissed without cause before its expiration has a right of action against the hirer of his services to recover the stipulated salary as its instalments fall due.

Charbonneau v. The Publishers' Press, Q.R. 42 S.C. 97 (Sup. Ct.).

The contract for hire of personal services may be continued by tacit renewal. The employee hired for one year, at a salary payable by the week with an agreement for one month's notice by either party to terminate the engagement, if dismissed without notice has a right of action against his employer for the amount of his salary for four weeks.

Choquette v. Paquette Co., Q.R. 42 S.C. 204 (Ct. Rev.).

An engineer engaged to superintend or manage a mine is entitled to employ a secretary to look after the routine business, correspondence, etc., and generally to use his discretion as to the manner in which he shall discharge his duties, and unless a clear abuse of such discretion is shewn, his employer cannot dismiss him before the term of his engagement.

Silver v. Standard Gold Mines, Ltd., 3 D.L.R. 103.

Liability of master for wrongful dismissal—Res judicata—Former proceedings under the Masters and Servants Ordinance.

Chekaluk v. Webster, 7 D.L.R. 866, 21 W.L.R. 159.

(§ I E—25)—LENGTH OF NOTICE; TERMINATING EMPLOYMENT.

Where a railway conductor had been employed continuously for twelve years by the same railway company and the practice of the company had been not to dismiss employees of that grade in their service without holding an official inquiry, it may be assumed, in the absence of any

contract to the contrary, that he should have a reasonable notice of the termination of his engagement other than for cause, and damages for wrongful dismissal are properly computed on the basis of the conductor being entitled to three months' notice.

Halliday v. Canadian Pacific R. Co., 7 D.L.R. 198, 4 O.W.N. 162, 23 O.W.R. 168.

II. Liability of master to servant.

A. Nature and extent; master's duty.

(§ II—30)—LIABILITY OF MASTER TO SERVANT.

The original contractor for the construction of a building, sued by one of the workmen for personal injury resulting from an accident in the course of employment, who pleads that before the date of the accident in question he had assigned his interest in the contract to a third party (without alleging that the plaintiff had been informed of such assignment, by formal notice or otherwise), and who merely produces a copy of such assignment at the close of the trial, will not be held responsible for the amount claimed as damages in the action, but will be held liable for costs of the action where it appears that the assignee of the contract in the meantime made a settlement with the plaintiff as to the amount of damages.

Leberre v. Beauchamp, 18 Rev. de Jur. 380.

(§ II A—35)—NATURE AND EXTENT; MASTER'S DUTY.

The Workmen's Compensation Act (Quebec) presupposes the existence of a legal contract for the hire of services between employer and workman.

Boutin v. Corona Rubber Co., 4 D.L.R. 640, 41 Que. S.C. 519.

(§ II A 1—43)—STATUTE REQUIRING NOTICE OF CAUSE OF INJURY.

Where a workman, a foreigner, under the impression that he was in the employ of a firm, which was the owner of several timber berths in the vicinity in which he was working, and which also owned and operated a saw-mill and conducted extensive logging operations in the same district, gave to the said firm the requisite statutory notice pursuant to the provisions of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, secs. 9 and 13, of the injuries received by him within the time limited by the said Act, his action was maintained aganst his actual employer, a limited liability company operating one of the berths owned by the said firm, notwithstanding the want of strict statutory notice to the company, where it appeared that the foreman in charge of the latter's works, in which the plaintiff was injured, knew of the accident and all the circumstances surrounding the same, and the evidence shewed that defendant company was in no way prejudiced by such failure to give the formal notice, and where the defendants had not pleaded want of notice as a defence but had subsequently, pursuant to sec. 14 of the Act, served notice of intention to set it up at the trial.

Quist v. Serpent River Logging Co., 7 D.L.R. 463, 4 O.W.N. 159, 23 O.W.R. 151.

Notice of inquiry—Workmen's compensation.

Michelli v. Crow's Nest Pass Coal Co., Ltd., 7 D.L.R. 904.

(§ II A 2—47)—EFFECT OF VIOLATION OF RULES.

In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snow-plough, which was being propelled by the locomotive at the time of the accident, by placing a signalman on the plough who had not passed the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death.

Jones v. Canadian Pacific R. Co., 5 D. L.R. 332, 3 O.W.N. 1404, 22 O.W.R. 439.

(§ II A 2—49)—COURSE OF EMPLOYMENT.

Where a delivery man in the employ of the defendants finding two fellow-employees in the office at a time when he wished to make extra deliveries of his employers' goods, requested one of them to accompany him for the purpose of assisting him, and upon neither being willing, obtained permission from one of the defendants to take one of the men, which he did, and on the next day, the delivery man, for the same purpose, took the other employee who was in the office the day before, though not by any special order of any one of the defendants, and after the deliveries were made, the horse they were using ran away and the employee so assisting the delivery man was injured, the injury will be held to have occurred in the "course of his employment."

Veitch v. Linkert, 3 D.L.R. 39, 3 O.W.N. 874.

A workman is not entitled to the benefit of the British Columbia Workmen's Compensation Act, for injuries received while in a place in his master's factory where his duty did not call him, and where he went to procure something for his own convenience and not in his employer's interest. [Smith v. Lancashire, etc., R. Co., [1899] 1 Q.B. 141, and Reed v. Great Western R. Co., [1909] A.C. 31, specially referred to.]

Scalzo v. The Columbia Macaroni Factory, 4 D.L.R. 866, 17 B.C.R. 201, 21 W. L.R. 223.

Evidence that a workman went to his work in his usual good health and afterwards came from his place of employment with a hernia and the nature of his work was such as was specially likely to be the

cause of hernia, is sufficient to establish that the hernia arose "out of and in the course of" his employment within sec. 4 of the Manitoba Workmen's Compensation Act of 1910 (Man.).

Re Eddles and School District (No. 1) of Winnipeg, 2 D.L.R. 696, 21 W.L.R. 214, 22 Man. L.R. 240.

One is not disentitled to the compensation under the provisions of the Workmen's Compensation Act (Alta.), merely by reason of the fact that he contracted to do the work at which he was employed at a lump sum and not upon a time basis.

Cargeme v. The Alberta Coal and Mining Co., 6 D.L.R. 231, 22 W.L.R. 68.

"Course of employment"—Workmen's Compensation Act, R.S.B.C. 1911, ch. 244—Employee working on a pile driver—Presumption that he fell overboard.

Alexander v. Todd, 7 D.L.R. 877.

(§ II A 3—50)—DUTY TO WARN OR INSTRUCT.

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons; but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instruction and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it, or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is intrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants. Young v. Hoffman Manufacturing Co., [1907] 2 K.B. 646, applied. In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law.

Canadian Northern R. Co. v. Anderson, 20 W.L.R. 416.

(§ II A 3—54a)—AS TO WARNING OF SPEED OF MACHINE.

Where a child or young person of comparative inexperience has been employed in working a machine operating at a fixed speed and is transferred to a similar machine operating at a different speed, it is the duty of the employer to warn such employee of the difference in the machines, and in default he will be liable for personal injuries sustained by the employee who, in ignorance of the difference in speed, applied to the operation of the second machine, the movements applicable to the first and was injured in consequence.

Pickard v. Deutcher-Canadier Co., 8 D.L.R. 888, 22 W.L.R. 817.

(§ II A 3—58)—INFANTS, NEGLIGENCE TOWARDS.

It is negligence for a master to direct a minor servant, who was not employed for such position, to work temporarily at a dangerous machine, without warning or instructing him as to the danger, sufficient to render the master liable for an injury sustained by the servant, where, in attempting to unclog such machine, his hand was caught by spikes in a cylinder thereof, which he had never seen. [Smith v. Royal Canadian Yacht Club, 3 O.W.N. 19, distinguished.]

Stokes v. Griffin Curled Hair Co., 4 D.L.R. 844, 3 O.W.N. 1414, 22 O.W.R. 474.

Where a minor under fourteen years of age is illegally employed in an industrial establishment contrary to the provisions of the Quebec Industrial Establishments Act, there is no legal contract for the hire of his services, and if the minor suffers personal injuries, his remedy lies in an action for damages at common law (article 1053 Criminal Code) and not in an action under the Workmen's Compensation Act.

Boutin v. Corona Rubber Co., 4 D.L.R. 640, 41 Que. S.C. 519.

Negligence—Condition of premises—Dangerous work—Infant—Absence of warning—Contributory negligence—Findings of jury.

Crockford v. Grand Trunk R. Co., 1 D.L.R. 923.

(§ II A 4—63)—SCAFFOLD.

Where a labourer, employed in the erection of a building, was ordered to finish some rivets at an elevation of at least fifty feet from the ground and for which work no scaffolding directly under the riveting was provided, and was ordered to place a plank across two beams near the work to be done and use the same for that purpose, and in doing so the plank slipped and he was thrown and injured, the master, by reason of his failure to provide safe scaffolding, is liable for the injuries thus sustained.

Dominion Bridge Co. v. Jodoin, 46 Can. S.C.R. 624, affirming 39 Que. S.C. 103.

Plaintiff was employed by defendant, a contractor, as a carpenter, and in the course of his employment was required to go upon a scaffold, which collapsed, whereby he suffered serious injury. It appeared that proper material had been furnished for use in construction of the scaffold, and that competent workmen had been employed, and that a scaffold constructed of such material and according to the design used, if properly erected, should not collapse. It was also found that the cause of the collapse was the splitting of one of the supporting cleats,

but no explanation as to the cause contributing to this was adduced. In an action for damages:—Held, that where an accident has happened resulting in injury, though the happening of the accident in itself may not be evidence of negligence, yet when the plaintiff establishes that the defendant owed to him a duty to take care, and also establishes that the injuries complained of resulted from a condition of things apparently incompatible with the performance of that duty, the maxim res ipsa loquitur applies, and the onus is cast upon the defendant of accounting for the accident, and if he does not satisfactorily account therefor, the happening of the accident under such a condition of things is evidence from which negligence may be inferred. (2) In this case the defendant not having accounted for the accident, the onus of accounting for which was on him, an inference of negligence must be drawn from the facts stated.

Lindsay v. Davidson, 4 S.L.R. 415.

An employer of workmen in the construction of a building is charged with the duty of making a reasonable inspection of the joists placed in the building on which and about which it is necessary for his servants to work, to ascertain their soundness and suitability for such purpose, and where an employee, in the absence of other means of egress, is compelled to walk across a joist placed in the building twenty-five feet above the ground in order to leave the building when work has ceased, the master, in the absence of such inspection, is liable for personal injuries to the servant resulting from the breaking of the joist from a defect therein.

Lafvendal v. Northern Foundry Co., 2 D.L.R. 155, 20 W.L.R. 714, 22 Man. L.R. 207.

Plaintiff was a carpenter employed by defendant in the construction of a house. While so engaged, a scaffold upon which he was working collapsed, throwing plaintiff to the ground, whereby he suffered injury. It appeared from the testimony on the part of the plaintiff that the persons who erected the scaffold were incompetent, that the material used was improper for that purpose, that the nails used were too small, and were improperly driven. It was also shewn that the cleat upon which the scaffold rested was found split after the accident, but the defendant took possession of these pieces and destroyed them. Apart from the matters above set forth, no explanation was given as to the cause of the accident. In an action for damages, the learned trial Judge applied the doctrine of res ipsa loquitur, and found for the plaintiff. On appeal:—Held (per Wetmore, C.J., and Johnstone, J.), (1) Negligence will not be assumed merely because an accident has happened, the fact of negligence must be proved or facts from which negligence can be presumed, established. (2) The plaintiff having established to the satisfaction of the learned trial Judge a set of facts from which negligence might be inferred, the trial Judge was justified, in the absence of any reasonable explanation by the defendant of the cause of the accident, in finding negligence on the part of the defendant. (3) (Per Newlands and Brown, JJ.) The defendant having destroyed the cleat which supported the scaffold and which was found to be split, and thus making it impossible for the plaintiff to shew that this was the cause of the accident, the onus of proof that there was no negligence was shifted to the defendant, and this onus not having been shifted back to the plaintiff, the findings of the learned trial Judge should not be interfered with.

Lindsay v. Davidson, 4 S.L.R. 415.

The fact that a certain appliance might have prevented the death of a servant will not render a master liable therefor where the jury found that its use would have been impracticable, and that its absence did not amount to a defect.

Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, 21 O.W.R. 808.

(§ II A 4—65)—Trenches.

Where a contractor is digging a trench, and previous blasting has rendered the sides of the trench liable to cave in, so that workmen in the trench are exposed to danger unless the sides are shored up, of which the contractor ought to have known, he is guilty of negligence if he fails to shore up the sides, and a workman is injured in consequence.

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

(§ II A 4—66a)—Walls.

Notwithstanding a servant knew that the method adopted by other servants of the defendant in laying brick in a cornice at the top of a wall fifty feet in height, was unsafe, and was also aware of the risk of injury therefrom, where he did not appreciate the real danger, and had reason to assume that those responsible for building the wall in such manner were exercising due care that it did not proceed to the danger point, the maxim volenti non fit injuria is inapplicable, as the only risk of injury the plaintiff voluntarily agreed to assume as part of his employment was such as he would have incurred had the work been carried on according to safe methods. [Smith v. Baker, [1891] A.C. 325, applied.]

Scotney v. Smith Bros. & Wilson, 4 D.L.R. 134, 21 W.L.R. 287.

(§ II A 4—66b)—Electrical uses and appliances.

A judgment for the plaintiff for negligently causing the death of a servant, will be sustained where the evidence justified the jury in finding that the deceased, a painter, who was free from contributory negligence, was not properly warned of the

danger from highly charged and imperfectly protected electrical wires located within a few inches of the place where he was required to work on a narrow scaffold, that no notice of the dangerous character of the wires was posted, and that the deceased was directed by his master to work at the place where he met his death, and if he had been warned to keep away therefrom, such warning was overriden by subsequent directions.

Lefebvre v. Trethewey Silver Cobalt Mine, Ltd., 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

(§ II A 4—67)—MISCELLANEOUS PLACES AND APPLIANCES.

Although at common law and by statute the servant is entitled to certain safeguards for his safety and protection such as a safe place to work, safe tools and appliances and care in selecting overseers, it is for the master to say just when the servant shall work, and if the master suspends or postpones the work, but continues to pay, the servant cannot complain nor can a damage claim be sustained upon the relation of master and servant in respect of personal injuries sustained by the latter when on the master's premises wholly at his own instance and for his own purposes during a period for which his work was suspended although the employee's wages were being paid in the interim. (Per Garrow, J.A.)

King v. Northern Navigation Co., 6 D.L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

A butcher's shop in which animals are, by slaughter, transformed into meat for sale is a manufactory within the meaning of the Workmen's Compensation Act and workmen there employed are entitled to the indemnity granted in the cases provided for. Under the provisions of article 7337, R.S.Q. 1909, the accidental collaboration of a fellow-workman is not essential; it suffices that a single workman is employed who has the rights and remedies provided by the Act. The indemnity under the Act may be awarded for injuries caused by accident without the necessity to establish negligence.

Thorne v. Roy, 41 Que. S.C. 305 (Sup. Ct.).

Safety as to appliances—Findings of trial Judge.

Rawlings v. Tomiko Mills, Ltd., 3 D.L.R. 876, 3 O.W.N. 1335, 22 O.W.R. 249.

(§ II A 4—68)—STEVEDORING COMPANY.

A stevedoring company is under a duty to its employees engaged in loading a ship by a winch and tackle, to provide against any fouled tackle going over the side of the ship, and to see that some person is on the deck for the purpose of signalling the winchmen to stop on the fouling of the wires supporting the sling board.

Snell v. Victoria and Vancouver Stevedoring Co., Ltd., 8 D.L.R. 32.

(§ II A 4—70)—MACHINERY.

Apart from any statutory obligation, no negligence is shewn on the part of an employer by his failure to place a guard on a dangerous machine where its presence would not have avoided the accident for which suit was brought, though such guard was afterwards placed on the machine, and it appeared that guards had been used in other localities prior to the accident. [Williams v. Western Planing Mills Co., 16 W.L.R. 13, specially referred to.]

Smolik v. Walters, 1 D.L.R. 891, 20 W.L.R. 57.

In an action to recover against a master for injuries received while operating a coping machine, where it appears from the plaintiff's evidence that he was not aware of any defect in the machine and another witness testifies that knowledge of the defect had been brought home to the defendants, such defect being the "tripping" of the machine twice when the operator had worked the "tripper" only once, a verdict by the jury for the plaintiff will not be disturbed on appeal, although it depends solely on the balance of probabilities without definite evidence on either side as to the cause of the repeated operation.

McMullen v. Coughlan, 7 D.L.R. 718, 22 W.L.R. 543.

(§ II A 4—71)—GUARDING DANGEROUS MACHINERY.

Workmen's Compensation for Injuries Act—Negligence—Defective Ways—Unguarded circular saw—Conflict of evidence.

Maitland v. Mills, 4 O.W.N. 557, 23 O.W.R. 688.

In an action for injuries received by reason of the alleged negligence of defendant in failing to provide a guard for a gear, where it is not disputed that the gear should have been securely guarded, that it had been originally guarded, but the guard had been broken but had not been replaced, and that the accident would not have happened if the gear had been guarded, and where there is no evidence of contributory negligence, a verdict by a jury in favour of the defendant will be reversed and a new trial granted.

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559.

A saw-mill is a "factory" within the meaning of sec. 20 of the Nova Scotia Factories Act 1901, which requires that all dangerous parts of mill-gearing, machinery, etc., shall be, so far as practicable, securely guarded, as such Act declares that "mill-gearing" comprises "every shaft, whether upright, oblique, or horizontal."

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

Failure to guard, as required by the Nova Scotia Factories Act of 1901, ch. 1, sec. 20, a protruding set-screw in a revolving shaft in a saw-mill at a point in close proximity to which a servant was required

to work, constitutes a defect, within the meaning of ch. 179, sec. 3 and sub-sec. (a) of sec. 5 of the Employers' Liability Act, R.S.N.S. 1900, in the arrangement of the work and machinery of which the master was aware, so as to render him liable for injuries sustained by the servant through his clothing catching on the set-screw.

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

Failure to guard protruding set-screws in a revolving shaft, as required by sec. 20 of the Nova Scotia Factories Act of 1901, at a place in close proximity to which a servant in the discharge of his duty was compelled to work, and which could have been guarded by placing a board over the shaft, renders the owner of a saw-mill liable for injuries sustained by the servant, whose clothes were caught by such set-screw, while he was in the discharge of his duty.

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

A violation of sub-sec. 1 (a) of sec. 20 of the Factories Act (Ont.), is sufficient to justify a verdict in favour of a servant, where it is shewn that he would not have been injured if a set-screw in a shaft, which was admittedly dangerous, had been securely guarded or sunk into the shaft.

McClement v. Kilgour Manufacturing Co., 3 D.L.R. 462, 3 O.W.N. 999, 21 O.W.R. 856.

In an action by the conductor of a construction train for injuries resulting from a wing of a gravel-spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, which, owing to the darkness, he could not see from where he stood without a light, to ascertain if there was sufficient air in the reservoir of the machine to operate the same, a motion for the nonsuit was rightly refused, it being for the trial Judge to say whether any facts have been established in evidence from which negligence may be inferred, and for the jury to say whether or not from these facts negligence ought to be inferred. [Metropolitan R. Co. v. Jackson, 3 A.C. 197, followed.]

Tobin v. Canadian Pacific R. Co., 2 D.L.R. 173, 20 W.L.R. 676.

(§ II A 4—75)—In mines.

In an action by a plaintiff workman against his employer for damages for an injury caused while at work on a ledge of rock, where the inference from the plaintiff's own testimony was that the clearing off of the debris on an incline above the ledge, if it had been well and carefully done, was a reasonable and proper measure of protection to the workmen, and where that clearing off was done by the plaintiff himself and his fellow-workmen, the defendant employer (unless negligent by knowingly appointing incompetent servants or omitting statutory precautions) escapes liability, under the doctrine of common employment, for the negligence of the fellow-workmen although the jury's finding grouped together as the cause of the injury both the negligent clearing and the omission to erect a barrier to deflect falling rock, which latter method was according to the plaintiff's evidence necessary only where the clearing could not be undertaken. [McDonald v. B.C. Electric R. Co., 16 B.C.R. 386, referred to.]

Bergklint v. Western Canada Power Co., 7 D.L.R. 720, 22 W.L.R. 535.

An action by a workman in respect of personal injuries caused by a stone rolling down a higher incline on to a ledge of rock upon which the plaintiff was working, fails, where the eminence above the ledge had been cleared to their own satisfaction by the plaintiff himself and the fellow-workmen sent by the superintendent of the works to clear such incline for the purpose of ensuring safety in such operations. [McDonald v. B.C. Electric R. Co., 16 B.C.R. 386, referred to.]

Bergklint v. Western Canada Power Co., 7 D.L.R. 720, 22 W.L.R. 535.

Workmen's Compensation Act—Liability to person injured while removing coal from mine—"Undertaker" as defined by Act—Meaning of "workman"—Casual employment.

Armstrong v. McIntyre, 7 D.L.R. 786.

(§ II A 4—76)—Pentices.

Where a trap door built over a mining shaft was negligently left open, by reason whereof a rock fell through it from another level of the mine and injured one of the miners, there is an omission on the part of the mining company of a statutory obligation under rule 17 of the Ontario Mining Act, 1908, to "provide a suitable pentice" for the protection of the workmen working on the lower level while work was going on on a higher level, and this notwithstanding that the trap door while kept closed would be effective as a pentice.

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 3 O.W.N. 695, 21 O.W.R. 454, 25 O.L.R. 524.

Mines—What places must be made safe in.

Temiskaming Mining Co. v. Siven, 8 D.L.R. 1030, 23 O.W.R. 312, 46 Can. S.C.R. 643.

(§ II A 4—83a)—Head-lights.

Where the plaintiff, in an action under the Fatal Injuries Act (Ont.) for damages for the death of her husband who had been run over by a train while employed as a section-man upon the railway, pleaded lack of notice or warning of the approach of the train and the defendant railway company pleaded in answer that the accident was not caused by their neglect or omission, the

fact that evidence was given and submitted to the jury at the trial of the failure to maintain a head-light in accordance with the company's rules, although that point was not more specifically raised by the pleadings, will not be a ground for granting the defendants a new trial, if they were not taken by surprise, but stood upon the evidence given and raised no objection until after verdict.

Graham v. Grand Trunk R. Co., 1 D.L.R. 554, 3 O.W.N. 538, 20 O.W.R. 965, 25 O.L.R. 429, 13 Can. Ry. Cas. 232.

(§ II A 4—89)—SWING BRIDGE.

Where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to his own negligence. [Smith v. Grand Trunk R. Co., 2 D.L.R. 251, reversed; Smith v. Grand Trunk R. Co., 3 O.W.N. 379, restored.]

Smith v. Grand Trunk R. Co. (No. 2), 8 D.L.R. 171, 4 O.W.N. 42, 23 O.W.R. 805.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned, although the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights on the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so. [Smith v. Grand Trunk R. Co., 3 O.W.N. 379, restored; Smith v. Grand Trunk R. Co., 2 D.L.R. 251, reversed.]

Smith v. Grand Trunk R. Co. (No. 2), 8 D.L.R. 171, 4 O.W.N. 42.

(§ II A 4—94a)—POLE NEAR TRACK.

A railway company which has complied with an order of the Board of Railway Commissioners, under sub-sec. (g) of sec. 30, ch. 37, R.S.C. 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming in contact with a stand pipe located as required by such order. [G.T.R. v. McKay (1903), 34 Can. S.C.R. 81, followed.]

Clark v. Canadian Pacific R. Co., 2 D. L.R. 331, 20 W.L.R. 877.

(§ II A 4—100)—RUNNING OF TRAINS.

Deceased was employed in the defendants' workshops, and travelled to and from his work on a pass. The condition on the back of the pass, exempting the company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the company unless given transportation. The jury found as a fact that deceased was travelling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial Judge:—Held, per Macdonald, C.J.A., and Galliher, J.A.:—That the finding as to want of knowledge of the condition on the pass should not be interfered with. Per Irving, J.A.:—That the finding was against the weight of evidence. Deceased, while travelling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow-servants in the employment of defendant company, but there was no other evidence of negligence:—Held, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible. Appeal allowed, and verdict set aside.

Farmer v. The British Columbia Electric Railway Co., Ltd., 16 B.C.R. 423.

(§ II A 4—105)—RUNNING SNOW PLOUGH.

A case for compensation under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, but not a case at common law, is shewn where an engineer in charge of a locomotive propelling a snow plough ran it for some time without ascertaining why crossing or station signals were not being given by the signalman on the plough, and a collision with another train resulted, in which the fireman of such locomotive was killed.

Jones v. Canadian Pacific R. Co., 5 D. L.R. 332, 3 O.W.N. 1404, 22 O.W.R. 439.

(§ II A 4—109)—FAILURE TO OBSERVE STATUTORY REQUIREMENTS.

Section 276 of the Railway Act, R.S.C.

1906, ch. 37, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under that section. [McMullin v. N.S. Steel and Coal Co., 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593, and Lamond v. G.T.R. Co., 7 Can. Ry. Cas. 401, 16 O.L.R. 365, followed.]

Pettit v. Canadian Northern R. Co., 7 D.L.R. 645, 22 W.L.R. 265.

B. Servant's assumption of risks.

(§ II B 2—130)—DANGERS OBVIOUS AND INCIDENTAL TO WORK.

The plaintiff's claim was for injuries sustained by the explosion of some dynamite while he was thawing it for use in blasting out hard pan in a gravel pit under the superintendence of one Campbell, a roadmaster in defendant's employ. In answer to questions, the jury at the trial found that the plaintiff was ignorant of the material he was using, that Campbell had not given him proper instructions, that the injury had been caused by the negligence of the defendant company, that such negligence consisted in not employing a competent person to superintend the work and in not furnishing proper appliances and storage for explosives, and that the defendant company had not used reasonable and proper care and caution in the selection of the person to superintend the work:—Held, Howell, C.J.M., dissenting, that the evidence at most shewed that, on the occasion in question, Campbell might have been negligent in his superintendence of the work, that there was no proof of his incompetency otherwise or that the defendant had been negligent in appointing him, or in furnishing proper appliances, the onus of proving which was on the plaintiff, and, therefore, the plaintiff could not recover at common law, but was entitled under the Workmen's Compensation for Injuries Act, R.S.M. 1902, ch. 178, sec. 3, to the amount alternatively fixed by the jury under sec. 6 of that Act. [Smith v. Howard (1870), 22 L.T.N.S. 130; Young v. Hoffman, [1907] 2 K.B. 650, and Cribb v. Kynoch, [1907] 2 K.B. 548, followed.] Per Howell, C.J.M.:—There was evidence to submit to the jury on all the questions answered by them and the verdict for damages at common law should not be disturbed:—Held, also, by all the Judges that the damages had not been "sustained by reason of the construction or operation of the railway," and, therefore, the plaintiff was not barred by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, from bringing his action after the lapse of one year.

Anderson v. Canadian Northern R. Co., 13 Can. Ry. Cas. 321; 21 Man. L.R. 121.

(§ II B 3—141)—DEFECTIVE OR DANGEROUS TOOLS, MACHINERY, APPLIANCES, PLACES OR METHODS OF WORK; ELEVATORS.

Liability covered by insurance—Election to proceed without jury—Workmen's Compensation for Injuries Act—Notice not given in time—Factories Act—Necessary to guard shaft of elevator—Proximate cause—Common law—Defective system—Conflict of evidence—Volunteer.

Gower v. Glen Woollen Mills, Limited, 4 O.W.N. 467, 23 O.W.R. 553.

(§ II B 3—143)—MACHINERY GENERALLY.

If a servant, who has been injured in the course of his employment, has disobeyed any order of his master, or has put himself in the wrong place or otherwise acted as he should not, and if his act was one without which he would not have been injured, he cannot recover damages from his master, even though his act was due to mere inadvertence. [D'Aoust v. Bissett, 13 O.W.R. 1115, and Mercantile Trust Co. v. Canada Steel Co., 3 O.W.N. 980, followed.]

Corea v. McClary Manufacturing Co., 3 D.L.R. 323, 3 O.W.N. 1071, 21 O.W.R. 909.

(§ II B 3—144)—UNGUARDED.

A machine which was no part of a factory or plant, but a product thereof manufactured for a customer, is not within the words or intention of sec. 32, ch. 8, of the B.C. Factories Act of 1911, which requires the secure guarding, so far as practicable, of all dangerous parts of mill-gearing, machinery, shafts, etc., so as to render a manufacturer liable where a servant sustained injuries while testing such newly constructed machine, by coming into contact with a portion thereof which was not guarded as such section required, since it was necessary that such portion should be exposed to view in order that all parts of the machine might be properly inspected.

Everett v. Schaake, 4 D.L.R. 147, 17 B.C.R. 271, 21 W.L.R. 525.

The maxim, volenti non fit injuria, is not applicable where a servant sustains injuries as a result of a violation of a statutory duty by a master. [Thomas v. Quartermaine, 18 Q.B.D. 685; Rodgers v. Hamilton Cotton Co., 23 Ont. R. 425; Baddeley v. Earl of Granville, 19 Q.B.D. 423; Kelly v. Glebe Sugar Co., 20 Rettie, 833; Thompson v. Wright, 22 Ont. R. 127; Groves v. Lord Wimborne, [1898] 2 Q.B. 402, and Beven on Negligence, 3rd ed., p. 645, specially referred to; see also Clark v. C.P.R., 2 D.L.R. 331.]

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

A servant who continues in an employment with knowledge of the close prox-

imity of a protruding set-screw in a revolving shaft that was not guarded, as required by ch. 1, sec. 20, of the Nova Scotia Factories Act of 1901, does not thereby voluntarily assume the risk of injury therefrom, so as to deprive himself of a cause of action for personal injuries under the Employers' Liability Act of N.S. 1900. [Compare Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 25 O.L.R. 524.]

Kizer v. The Kent Lumber Co., Ltd., 5 D.L.R. 317, 11 E.L.R. 41.

The maxim volenti non fit injuria has no application where a servant is injured as a result of a master's violation of a duty imposed by statute. [Baddeley v. Granville (1887), 19 Q.B.D. 423, and Rogers v. Hamilton Cotton Co., 23 O.R. 425, followed; Thomas v. Quartermaine (1887), 1 Q.B.D. 685; Love v. New Fairview Corporation (1904), 10 B.C.R. 330, and Bell v. Inverness Coal and R. Co. (1908), 42 N.S.R. 265, specially referred to.]

McClemont v. Kilgour Manufacturing Co., 3 D.L.R. 462, 3 O.W.N. 999, 21 O.W.R. 856.

The workman who, knowing of the danger of using a machine not properly protected, voluntarily continues to do so and is injured does not necessarily come within the principle of the maxim volenti non fit injuria. If his employer, also aware of the defective nature of the machine, has failed to provide a remedy, and has allowed the workman to use it in its unprotected condition there is fault and common liability.

Viau v. Villeneuve, Q.R. 21 K.B. 263.

A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily merely because the servant, in the exercise of his duty, performed the service, instead of refusing to do so at the risk of dismissal.

McClemont v. Kilgour Manufacturing Co., 8 D.L.R. 148, 4 O.W.N. 313.

A servant who does that which his duty requires him to do, though it may be dangerous, and does it in a reasonable manner, so as not to increase the risk, does not bring himself within the rule volenti non fit injuria. [McClemont v. Kilgour Manufacturing Co., 3 D.L.R. 462, 3 O.W.N. 999, affirmed.]

McClemont v. Kilgour Manufacturing Co., 8 D.L.R. 148, 4 O.W.N. 313.

(§ II B 3—146)—IN MINE.

The doctrine of "volenti non fit injuria" applies to bar a negligence action by an employee for personal injury in respect of the employer's failure to protect the place of work on a hillside from falling stones and debris, where the nature of the risk was known to the employee, who with his fellow-workmen had done the work they thought sufficient to guard the place against the stones and debris, and where the plaintiff was an experienced man at such work. (Per Irving, J.A.) [Smith v. Baker, [1891] A.C. 325, distinguished.]

Bergklint v. Western Canada Power Co., 7 D.L.R. 720, 22 W.L.R. 535.

The relation of master and servant implies an obligation on the part of the master to provide for the safety of his servant in the course of his employment to the best of the master's judgment; yet, in that sort of employment where the servant must have known as well as his master, or probably better, whether or not the place was safe, it is the servant's duty to exercise diligence and caution to avoid danger. (Per Irving, J.A.) [Priestley v. Fowler (1837), 3 M. & W. 1, applied.]

Bergklint v. Western Canada Power Co., 7 D.L.R. 720, 22 W.L.R. 535.

The plaintiff, a miner in the employ of the defendant, was injured by an explosion in the defendants' mine, and sued to recover damages. The jury found that the plaintiff's injury was caused by the defendants' negligence, and that the plaintiff was not guilty of contributory negligence, and they assessed the damages at $1,500. On appeal:—Held, that there was evidence to support the jury's finding that the defendants were guilty of negligence, but the jury's finding that the plaintiff was not guilty of contributory negligence was unsupported by the evidence, and must be reversed. Held, further, that there had been a mis-direction to the jury by the trial Judge in instructing the jury that the question of contributory negligence only arose in case the jury found that the company had carried out their statutory obligations and their common law duties. Held, further, that there should be a new trial on the ground of improper admission of evidence, such evidence consisting in a policy of insurance whereby the defendants were insured against loss to the sum of $1,500. Judgment of Sifton, C.J., set aside, with costs, and new trial ordered.

Davies v. The Canadian American Coal and Coke Co., Ltd., 7 Terr. L.R. 240.

(§ II B,3—156)—TRACK AND ROADBED.

Where in emergency work on a railroad, a member of the wrecking crew, while assisting in clearing the track after an accident from an unknown cause, is injured by the unexpected and unusual plunge of a twisted rail on its release by cutting the bolts on the fish-plate connecting the rail, no negligence is shewn against his employer and the doctrine res ipsa loquitur does not apply. [Readhead v. Midland, L.R. 4 Q.B. 379; Ferguson v. Canadian Pacific R. Co., 12 O.W.R. 943; O'Brien v. Michigan Central R. Co., 19 O.L.R. 345, specially referred to.]

Rostrom v. Canadian Northern R. Co., 3 D.L.R. 302, 21 W.L.R. 225, 22 Man. L.R. 250.

(§ II B 4—158)—Speed of train.

A car cleaner employed by the defendants was injured through being struck by a locomotive engine while walking upon the track upon which the engine was moving. The jury at the trial found that the injured party was not guilty of any negligence which caused or contributed to the accident, but that the negligence which caused the accident was improper light of yards during the time of alterations and the train being a little ahead of time running at an excessive speed. The jury did not answer the question as to failure to ring the bell. It was held, that the accident was not due to actionable negligence on the defendant's part and the action must be dismissed. Moss, C.J.O.:—When a jury exonerate an injured party from the charge of contributory negligence upon the evidence which but for the finding would appear to shew very convincingly that he was the author of his own injuries, the Court should ascertain whether there is evidence upon which the jury might reasonably find negligence on the part of the defendants which actually caused the injury or whether the findings of the jury make a case of actionable negligence against the defendants. Charges of alleged negligence expressly put to the jury upon which the jury did not make a finding must be taken to have been negatived. Meredith, J.A.:—There was no duty owed by the defendants to the plaintiff regarding the time of arrival of any of its trains. There is no rule of law limiting the rate of speed of railway trains in the interests of railway workmen. [Andreas v. Canadian Pacific R. Co., 37 Can. S.C.R. 1, 5 Can. Ry. Cas. 450, followed.]

Paquette v. Grand Trunk R. Co., 13 Can. Ry. Cas. 68, 19 O.W.R. 305.

(§ II B 4—160)—Knowledge by servant of defect or danger.

Where a servant was killed by a brick falling through an opening in a platform under which his work did not take him the master is not answerable therefor where the servant had been warned as to and knew the danger of going under the opening, and had been expressly directed to keep away therefrom. [Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, affirmed on appeal.]

Mercantile Trust Co. v. Canada Steel Co. (No. 2), 5 D.L.R. 55, 3 O.W.N. 1467, 22 O.W.R. 568.

(§ II B 4—161)—In railway cases.

Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim volente non fit injuria applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto. (Per Galliher, J.A.)

Clark v. Canadian Pacific R. Co., 2 D. L.R. 331, 20 W.L.R. 877.

(§ II B 4—162)—Failure to complain.

Where the mode of laying brick in a cornice at the top of a brick wall 50 feet in height, which was in itself architecturally sound, was unsafe as a result of the system or method of laying it adopted by servants of the defendant other than the plaintiff, the master will be liable for injuries sustained, through the falling of the wall, by a servant, an experienced bricklayer, who, without complaint as to the manner in which the work was being done, continued to work thereon, where, notwithstanding he knew that the manner of laying brick was unsafe, he did not fully appreciate the real danger he was incurring. [Ainslie Mining and R. Co. v. McDougall, 42 Can. S.C.R. 420; Lindsay v. Davidson, 19 W.L.R. 433, and Smith v. Baker, [1891] A.C. 325, specially referred to.]

Scotney v. Smith Bros. & Wilson, 4 D. L.R. 134, 21 W.L.R. 287.

(§ II B 6—170)—Compliance with commands.

Where the defendant's donkey engine was being moved by its pulling with its own steam upon a cable attached to a stationary object, thus being dragged along in the direction desired and was operated by the plaintiff, the engineer, who was standing on the two handles which worked the drums on one of which the cable was being rolled up as the engine moved along, though there was a runner along the side of the engine which would have been a safer place for him to stand if the engine should jerk, and the engine stuck fast and would not go ahead and the defendant's foreman in charge of the work shouted to the plaintiff to "slacken her up and give her head," meaning to loosen the cable and then go ahead at full steam so that when the cable pulled taut the engine would be jerked over the obstruction, and the plaintiff obeyed the order, and the jerk resulting threw him off the engine and injured him, there being no evidence that the foreman knew that the plaintiff was riding on the handles, these circumstances shewed no negligence within sub-sec. 3 of sec. 3 of the British Columbia Employers' Liability Act, providing that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in his employ. [Wild v. Waygood, [1892] 1 Q.B. 783, specially referred to.]

Latham v. Heaps, 2 D.L.R. 313, 20 W. L.R. 819, 17 B.C.R. 211.

It is immaterial, under the Quebec Workmen's Compensation Act, that the workman is paid by the piece or by the foot, provided the work is done on the premises, and under the supervision of the employer.

Beaulieu v. Picard, 7 D.L.R. 2, 42 Que. S.C. 455.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and the workman is injured by an explosion of the dynamite, the foreman's employer is responsible to the workman for such injuries under sub-sec. (2) of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

Nigro v. Donati, 6 D.L.R. 316, 4 O.W.N. 2, 22 O.W.R. 974.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and the workman is injured by an explosion of the dynamite, the foreman's employer is responsible to the workman for such injuries under sub-sec. (2) of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160. [Nigro v. Donati, 6 D.L.R. 316, affirmed.]

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

(§ II B 6—171)—In ditch or trench.

In order to establish a case under the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160), of liability for the negligence of a superintendent, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. (Per Clute, J.) [Kearney v. Nicholls, 76 L.T. News. 63, followed.]

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

Where a foreman in charge of blasting operations charges a drill hole with dynamite, and, forgetting that he has done so, orders one of the workmen to clean out the hole, and where the workman had been told by his employer to obey the orders of the foreman, and did obey, the employer may be held liable in damages under sub-sec. 3 (as well as under sub-sec. 2) of sec. 3 of the Workman's Compensation for Injuries Act, R.S.O. 1897, ch. 160. [Osborne v. Jackson, 11 Q.B.D. 619; Cox v. Hamilton Sewer Pipe Co., 14 O.R. 300; Lefebvre v. Trethewey Silver Cobalt Mine, 5 D.L.R. 195, 3 O.W.N. 1535; Evans v. Astley, [1911] A.C. 674, 678, referred to.]

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

(§ II B 6—173)—Machinery generally.

Negligence on the part of an employer resulting in injury to one of his employees is shewn where it appears that his foreman, while men under him were engaged in moving across the floor of the master's works a heavy iron beam with hooks large and adequate enough to carry the beam, ordered the men to use smaller hooks because the larger hooks, on account of their length, would not lift the beam over a pile of iron stringers on the floor, and where it was proved that the smaller hooks were insufficient for the purpose and permitted the beam to fall, injuring one of the men engaged in the work of removing it. [Smith v. Hamilton Bridge Works Co., 3 O.W.N. 177, 20 O.W.R. 227, affirmed on appeal.]

Smith v. Hamilton Bridge Works Co., 5 D.L.R. 216, 3 O.W.N. 1524, 22 O.W.R. 872.

(§ II B 7—175)—Minor employees.

Workmen's Compensation for Injuries Act, sec. 3 (5)—Negligence of fellow-servant—Person in control of machine upon tramway—Findings of jury.

Dunlop v. Canada Foundry Co., 2 D.L.R. 887, 3 O.W.N. 932.

(§ II B 8—180)—Fellow-servant's negligence.

It is actionable negligence when defendant's servants placed a plank in a weak and insecure position for the workmen to walk up so that it tilted while the plaintiff was turning over a box of bolts end over end upon it in loading a dray alongside his employer's warehouse, with the result that the plaintiff, who did not know that it was insecure, fell and was injured, particularly where by statute the employer is held liable for the negligence of a fellow-workman of the injured party. [N.W. Ord. (Alta.) 1911, ch. 98.]

Brand v. Ross Brothers, 8 D.L.R. 256, 22 W.L.R. 781.

C. Contributory negligence of servant.

(§ II C 1—185)—Contributory negligence of servant.

In the absence of an express finding by the jury that a servant at the time he was killed was guilty of contributory negligence a master will not be liable therefor on the theory that his death was the result of a mere act of inadvertence upon the servant's part during the course of his employment. [Laliberte v. Kennedy (Ont.), not reported, and Wilson v. Davis, 10 O.W.R. 315, specially referred to.]

Mercantile Trust Co. v. Canada Steel Co., 3 D.L.R. 518, 3 O.W.N. 980, 21 O.W.R. 808.

Held, upon the evidence, in an action for damages for injuries sustained by the plaintiff, while working for the defendants in the woods as a rigging slinger, that the findings of the jury that a part of the defendants' plant was defective and that the plaintiff was not guilty of contributory negligence were supported by the evidence; that the case was brought within the Employers' Liability Act; and that the judgment entered for the plaintiff, upon the jury's findings should not be disturbed; Irving, J.A., dissenting. Per Irving, J.A., that there was no case to go to the jury that the injury was caused by reason of the defect in the plant; and that it was plainly caused by the plaintiff's own negligence. Per Irving, J.A., also, that answers given in re-examination to leading questions, expressed in terms which conflict with what the witness has said in cross-examination, are no guide in arriving at the truth.

Calneck v. Vancouver Timber and Trading Co., 18 W.L.R. 318 (B.C.).

(§ II C 1—192)—RIGHT TO SET UP, VIOLATION OF STATUTE.

A servant, whose duty required him to work in a restricted place at a table in close proximity to a set-screw in a revolving shaft that was not guarded, as required by sec. 20 of ch. 1 of the Nova Scotia Factories Act of 1901, is not guilty of contributory negligence, where, while passing over the table in the discharge of his duties, his clothing was caught by such set-screw and he was seriously injured. [Compare Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 25 O.L.R. 524.]

Kizer v. The Kent Lumber Co., Limited, 5 D.L.R. 317, 11 E.L.R. 41.

(§ II C 2—195)—RAILWAY AND STREET RAILWAY CASES.

An employee of a railway company is guilty of contributory negligence, which will bar a recovery of damages by his personal representatives against the railway company for his death in the course of his employment, where it is shewn that the deceased was walking between two parallel tracks in a railway yard, and, without looking to ascertain if any train was approaching, stepped upon a track on which a freight train was moving and where the yard helper on one of the moving cars had done his utmost to warn the deceased, and when it became apparent that no notice was being paid to the warnings, immediately gave the stop signal, and caused the brakes to be applied, although not in time to prevent the deceased being struck.

McEachen v. Grand Trunk R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

The plaintiff's husband, a brakeman, in the employ of the defendants, was accidentally killed while walking on a siding by being run over by one of the cars of the defendants. The negligence charged was that (1) the plaintiff was compelled to walk upon the siding, no way being left on either side on account of lumber being piled too close; (2) the siding had become defective, unsafe and insufficient by reason of the accumulation of snow and ice; (3) the railway frog was not packed and the coupling lever was defective:—Held, 1. That the proximate cause of the accident was the falling of the deceased on the siding and being run over by a moving car. 2. That the unsafe and almost impassable condition of the said siding and the defective construction or condition of the coupling, if it was defective, owing to the negligence of the defendants were not the proximate cause of the accident. 3. That the deceased took the risk of accident by disobedience to the orders of the defendants and no action for negligence would lie.

Pettigrew v. Grand Trunk R. Co., 13 Can. Ry. Cas. 118.

(§ II C 2—199)—COUPLING CARS.

The fact that a box freight car was not equipped with ladders at the ends as required by sub-sec. 5 of sec. 264 of the Railway Act, will not render a railway company liable for injuries sustained by a servant while attempting to couple cars, where the absence of such ladder was not the contributing cause of such injury.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

It is contributory negligence for a brakeman while standing with one foot on a loose step on the side of a box car 6½ inches below the bottom thereof, and with one hand holding a rung of a ladder on the side of the car 14 inches above the bottom of the car, to attempt to open the coupling device by working the lever that operated it, the end of which was about 15 or 16 inches from the side of the car.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

A verdict for the defendant should be directed where the evidence shews that the plaintiff, a brakeman in the former's employ, received an injury as the result of his own carelessness while attempting to couple cars, and not as the result of the absence of a ladder from the end of a car that, in the interchange of traffic, under sec. 317 of the Railway Act, was received by the defendant from and was owned by a railway company operating in the United States, which was not shewn to be under any obligation, statutory or otherwise, to maintain ladders on the ends as well as the sides of its box freight cars.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

(§ II C 2—201)—Dangerous position on car.

Where one employed by another as a car repairer was ordered by another employee to assist him in repairing a car standing upon a track in the yard when other cars were propelled against it and injured him, the master, in the absence of a plea of volens or evidence that the negligence of the servant contributed to the injury, is liable in an action under the Workmen's Compensation Act (Ont.) for the injuries thus sustained.

Grand Trunk R. Co. v. Brulott, 46 Can. S.C.R. 629, affirming Brulott v. G.T.R. Co., 24 O.W.R. 154, 19 O.W.R. 514.

D. Disobedience of rules.

(§ II D—205)—Disobedience of rules.

The fact that a workman, despite warnings, persists in remaining in a place of danger where he is killed is inexcusable fault on his part for which the damages should be diminished, but it does not mean that the accident was intentionally induced by him so as to deprive his representatives of the right to any indemnity. When an accident happens during working hours it is not necessary that it should occur in the immediate vicinity of the place assigned to the workman who is its victim; it suffices that it was occasioned by the work. Thus, the employee engaged on special work near the surface of a stone quarry who is killed by the fall of stone being hoisted at another place some twenty feet away from a pit about thirty feet below him, with no explanation of his presence there, is the victim of an accident for which his representatives may recover damages. The condition of a workman killed by an accident in the course of his employment who is the sole support of the ascendant who claims indemnity raises only a question of fact. If, then, the deceased was the plaintiff's sole support the latter is entitled to indemnity though he contributed to the maintenance of others.

Dominion Quarry Co. v. Morin, 21 Que. K.B. 147.

E. Fellow-servants and their negligence.

(§ II E—210) — Fellow-servants and their negligence.

Where an employee, while engaged with fellow-workmen in rolling up timbers on flat cars, which timbers were similar to telegraph poles, being larger at one end than the other, and the only inference to be drawn from the evidence as to the cause of the accident is one of three alternatives:—(1) the small end was rushed up too fast; or (2) the fellow-employees of the plaintiff let go the big end when they should and could have held it; or (3) there was not sufficient men on the job to hold the timber up, a judgment by the trial Court in favour of the defendant will be reversed on appeal and judgment entered for the plaintiff for his damages sustained. [Rostrom v. C.N.R., 3 D.L.R. 302, 21 W.L.R. 225, distinguished.]

Torangue v. The Canadian Pacific R. Co., 8 D.L.R. 211.

(§ II E 2—216)—In mine.

The defence of common employment has no application to the breach of the statutory duty to supply a "pentice" to protect a shaft, imposed by statutory rule 17 of sec. 164 of the Mining Act of Ontario, 8 Edw. VII. ch. 21. [Sault Ste. Marie Pulp and Paper Co. v. Myers, 33 Can. S. C.R. 23, followed; Groves v. Wimborne, [1898] 2 Q.B. 402, specially referred to.]

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 3 O.W.N. 695, 21 O.W.R. 454, 25 O.L.R. 524.

(§ II E 4—225) — Workmen's Compensation Act.

In order to recover under the Workmen's Compensation for Injuries Act, C.S. 1903, ch. 146, as amended by 8 Edw. VII, ch. 31, sec. 3 (a) for injuries caused by a defect in the condition or arrangement of the gear, etc., connected with, intended for, or used in the business of the employer, the workman must prove that the defect was due to negligence on the part of the employer.

Campbell v. Donaldson et al., 40 N.B.R. 525.

(§ II E 4b—230)—Operation of railroads.

Held, that the jury having found that the defendants were negligent and the plaintiff free from contributory negligence necessarily precluded a finding that the plaintiff was volens. Held, Idington, J.: —That section 306 of the Railway Act was not applicable to the facts of this case and volens should have been specially pleaded. Davies, J., dissenting, thought there should be a new trial.

Grand Trunk Pacific R. Co. v. Brulott, 13 Can. Ry. Cas. 95, 21 O.W.R. 206.

Sub-section 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R. S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. The plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders, M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—Held (Lennox, J., dissenting), that there was reasonable evidence that M. was, on the occasion in question, a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon

the findings of the jury (set out below), in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M. Judgment of Mulock, C.J.Ex.D., affirmed.

Martin v. Grand Trunk R. Co., 27 O.L.R. 165.

The plaintiff and T. were both employed by the defendants. The plaintiff was assisting T. in repairing a car standing on a track in the defendants' yard, when the yard-engine propelled other cars against the car under repair, and injured the plaintiff, who brought this action to recover damages for his injuries, under the Workmen's Compensation for Injuries Act, alleging negligence on the part of T., a person in a position of superintendence to whose orders the plaintiff was bound to conform and did conform, in not placing a flag or flags in a position to give warning that work was going on upon the track. At the trial, the jury, in answer to questions, found:—(1) that the plaintiff's injuries were caused by negligence of the defendants; (2) that the negligence was the neglect of T. in not placing the flag for protection; (3) that the injuries were caused by the negligence of a person in a position of superintendence over the plaintiff and to whose orders he was bound to conform; (4) that T. was that person, and his negligence consisted in not placing the flag; (5) that the plaintiff's injuries were not caused by his own want of care; "it was no part of his duty to place these flags;" and they assessed the damages at $1,980:—Held (Meredith, J.A., dissenting), that, notwithstanding that the jury had not found that T. was exercising superintendence at the time of the injury, and had not found that the plaintiff did conform to T.'s orders, yet, having regard to the evidence and the Judge's charge, the findings were sufficient, under the Workmen's Compensation for Injuries Act, to support a judgment for the plaintiff. [Marley v. Osborn (1894), 10 Times L.R. 388, specially referred to.] After counsel had addressed the jury, and when the Judge was about to begin his charge, a discussion arose about the frame of two of the questions proposed to be submitted to the jury, in the course of which the defendants' counsel suggested another question:—"Did the plaintiff voluntarily perform the acts which caused his accident, knowing of the dangers which he ran?" This defence was not set up in the pleadings nor previously at the trial; and no application was made for leave to amend or to reopen the case or postpone the trial. The Judge declined to submit the question, saying that he did not think it fair to introduce it at that stage:—Held, Meredith, J.A., dissenting, a proper exercise of discretion. Judgment of Falconbridge, C.J.K.B., affirmed.

Brulott v. Grand Trunk R. Co., 13 Can. Ry. Cas. 76.

(§ II E 5—252)—Trackmen and trainmen.

A person employed by a railway company as a watchman at the crossing of its railway with a street railway at level is a fellow-servant with the crew of a train passing over the crossing; and, if he is killed in consequence of the negligence of the train crew, his widow cannot recover damages at common law against the railway company. [Waller v. South Eastern R. Co., 2 H. & C. 102; Morgan v. Vale of Neath R. Co., L.R. 1 Q.B. 149; and Lovell v. Howell, 1 C.P.D. 161, followed.]

Pettit v. Canadian Northern R. Co., 7 D.L.R. 645, 22 W.L.R. 265.

(§ II E 5—255)—Vice-principal.

A teamster employed by a company to carry its workmen to and from their work, has not "superintendence entrusted to him" over the workmen whom he is carrying, within the meaning of the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160, sec. 3), and a workman injured by his negligence has no right of action against the company under that statute.

Demers v. Nova Scotia Silver Cobalt Co., 3 D.L.R. 346, 3 O.W.N. 1206, 22 O.W.R. 97.

The application of the rule respondeat superior to each particular case depends upon facts and is a question of fact. [McCartan v. Belfast Harbour Commissioners, [1911] 2 Ir. R. 143, 44 Ir. L.T. 223, referred to.]

Pattison v. Canadian Pacific R. Co., 5 D.L.R. 582, 3 O.W.N. 1245, 22 O.W.R. 131, 26 O.L.R. 410.

(§ II E 5—256)—Foreman.

Under sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under immediate orders of such superintendence, and it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, although each may be occupied in distinct departments of that common object; but the case is much stronger where the plaintiff was under the orders of the foreman doing the work in question. [Darke v. Canadian General Electric Co., 4 D.L.R. 259, 3 O.W.N. 817; Kearney v. Nichols, 76 L.T. 63, followed.]

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438.

It is inexcusable fault, involving the employer's liability, for a foreman to do a

direct act of disobedience to the well-known rules of the establishment (e.g., giving orders to a workman to enter a "cyclone" stone-crushing machine without previously removing the transmission belt therefrom, and later putting the machine in motion without ascertaining whether such workman had left it).

Houle v. Asbestos and Asbestic Co., 3 D. L.R. 466, 42 Que. S.C. 176.

Under sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under immediate orders of such superintendence, and it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, although each may be occupied in distinct departments of that common object. [Kearney v. Nichols, 76 L.T. 63, followed.]

Darke v. Canadian General Electric Co., 4 D.L.R. 259, 21 O.W.R. 583, 3 O.W.N. 817.

Where it was the duty of an electrical expert engineer in the employ of an electric company to make a test of an electric generator, which had been just set up by the workmen of the mechanical department, and before making the test, he informed the foreman of the mechanical department that he did not think the generator was properly secured to the floor, and such foreman ordered two of the men in his department to be present at the time the test was made for the purpose of doing all necessary mechanical work to the machine, the electrical engineer, although he issued no orders to the workmen, was a person having superintendence within the meaning of sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries, caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, as explained by sub-sec. 1, of sec. 2, of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, providing that "superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour. [Darke v. Canadian General Electric Co., 3 O.W.N. 368, 20 O.W.R. 587, reversed.]

Darke v. Canadian General Electric Co., 4 D.L.R. 259, 21 O.W.R. 583, 3 O.W.N. 817.

Sub-sec. 1 of sec. 2 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, providing that "superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour, does not have the effect of limiting the word "superintendence" as found in sec. 8 of the Employers' Liability Act (Eng.) 43 and 44 Vict. ch. 42, in which the expression "person who has superintendence intrusted to him" is defined to mean a person whose sole or principal duty is that of superintending and who is not ordinarily engaged in manual labour.

Darke v. Canadian General Electric Co., 4 D.L.R. 259, 21 O.W.R. 583, 3 O.W.N. 817.

(§ II E 5—256)—Foreman.

No common law liability on the part of the employer is shewn where the foreman in charge was a competent man and the injury to the workman was caused by the failure of the foreman to use certain protective measures for which the foreman had been supplied with adequate materials which he neglected to use either wilfully or by inadvertence. [Wilson v. Merry, L. R. 1 H.L. Sc. 326, considered.]

Murray v. Eburne Saw Mills Co., 8 D. L.R. 71.

Where a servant, who was directed to test a machine manufactured by the defendant, called the attention of the defendant's foreman to the danger of doing so without the guarding of rapidly moving saws, and was thereby injured while making such test, the jury may find a verdict against the master under B.C. Employers' Liability Act.

Everett v. Schaake, 4 D.L.R. 147, 17 B. C.R. 271, 21 W.L.R. 525.

Where a contractor is digging a trench, and it is the duty of the man in charge of the blasting to place logs over the drill-holes to prevent the scattering of debris by the blast, and he negligently rolls a log upon and injures a man working in the trench, the contractor is liable under the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160), for his negligence, even though the injured workman be not in the blasting department.

(§ II E 5—265)—Signalman.

Where a railway company applies to the Railway Board under sec. 227 of the Railway Act, R.S.C. ch. 37, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant

shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing, shall be entitled, upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a servant of the applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing. [Judgment of Boyd, C., Pattison v. C.P.R., 24 O.L.R. 482, reversed, Garrow, J.A., dissenting.]

Pattison v. Canadian Pacific R. Co., 5 D.L.R. 582, 3 O.W.N. 1245, 22 O.W.R. 131, 26 O.L.R. 410.

Magnussen v. L'Abbé, 4 D.L.R. 857, 3 O.W.N. 864, 21 O.W.R. 376.

(§ II E 6—276)—IN MINE.

An employer who has provided for the inspection as to the safety of a mining tunnel, is not answerable as for negligence to his workman who was injured by sticking his pick into a piece of dynamite, if the failure to discover its presence was due to the neglect of a fellow-servant to whom the duty of inspection had been assigned; and no facts were disclosed which would be inconsistent with the theory that the dynamite was left at the place of the accident through the carelessness of a fellow-workman. (Per Irving, J.A.) [Priestley v. Fowler, 3 M. & W. 1, applied.]

Root v. Vancouver Power Co., 2 D.L.R. 303, 20 W.L.R. 847, 17 B.C.R. 203.

III. Liability of master to strangers for acts of servant; independent contractor.

A. For acts of servants or agent.

(§ III A 2—290)—SCOPE OF EMPLOYMENT.

Where an incorporated company is authorised to engage in the business of company promotion and of buying and selling corporate shares, its sales agent has no implied authority to bind the company to re-purchase at a premium the shares of another company which it is promoting, although such agreement is made as part of or collateral to the agreement of sale and forms a part of the consideration thereof.

Whaley v. O'Grady (No. 1), 1 D.L.R. 224, 19 W.L.R. 885, 48 C.L.J. 112.

(§ III A 2—291)—WANTON OR MALICIOUS ACTS.

A master is answerable in damages for the act of a driver in his employ who, while driving a waggon on car tracks just ahead of a street car, turned out for it at a street intersection, where many people were standing in the roadway waiting to board the car, shouted for them to get out of his way, and drove through the crowd in such a reckless manner as to strike the plaintiff, a person attempting to board the car, which was then opposite the waggon, and knock him down, so that the car ran over and crushed his foot.

Baillargeon v. St. George's, 4 D.L.R. 894.

Automobile taken out of sale-room by servant—For his own purposes—Without knowledge or permission of owner—Person injured by careless driving—Excessive speed—Liability of owner—Neglect to prevent wrongful use of automobile—Motor Vehicles Act, 6 Edw. VII., ch. 46 (Ont.).

Verrall v. Dominion Automobile Co., 3 O.W.N. 108, 20 O.W.R. 178.

Where servants are employed to build a cabin on uncleared land, the clearing of the site for the erecting of the cabin is presumably within the scope of their employment.

Derby v. Ellison, 2 D.L.R. 279, 20 W.L.R. 794.

B. For acts of independent contractor.

(§ III B—298)—TROVER.

One who, with knowledge of the circumstances, has received, through an independent contractor engaged by him, chattels wrongfully taken by the contractor from another, and has sold such chattels, is answerable to that other for the value thereof.

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

(§ III B 2—300)—FOR WHAT ACTS OF CONTRACTOR EMPLOYER IS LIABLE.

Under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 4, both the immediate employer and owner of the premises on which one is working as an independent contractor are jointly responsible for injuries to a servant of the latter, where it appears that, although the work was being done originally by the independent contractor alone, it later developed that it was impossible to carry out the original agreement and an arrangement was entered into whereby the work was done under their joint supervision, and the accident occurred through the negligence of both the independent contractor and the owner.

Dallontania v. McCormick and the Canadian Pacific R. Co., 8 D.L.R. 757, 4 O.W.N. 547, 23 O.W.R. 861.

(§ III B 2—303)—INJURY TO ADJOINING OWNER.

The act of committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, is to be differentiated from the act of turning over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted; and while it may be just

to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if safeguards are not provided, no matter through whose fault the omission to take the necessary measures for such prevention may arise; and, where the owner of lands, in the construction of works thereon for which injury to the adjoining premises must be expected to result, himself omits to take the necessary measures to prevent such mischief, he may be held liable upon a plea alleging such omission. [Bower v. Peate, 1 Q.B.D. 321, 326, applied.]

Cockshutt Plow Co., Limited v. MacDonald, 8 D.L.R. 112, 22 W.L.R. 798.

The liability of a master for an omission to do something depends entirely upon the extent to which a duty is imposed to cause that thing to be done, and in such a case it is quite immaterial whether the actual actors are servants or not. [Quarman v. Bennett, 6 M. & W. 509, referred to.]

Cockshutt Plow Co., Limited v. MacDonald, 8 D.L.R. 112, 22 W.L.R. 798.

(§ III B 3—305)—WHO ARE INDEPENDENT CONTRACTORS.

Liability of master for injuries to employee of independent contractor—Contract under supervision of mine superintendent—Driving a tunnel.

Bradshaw v. Britannia, 7 D.L.R. 878.

In order to be an independent contractor a workman must be free from control and must not be subject to the orders of anyone as to the manner in which the work is to be done.

Beaulieu v. Picard, 7 D.L.R. 2, 42 Que. S.C. 455.

Where a municipal corporation enters into a contract with certain contractors for the construction of a bridge, but some difficulty arising as to the remuneration for the piling, a $6 per diem charge was by a subsequent agreement allowed for the contractor's own time and the use of his piling plant, but the contractor still retained complete control over the entire work and he could select his own employees, he is in law an independent contractor and not an employee of the municipality, and the municipal corporation is not liable for his negligence.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

IV. Liability of servants.

(§ IV—310)—LIABILITY OF SERVANTS.

When a workman has supplied his materials and done his work and payment thereof has been made, he has no responsibility in case of damages resulting to the structure put up, either from a defect of construction or the nature of the soil, and no presumption of fault at all rests on his shoulders, either of aquilian or of contractual fault under C.C. 1688.

Stilwell-Bierce and Smith-Vale Co. v. Lyall, 3 D.L.R. 369.

(§ IV—313)—LIABILITY OF INDEPENDENT CONTRACTORS.

One who employs a contractor to erect a building is not answerable for damages sustained by an adjoining property owner through the falling of a wall as the result of the negligence of the contractor in building it, the maxim, qui facit per alium facit per se, not being applicable. [Reedie v. London and North Western R. Co., 4 Ex. 244, and Gayford v. Nicholls, 9 Ex. 702, followed; Beven on Negligence, 3rd ed., ch. 3, specially referred to.]

Cockshutt Plow Co. v. MacDonald, 5 D.L.R. 365, 20 W.L.R. 197.

V. Workmen's compensation; procedure.

(§ V—340) — WORKMEN'S COMPENSATION ACT.

Under the Alberta Workmen's Compensation Act, a District Court Judge acting thereunder as the statutory arbitrator, has the power to direct the issue of a commission to take the evidence of witnesses in order that the evidence so taken may be used before him as part of the evidence on which to base his award. [Sutton v. Great Northern R. Co., [1909] 2 K. B. 791, distinguished; Jessop v. Maclay, 5 B.W.C.C. 139, considered.]

Bodner v. West Canadian Collieries, 8 D.L.R. 462, 22 W.L.R. 765.

In an action under the Workmen's Compensation Act (Alta.), there is no appeal from the District Court Judge, except that given by par. 4 of the second schedule of the Act, which is by implication only, and limited to questions of law, by analogy to the English Workmen's Compensation Act of 1897. [Smith v. Lancashire and Yorkshire R. Co., [1899] 1 Q.B. 141, applied.]

Cargeme v. The Alberta Coal and Mining Co., 6 D.L.R. 231, 22 W.L.R. 68.

Where a plaintiff sues her son's employers for negligence charged as having caused the son's death in the course of the employment and a judgment in her favour in the negligence action is reversed on appeal, the plaintiff may still apply to a Judge of the Supreme Court (B.C.) to fix and allow compensation apart from negligence to which she may be entitled by reason of the fatal injury having been received in the course of the son's employment with the defendant. [McCormick v. Kelliher, 4 D.L.R. 657, applied.]

McCormick v. Kelliher (No. 2), 7 D.L.R. 732.

According to the Workmen's Compensation Act, the plaintiff's provisional ali-

mentary allowance pending the suit should be fixed as much as possible on the same basis as the final allowance will be determined.

Sutherland v. The Phœnix Brass Works Co., Limited, 13 Que. P.R. 408 (Sup. Ct.).

A petition to sue under the Workmen's Compensation Act will be dismissed, if it only alleges that the accident occurred while the deceased was employed by the City of Montreal in the making or repairing the roadway, directing a machine, which serves to mix concrete, said machine being propelled by mechanical force other than hand or horse power.

Dame Léa Caillé v. La Cité de Montréal, 14 Que. P.R. 82 (Sup. Ct.).

When the art. 2 of statute 9 Edw. VII. ch. 66, relating to employment accidents, allows to an employee an income in a case when he receives an injury during his employment, which injury carries with it a permanent partial incapacity, it is on condition that his professional capacity would decrease, and be lasting in reduction of his salary. It is this reduction of salary that should be the basis of figuring the income to which the employee will have a right, income which will amount to one-half the reduction in salary which he suffered through the accident. This essential condition required by law will not apply when, after the accident the plaintiff voluntarily renewed his employment with the same salary as he received before the accident. In such circumstances, he will find that art. 2 of the above law, is, by voluntary act of the plaintiff, rendered inapplicable, and that, in the present state of the legislation, he has no right to any income.

Cater v. The Grand Trunk R. Co., 18 Rev. de Jur. 27.

Upon a request to authorize a suit by virtue of the employment accident law it is not the place to decide if it is the law of the foreign province, that will apply in such a case, since the petitioner has shewn a sufficient cause of action. [Gabella v. The Grand Trunk R. Co., 12 Que. P.R. 329.]

Bonidetti v. The Canadian Pacific R. Co., 13 Que. P.R. 329 (Sup. Ct.).

(§ V—340) — WORKMEN'S COMPENSATION FOR INJURIES ACT; PROCEDURE.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway." [Martin v. Grand Trunk R. Co., 4 O.W.N. 51, applied.]

Allan v. Grand Trunk R. Co., 8 D.L.R. 697, 4 O.W.N. 325, 23 O.W.R. 453.

Where a yard foreman, engaged with his assistant upon their duties in the yard, was struck and injured by an engine which was being used for shunting purposes, a finding by the jury that the accident was caused by reason of the negligence of the assistant and that the latter had the charge or control of the engine, within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, is supported by reasonable evidence where it appears that the engine was being run by an engineer who was subject to the orders of the assistant, who failed to carry out the orders he received from the yard foreman.

Martin v. Grand Trunk R. Co., 8 D.L.R. 590, 4 O.W.N. 51, 27 O.L.R. 165.

A master is liable, under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," where a yard foreman is injured by being struck by an engine engaged in shunting operations and under the control of his assistant by reason of the negligence of the assistant in failing to carry out an order of the foreman.

Martin v. Grand Trunk R. Co., 8 D.L.R. 590, 4 O.W.N. 51, 27 O.L.R. 165.

MATERIALMEN.

Lien of, see Mechanics' Liens, IV.

MATURITY.

Of notes, see Bills and Notes, VI.

MAXIMS.

(§ I—1)—"EXPRESSIO UNIUS."

The maxim "expressio unius est exclusio alterius" is not of universal application, but depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction, and should not be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 3 O.W.N. 1660, 27 O.L.R. 87.

MECHANICS' LIENS.

I. CONSTRUCTION AND VALIDITY OF STATUTES.
II. THE RIGHT; WHEN LIEN EXISTS.
III. PRIORITIES.
IV. FOR WHAT WORK OR MATERIALS.
V. TO WHAT PROPERTY ATTACHES.
VI. OF SUB-CONTRACTS AND MATERIALMEN.
VII. HOW WAIVED OR DEFEATED.
VIII. ENFORCEMENT; PROCEDURE.

I. Construction and validity of statutes.

(No cases.)

II. The right; when lien exists.

(No cases.)

III. Priorities.

(§ III—13)—OVER MORTGAGE.

Priorities over mortgage—Reference.

Rat Portage Lumber Co. v. Hewitt, 6 D.L.R. 871, 23 W.L.R. 249.

IV. For what work or materials.

(§ IV—15)—FOR WHAT WORK OR MATERIALS.

One who contracts with an owner of land who intends building a house to purchase materials and pay the workmen receiving two dollars per day during the construction is a builder within the meaning of art. 2013 et seq. C.C. and, on observing the prescribed formalities, acquires for what is due him the privilege accorded by that article. If he contracts directly with the owner as if he were an independent contractor he is not obliged to give the notice required by art. 2013. A house, even when leased and occupied by the lessee, does not "become ready for the use to which it is destined" within the meaning of art. 2013 (b) so long as there is work to be finished, such as joining work and painting. The delay of thirty days for registering the builder's preference or privilege only begins to run from the completion of such work. The builder is not subject to the provisions of art. 2013 (i), par. 2, nor bound to take legal proceedings within three months. Such condition is only demanded of the furnisher of materials.

Letellier de St. Just v. Blanchette, 21 Que. K.B. 1.

(§ IV—24)—IN GETTING OUT LOGS.

The Woodman's Lien Act, 10 Edw. VII. (Ont.), ch. 70, is not in force in any of the counties of Ontario, but only in the districts.

White v. Sandy Lake Lumber Co., 48 C.L.J. 25.

Sections 3, 6, 15, of the Woodmen's Wage Lien Act, 10 Edw. VII. (Ont.) ch. 70, providing a lien for the performance of labour on "logs, cordwood, timber, cedar posts, telegraph poles, railroad ties, tanbark, pulpwood, shingle bolts and staves, or any of them . . ." is in derogation of the common law, and under strict construction, applies only to "railroad ties" manufactured or hewn in the woods, or for the work in getting the timber out of the forest about to be cut and before their arrival at the saw-mill, but not when sawn into lumber and made into railroad ties in the defendant's saw-mill.

White v. Sandy Lake Lumber Co., 48 C.L.J. 25.

V. To what property attaches.

(§ V—30)—TO WHAT PROPERTY ATTACHES.

Failure to complete a building in accordance with the specifications in a building contract precludes recovery of the contract price and the enforcement of a mechanics' lien thereon.

Simpson v. Rubeck, 3 O.W.N. 577, 21 O.W.R. 260.

(§ V—32)—SEPARATE LOTS.

To what property it attaches—Separate lots—Indivisible contract.

Barr and Anderson v. Percy & Co., 7 D.L.R. 831, 21 W.L.R. 236.

VI. Of sub-contractors and materialmen.

(§ VI—45) — OF SUB-CONTRACTOR AND MATERIALMEN.

Where the assignee of an architect superintended for the defendant the work of constructing a building, brought action to recover the money due for the architect's services, and to enforce payment thereof by filing a lien for the sale and building, it was held, that the defendant should have raised in the pleadings the objection that the architect had not posted upon the building or delivered to the owner a receipted payroll pursuant to sec. 15 of the Mechanics' Lien Act, or led evidence upon that point. Therefore, that defence was not open. Held, also, that, the lien being assignable, every remedy for its enforcement went with it. Held, further, upon the facts, that there was a sufficiently substantial performance of the contract to entitle the architect or his assignee to a lien, notwithstanding that some portion of the material contracted for had not been supplied by one of the contractors at the time he received his final certificate from the architect.

Sickler v. Spencer, 17 B.C.R. 41.

VII. How waived or defeated.

(No cases.)

VIII. Enforcement; procedure.

(§ VIII—60)—ENFORCEMENT; PROCEDURE.

Plaintiff brought action to enforce a mechanics' lien, and tendered in evidence in proof of the lien a certified copy which shewed no affidavit of execution, and did not shew any seal affixed. Further, the lien itself was irregularly drawn and improperly filled out, the necessary information not being filled into the appropriate

blanks, and the list of materials referred to in the lien as exhibit "A" being marked only by the letter A without any attesting signature. The claim being allowed, defendant appealed:—Held, without deciding whether the execution of the lien would be sufficient, had the corporate seal been omitted the lien would have been invalid in the absence of such a seal, because no affidavit of execution was attached. 2. That the curative sections of the Mechanics' Lien Act do not affect the provisions of the Land Titles Act and cure invalidating defects in instruments under the latter Act. 3. But it appearing that the lien having in fact been sealed with the corporate seal of the plaintiff company, it should be given leave to prove that fact in proper form, but as a term of such indulgence should be ordered to pay defendant's costs. 4. That the particulars of the amount claimed in the lien were set out in a manner which substantially complied with the Act, and being so set out, the lien notwithstanding defects, should be held valid under the provisions of sec. 19 of the Mechanics' Lien Act.

The Monarch Lumber Co., Limited v. Garrison et al., 4 S.L.R. 514.

The words of sec. 17 of the Mechanics' Lien Act, "No assignment by the contractor . . . of any moneys due in respect of the contract shall be valid as against any lien given by this Act," were held, not to operate so as to prevent payments made by the owner to creditors of the contractor, under an arrangement between the owner and the contractor, from being effective as payments on account of the contract price, in the ascertainment of the amount due from the owner to the contractor, upon which alone the lien of materialmen attaches under sec. 32 of the Act, as amended by sec. 12 of the Statute Law Amendment Act, 1908. Secus, if arrangement had been one for payment in the future; but, once the arrangement was acted upon and payments were made in pursuance of it, the assignment (if the arrangement amounted to an assignment) ceased to be of importance, and the payments must be regarded as payments to the contractor—no notice in writing having been given by the plaintiffs—and the owner was protected to the amount of these payments. [False Creek Lumber Co. v. Sloan, 17 W.L.R. 525, applied and followed.] Costs of the plaintiffs equitably adjusted, in view of all the circumstances, including the circumstances that the plaintiffs might have proceeded by way of originating summons, instead of by action.

Pioneer Lumber Co. v. Rooney, 19 W.L.R. 913.

(§ VIII—61)—PARTIES.

Registration of claim of lien after proceedings taken by another lienor—Mechanics' Lien Act, 10 Edw. VII. ch. 69, sec. 24—Meaning of "In the meantime"—Benefit of proceedings taken—Preservation of lien.

Eadie-Douglas v. Hitch & Co., 4 O.W.N. 147, 27 O.L.R. 257.

(§ VIII—64)—AMENDMENT.

The plaintiff, a lien holder, brought action within the ninety-day period allowed by the Ordinance, asking for a personal judgment for the amount for which the lien was filed. Subsequently and after the expiration of the ninety-day period the plaintiff, without leave, amended his statement of claim by claiming to realize the lien and by adding the necessary averments to support such a claim. The defendant not appearing, an order was made for judgment in accordance with the amended claim. On application by defendant to set aside this order, held (following United States authorities), that the amendment to the statement of claim was properly made.

Nelson v. Brewster, 7 Terr. L.R. 458.

It is a ground for vacating the registration of a certificate of lis pendens issued pursuant to sec. 35 of the Alberta Mechanics' Lien Act, by the clerk of the Court, certifying that an action had been commenced for the realization of a lien, that the statement of claim filed with the said clerk was defective and irregular in not containing the necessary statutory allegations, and not claiming to have the rights to a lien declared, or a sale of the land ordered, and that no other relief incidental to the rights of the lien holder was claimed thereby, notwithstanding that an amended statement of claim was afterwards delivered, without the requisite leave, in which a claim to realize on the lien was made.

Horne v. Jenkyn, 6 D.L.R. 54.

(§ VIII—65)—ACCOUNTING.

An interlocutory application to stay proceedings in an action under the Mechanics' Lien Act (Ont.), brought by workmen against both their employer and the property owner, should not be granted to enable the owner to complete the work on the contractor's default and so ascertain the balance, if any, owing by the owner under the contract; such a question should not be determined in Chambers but should be determined at the trial, or if the pleadings properly raise the question of law under Ont. Consolidated Rule 259, it can be determined upon a motion in Court.

Saltsman v. Berlin Robe and Clothing Co., 6 D.L.R. 350, 4 O.W.N. 88, 23 O.W.R. 61.

(§ VIII—66)—TIME FOR FILING LIEN OR GIVING NOTICE.

Procedure—Time for registering lien—Wrongful termination of building contract—Liability of contractor—Architect's certificate—Lien of sub-contractor.

Fuller v. Beach, 7 D.L.R. 822, 21 W.L.R. 391.

(§ VIII—68)—Discharge of lien.

Dismissal of proceedings to enforce lien —Default of plaintiff in making discovery —Rights of other lien holders—Absence of plaintiff—Opportunity to proceed.

Ramsay v. Graham, 2 D.L.R. 889, 3 O.W. N. 972.

(§ VIII—73)—Statutory directions as to trial.

Under the statutory direction contained in the Mechanics' Lien Act, R.S.N.S. 1900, ch. 171, sec. 30, which specifies that in a mechanics' lien action the trial Judge shall "do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action," it is sufficient if the trial Judge disposes of all questions which are necessary to be tried to enable him to dispose of the action. [See also Ontario Mechanics' Lien Act, 10 Edw. VII. (Ont.) ch. 69, sec. 37 (3); Manitoba Mechanics' Lien Act, R.S.M. 1902, ch. 110, sec. 31; B.C. Mechanics' Lien Act, R.S.B.C. 1897, ch. 132, sec. 16; New Brunswick Mechanics' Lien Act, R.S.N.B. 1903, ch. 147, sec. 50.]

Dixon v. Ross, 1 D.L.R. 17.

(§ VIII—74)—Class of action to enforce.

Where art. 2013 (b) C.C. (Que.) provides that a builders' and workmen's privilege exists only for one year from the date of registration unless a suit be taken in the interval, the suit required is a hypothecary action to enforce the privilege and a personal action against the debtor does not suffice.

Demers v. Byrd, 6 D.L.R. 807, 41 Que. K.B. 330.

The action to enforce a mechanics' lien (builders' privilege) under art. 2013 (b) of the Civil Code (Que.) is a personal hypothecary action if the property is still in the debtor's hands or an action in declaration of hypothec if it has passed into the hands of a third party.

Demers v. Byrd, 6 D.L.R. 807, 41 Que. K.B. 330.

Enforcing lien—Defendant not appearing—Judgment of official referee—Motion to set aside—Jurisdiction of Master in Chambers—Con. Rules 42 (17) (d), 778—Jurisdiction of referee.

Guest v. Linden, 1 D.L.R. 908.

MEDICAL EXAMINERS.

Statements made to, by insured, see Insured.

MEDICAL ATTENDANCE.

Homicide by failing to furnish, see Homicide.

MEDICAL PRACTICE.

See Physicians and Surgeons.

MERCHANT SHIPPING.

See Shipping.

MERGER.

I. In general.
II. By judgment.
III. Documents under seal.
IV. Of equitable in legal estate.
V. Of other estates.
VI. Of torts into felonies.
VII. Charges and incumbrances.
VIII. Criminal law.

Mesne profits in ejectment, see Ejectment.

I. In general.

See Mortgages, V 66.

VII. Charges and incumbrances.

(§ VII—30)—Charges and incumbrances.

An absolute assignment of a timber berth which was intended as a mortgage, was superseded by a mortgage given for a greater amount, which included the indebtedness covered by such assignment, without mentioning the assignment.

Manitoba Lumber Co., Limited v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

MESNE PROFITS.

Right to recover, see Trespass.

MILITIA.

(§ I—5)—Liability of members.

The members of a civilian rifle association, purporting to be constituted in pursuance of powers conferred by the Militia Act, R.S.C. 1906, ch. 41, and of regulations made under secs. 63 and 64 of that Act, having its range selected, approved and inspected by military officers and financially aided by the federal government and having its ammunition supplied by the military authorities, are, while engaged in a shooting competition, approved by the district officer and under the command of a deputy captain, acting in pursuance of the Militia Act, and are entitled to the benefit of its provisions, in an action to recover damages for alleged injuries due to their negligence while engaged in such competition. [Edward v. St. Mary's, Islington, 22 Q.B.D. 338, referred to.]

Webster v. Leard, 7 D.L.R. 429, 11 E.L. R. 203.

MINES AND MINERALS.

I. On public lands.
A. Claims; location; re-location.
B. Work; abandonment; forfeiture.
C. Conflicting claims; contests.
II. On private lands.
A. In general; coal mines; quarries.
B. Oil and gas.

III. MINERS' LIENS.
- A. When lien exists.
- B. Priorities.
- C. For what work or materials.
- D. To what property attaches.
- E. How waived or defeated.
- F. Enforcement; procedure.

Injury to employee in, see Master and Servant.

I. On public lands.

A. Claims; location; relocation.

(§ I A—5)—CLAIMS; LOCATION; RELOCATION.

The legislative intent of the Railway Aid Act (B.C.) was, that the interest of the Crown in lands (already located as mineral claims), which are comprised in a greater block of lands granted as a subsidy to a railway company under the Act, may pass to the railway company, subject to existing and future rights of the persons who prior to the subsidy had made such locations. [Railway Aid Act, B.C. Statutes, 1890, ch. 40, construed; Osborne v. Morgan (1888), 13 A.C. 227; Nelson and Fort Sheppard R. Co. v. Jerry (1897), 5 B.C.R. 396; Re Demers, 1 B.C.R., pt. 2, 334; Staffordshire Banking Co. v. Emmott, L.R. 2 Ex. 208, referred to.]

Farrell v. Fitch, 7 D.L.R. 657, 22 W.L. R. 517.

Defendants were co-owners of certain mineral claims. S., in July, 1909, filed a petition in bankruptcy in a New York Court, which adjudged him a bankrupt and directed a reference. The petition, without in terms assigning any specific property, recited that S. was willing to surrender all his property for the benefit of his creditors, and included in a schedule of his personal property were his interests in the two mineral claims in question. On the 26th of July G. was appointed trustee of S.'s estate. The point was not disputed that the bankruptcy proceedings were sufficient to transfer the claims to G. if the claims had been in New York State. On the 4th of September, 1909, S., being in default in his share of assessment work, defendant duly advertised, under sec. 25b, forfeiture of S.'s interest if the amount due was not paid within 90 days. On the 18th of October, G. sold the claims to plaintiff and executed a transfer of them. This transfer, with a certificate of G.'s appointment, were recorded in the mining recorder's office on the 4th of November, but the sale was not confirmed by the referee in bankruptcy until the 8th of October, 1910. Before the expiration of the 90 days under the advertisement, the amount due under S.'s default was tendered by plaintiff to defendant, who refused to accept it, and completed his forfeiture proceedings. S.'s mining license expired on the 31st of May, 1908, was not renewed until the 14th of June, 1908; it expired again on the 31st of May, 1910, and was not renewed. At the time of the transfer of S.'s interest to plaintiff, neither the latter nor G. held a free miner's certificate. Plaintiff took one out on the 26th of October, 1909, and G. on the 16th of November, 1909. It was submitted for plaintiff that a mineral claim is a chose in action, and governed by the law of the place where the owner is; therefore, S., being in New York, and having been adjudged a bankrupt by a Court of that state, the sufficiency of the transfer from him should be governed by the law there. Held, that in the absence of direct proof of domicile, and of authority for the latter proposition, it was quite consistent with the bankruptcy proceedings that S.'s domicile was elsewhere; that as the mineral claims were immovables within British Columbia, they were subject to British Columbia law (Mineral Act, R.S.B.C. 1897, ch. 135, sec. 2); that the absence of a free miner's certificate at the time of the transfer was fatal in the case of S. and G. (sec. 9); that as all the proceedings alleged to constitute the transfer had not been recorded, sec. 50 was not complied with; and that the transfer to the plaintiff was not recorded within the time fixed by secs. 19 and 49. Accordingly it had not been shewn that the plaintiff was the owner of an undivided one-third interest in the two mineral claims.

Barinds v. Green and Silverman, 16 B.C. R. 433.

(§ I A—6)—DISCOVERY.

Where the holder of a miner's license under the Mining Act of Ontario, 8 Edw. VII. ch. 21, stakes out a mining claim after the expiration thereof, a subsequent special renewal license obtained by him under sec. 85 (1) (a) of the Act gives no validity to the previous staking and he acquires no rights thereunder.

Re Sanderson and Saville, 6 D.L.R. 319, 3 O.W.N. 1560, 22 O.W.R. 672, 26 O.L.R. 616.

To stake out a mining claim without a miner's license is a crime under the Mining Act of Ontario, 8 Edw. VII. ch. 21, and the discoverer acquires by such staking no rights which will be allowed by the Court or enforced against the claim of any other. (Per Riddell, J.)

Re Sanderson and Saville, 6 D.L.R. 319, 3 O.W.N. 1560, 22 O.W.R. 672, 26 O.L.R. 616.

(§ I A—7a)—NOTICE AND RECORD OF CLAIM.

An application under the Mining Act, 8 Edw. VII. (Ont.) ch. 21, sec. 62, for a mining claim is deemed to be recorded in the mining recorder's office as soon as the application is received in the recorder's office after all requirements for recording have been complied with by the applicant.

Re Campsall and Allen, 7 D.L.R. 18, 4 O.W.N. 130, 23 O.W.R. 140.

Under the Mining Act of Ontario (8 Edw. VII. ch. 21), a licensee who prospects on Crown lands and discovers valuable mineral and stakes and records a claim, has up to this point no right, title, interest or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent, and he is a mere licensee of the Crown, but after the issue of the certificate, he is a tenant-at-will of the Crown until he procures his patent. (Per Riddell, J.) [Sec. 68 of Mining Act, 8 Edw. VII. ch. 21, considered.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

(§ I A—9)—LEASE OF COAL MINES BY CROWN.

The question being whether a partnership existed in a lease from the Crown of coal mining rights, letters written by the defendant to the plaintiff were relied on as evidence. In none of these letters was there any express declaration of a partnership, but the defendant had, in referring to the subject matter, used such words as "our," "we," "you and I," "us," etc. Held, that the letters were sufficient to raise a trust by implication, and that the case was within the ratio decidendi of Forster v. Hale, 3 Ves. 696; 5 Ves. 308; 4 R.R. 128.

Gilmour v. Griffis, 7 Terr. L.R. 225.

B. Work; abandonment; forfeiture.

(§ I B—10)—WORK; ABANDONMENT; FORFEITURE.

A mineral claim of a free miner under location at the date of the grant of a land subsidy in the Province of British Columbia to a railway company pursuant to the Railway Aid Act, 1890, is not excepted under that Act from the grant to the railway company, as lands "alienated by the Crown," where the locator by his default (in not performing certain conditions) loses his right to a grant of the land as well as its minerals. [Secs. 10, 13, Railway Aid Act, ch. 40, B.C. Statutes, 1890, referred to.]

Farrell v. Fitch, 7 D.L.R. 657, 22 W.L. R. 517.

(§ I B—11)—JOINT OWNERS; DEFAULT OF ONE.

The provisions of sec. 81 of the Mining Act, 8 Edw. VII. ch. 21, that each of two or more persons holding an unpatented mining claim shall contribute proportionately to his interest, or as they may otherwise agree between themselves, in the work required to be done thereon by sec. 78 of the same Act in order to hold the claim, and that in case of default by any holder the mining commissioner upon the application of any other holder may make an order vesting the interest of the defaulters in the co-owners, does not apply where two owners of a mining claim instead of doing the work required or expending their own money to have it done, agreed to obtain subscriptions for stock in a company to be incorporated and with the money so obtained to develop the property, which was done, and the co-owner who secured all the subscriptions, the other doing nothing, is not entitled to an order of the mining commissioner vesting the interest of the other owner in him.

Irish v. Smith, 2 D.L.R. 230, 3 O.W.N. 711, 21 O.W.R. 297.

C. Conflicting claims; contests.

(§ I C—21)—CONTEST.

A tenant at will under the Crown holding an unpatented mining claim under the Mining Act of Ontario, 8 Edw. VII. ch. 21, has no status to attack an express adverse grant of the Crown, nor to set up a claim for damages against the adverse grantee. [See Re Clarkson and Wishart (1912), 6 D.L.R. 579, 27 O.L.R. 70, 3 O. W.N. 1645, analyzing and passing upon licensee's rights to each stage up to patent.]

Bucknall v. British Canadian Power Co. (No. 2), 7 D.L.R. 62, 4 O.W.N. 164, 23 O. W.R. 155.

Under the Mining Act, 8 Edw. VII. (Ont.) ch. 21, sec. 62, where an application for a mining claim is refused by the mining recorder, and the refusal is contested, the applicant's proper and competent procedure for a hearing is that provided under secs. 63, 65, 66, 130 (2), where the recorder's formal decision is to be obtained in the first instance before the right to appeal to the mining commissioner arises.

Re Campsall and Allen, 7 D.L.R. 18, 4 O.W.N. 130, 23 O.W.R. 140.

Under the Mining Act of Ontario, 8 Edw. VII. ch. 21, where a disputant, ignoring secs. 63, 65, 66 and 130 (2), fails to submit the dispute in the first instance to the recorder and instead initiates his proceeding before the mining commissioner, the commissioner will rightly refuse to go into the merits because the dispute is not properly before him under sec. 130 (2).

Re Campsall and Allen, 7 D.L.R. 18, 4 O.W.N. 130, 23 O.W.R. 140.

II. On private lands.

A. In general; coal mines; quarries.

(§ II A—28)—ASSIGNMENT OF.

The plaintiff S. and the defendant R. were associated in matters connected with mining in New Brunswick, for some time prior to the transaction over which this suit has arisen, both in promoting and developing coal mines, and their transactions had been for the benefit of both. S. was in a position in which he could interest capitalists in New York and Boston, and

R. was a practical man and spent the greater part of his time superintending the mining and development work at the mines, and in obtaining concessions and licenses from the government at Fredericton. Their first transaction was in reference to the Crawford Mine (so called). In June, 1908, R. sold this property to the Canadian Coal Company, a different company from the plaintiff in this suit. R. owned this property and S. found the purchasers, and was paid a percentage of the proceeds for his services. S. also held a number of bonds of the company belonging to R., as part of the purchase price, and which he was to dispose of for R.'s benefit. On September 12th, 1908, R. executed an absolute assignment of certain applications for license to work to the plaintiff, the Canadian Coal Lands, Limited. On the same day he was paid the sum of one thousand dollars by S. Previous to this date, R. had received money from S. to cover expenses in connection with procuring the licenses mentioned above. The Canadian Coal Lands, Limited, was not an active organization, but what is called a "holding company." It had only five members, each holding one share, and on January 4th, 1910, after this dispute had arisen it assigned its interest in these areas to S.:—Held, that the assignment to the plaintiff company by R. was made for the sole purpose of enabling S. to sell the mining rights for the joint benefit of himself and R., and that it was not an absolute sale to the plaintiff company.

Shaw et al. v. Robinson et al., 4 N.B. Eq. 286.

(§ II A—30)—SALE OF RIGHT TO TAKE AWAY AND REMOVE MINERAL.

The sale of the right to take away and remove from now and for ever all the natural paint mineral or other minerals which may be found in a certain immoveable constitutes a sale of the mine carrying with it the concessions of the surface, and is not merely the sale of the right to work the mine; such a sale is the sale of an immoveable right with all the effects thereof, whereas the sale of the right to mine is the sale of a moveable right.

Houle v. Quebec Bank and Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

(§ II A—30a)—SALE OF MINE OR RIGHT TO MINE.

There are three elements which must be taken into consideration to ascertain whether a sale is that of a mine itself or that of the right to mine; the mine itself, the ground and the rent.

Houle v. Quebec Bank and Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

(§ II A—32)—RIGHTS OF DEVISEE OR GRANTEE.

Where a deed granting all the sewer pipe clay on a part of the grantor's farm made no limit as to the depth the grantees were to go in removing the clay and there was no other agreement as to that subject, the grantor is not entitled to have the deed rectified so as to conform to what both parties at the time of its execution contemplated would be the depth to which the grantees would go in getting the clay as the result of tests then made. [Okill v. Whittaker, 1 DeG. & Sm. 83, and Howkins v. Jackson, 2 Macn. & G. 372, applied.]

Gallagher v. Ontario Pipe Clay Co., 3 D.L.R. 394, 3 O.W.N. 732, 1240, 21 O.W.R. 550 and 1002.

B. Oil and gas.

(§ II B—41)—DEED OR RESERVATION OF OIL OR GAS.

The words "mines" and "minerals" are not definite terms but are susceptible of limitation or expansion according to the intention with which they are used. [Glasgow (Provost of) v. Farie, 13 App Cas. 657, applied.]

Barnard-Argue-Roth Stearns Oil and Gas Co., Limited, The Alexandra Oil and Development Co., Limited, and the Canada Co. v. Farquharson, 5 D.L.R. 297, 23 O.W.R. 90, 28 Times L.R. 590, 32 C.L.T. 843.

(§ II B 4—52)—CONDITIONS AS TO DEVELOPING.

An agreement by two separate landowners, neither of whom had any title or right to or interest in the farm of the other, that they are to give "the usual gas and oil leases of their respective farms," where the agreement throughout uses the word "leases" in the plural and never in the singular, is an agreement for separate leases of their respective farms and not for one joint lease of the two farms, notwithstanding a provision that the lessee was to supply gas free of charge to the landowners. [Welland County Lime Works v. Shurr, 1 D.L.R. 913, 3 O.W.N. 775, reversed; Welland County Lime Works v. Shurr, 3 O.W.N. 398, restored.]

Welland County Lime Works Co. v. Shurr (No. 2), 8 D.L.R. 720, 4 O.W.N. 336, 23 O.W.R. 397.

(§ II B 4—53)—RIGHT AND TITLE ACQUIRED UNDER LEASE.

Subsequent lessees of an "oil lease" where there is already on record an outstanding valid "oil lease" on the same property will be restrained from entering upon or prospecting for oil or gas on the lands in question during the period that the prior lessees are so entitled.

Maple City Oil and Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

(§ II B 4—56)—CONTRACTS.

Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of

cancellation under certain contingencies: —Held, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title.

Dunsmuir v. Last Chance Mining Company, Limited, 16 B.C.R. 499.

III. Miners' liens.

B. Priorities.

(§ III B—85)—PRIORITIES; UNDIVIDED.

A mortgagee of an undivided one-half interest in a mining claim, who entered into possession and removed gold dust therefrom, must account for one-half thereof to a person who obtained a lien on the other undivided one-half of such claim by virtue of a proceeding under the Miners' Lien Ordinance.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

A lien on mining claims filed under the provisions of the Miners' Lien Ordinance, can be obtained only on an undivided one-half interest therein, as against the holder of a duly registered mortgage of the other undivided one-half of the claim.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

C. For what work or materials.

(§ III C—90)—FOR WHAT WORK OR MATERIALS.

Services performed as a cook on a mining claim are not of a lienable nature, under the Miners' Lien Ordinance. [Davis v. Crown Point Mining Co., 3 O.L.R. 69, followed.]

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

D. To what property attaches.

(§ III D—95)—TO WHAT PROPERTY ATTACHES.

A claim for a lien, under the provisions of the Miners' Lien Ordinance, sufficiently locates the mining claims on which it is sought, as being in the Yukon Territory, by describing them as being "all below Discovery on Thistle Creek and Discovery Claim, and numbers 1, 2, 3, 4, and 5, above Discovery on Statute Gulch, a tributary on the left limit of Thistle Creek, below Discovery," and owned by the defendants, who were named as residents of Thistle Creek, in the Yukon Territory.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

All mining claims grouped under a certificate filed pursuant to the Placer Mining Act of Yukon Territory, in the office of the Gold Commissioner thereof, are subject to lien under the Miners' Lien Ordinance, for work or labour performed on any one of such claims.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

F. Enforcement; procedure.

(§ III F—105)—ENFORCEMENT; PROCEDURE.

A statement in a lien claim that it was for work and labour done and performed on and in respect of described mining claims, is a sufficient compliance with the requirements of the Miners' Lien Ordinance, since it is not necessary to describe minutely the different kinds of work performed.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

The fact that money, for which a lien is sought against mining claims under the Miners' Lien Ordinance, was due or to become due, is sufficiently shewn by a statement in the claim of lien that it was for wages due from the defendants for work and labour done and performed for them within the times mentioned, and that there was no period of credit agreed upon.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

A lien under the Miners' Lien Ordinance does not attach to the interest in a mining claim of one who was not served with an originating summons or any of the proceedings, as required by such ordinance.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

A notice of lien under the Miners' Lien Ordinance filed against several owners of mining claims, is not vitiated by the fact that in the operating part thereof the claims were referred to as belonging to one defendant who was in control of them, were, in a grouping certificate, filed under the Placer Mining Act, he was described as being the owner of the claims under an agreement for their purchase from his co-defendants.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

Upon upholding the validity of a proceeding for a lien under the provisions of the Miners' Lien Ordinance, a personal judgment will also be rendered against the defendants for the amount of the lien claimed, together with costs.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

It is not necessary in the first instance to make a mortgagee a party to a proceeding for a lien under the Miners' Lien Ordinance, since it is sufficient to file it against the owner or supposed owners, and, after an examination of the records of the office of the Gold Commissioner, to notify the mortgagee, and in the originating summons, make him a party to the action.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

MINORS.

See Infants.

MISCHIEF.

See Malicious Mischief.

MISDEMEANOURS.

See Criminal Law.

MISDIRECTION.

See Appeal; Criminal Law.

MISJOINDER.

In pleading, see Pleading, I.
Of parties, see Pleading.
Of actions, see Actions, II.

MISREPRESENTATION.

See Fraud and Deceit.

MISSIONARY SOCIETIES.

See Religious Societies.

MISTAKE.

I. In general.
II. Mistake of law.
III. Mistake of fact.
- A. As to the nature of the transaction.
- B. As to the identity of the other party.
- C. As to the identity of the subject-matter.
- D. Materially connected with subject-matter.

IV. Mistake as to title.
V. Mistake in expression of consent.
VI. Relief.
- A. In general.
- B. When it may be granted.
- C. Rescission.
- D. Rectification.
- E. Defence in action for specific performance, or damages.
- F. Evidence.
- G. Effect of lapse of time.
- H. Practice.

VII. Recovery of money.
- A. Money paid voluntarily under a mistake of fact.
- B. Money paid voluntarily under a mistake of law.

VII. Recovery of money.

A Money paid voluntarily under a mistake of fact.

(§ VII A—160)—Recovery of money voluntarily paid; mistake of fact.

The future happening of an unforeseen event which affects the right of one to whom money had been voluntarily paid does not amount to a mistake of fact that will permit the payor to recover such payment.

Bethune v. The King, 4 D.L.R. 229, 21 O.W.R. 559, 26 O.L.R. 117, 3 O.W.N. 941.

Répétition de l'indu—Money paid in error. The hirer of services may maintain an action en répétition de l'indu to recover a sum in excess of their value paid by his agent to the employee through error, and on a representation that the amount had been fixed by agreement.

Menier v. Viau, 41 Que. S.C. 298 (Ct. Rev.).

Where the executor of an estate from which an annuity was payable, in order to facilitate the settlement thereof, paid all of the succession duty on the annuity in one payment, instead of in four annual instalments, as he might have done under sec. 11 (1) of the Succession Duty Act, 7 Edw. VII. ch. 10, he cannot recover from the Crown upon the death of the annuitant immediately after such payment was made, on the theory that it was paid under a mistake of fact, the amount of the three annual instalments of succession duty that would have subsequently accrued had it not all been paid at one time, notwithstanding such Act provides that in the death of the annuitant before the expiration of the four years, payment should be required only of the instalments which fell due before the death of the annuitant.

Bethune v. The King, 4 D.L.R. 229, 21 O.W.R. 559, 26 O.L.R. 117, 3 O.W.N. 941.

B. Money paid voluntarily under mistake of law.

(§ VII B—160)—Mistake.

Money paid in satisfaction of a succession duty under a mistake of law to the effect that a bequest created an annuity, cannot be recovered from the Crown. [Rogers v. Ingham (1876), 3 Ch.D. 351; and William Whiteley, Ltd. v. The King (1909), 101 L.T.R. 741, referred to.]

Bethune v. The King, 4 D.L.R. 229, 26 O.L.R. 117, 3 O.W.N. 941, 21 O.W.R. 559.

MISTAKE OF TITLE.

See Encroachment.

MITIGATION.

Of damages, see Damages, III.

MONEY IN COURT.

(§ I—3)—Paying out.

A party making a deposit on any preliminary plea has the right to withdraw it so soon as adjudication is made thereon, without waiting for the final decision on the merits of the case.

Miller v. Demers, 13 Que. P.R. 420.

MONOPOLY AND COMBINATIONS.

I. What constitutes; in general.
II. Combinations in restraint of trade, commerce or competition.
- A. In general.
- B. Of manufacturers of, or dealers in, various products.

C. To control prices for services generally.
D. Of railroad companies or carriers.
E. Of insurers.

III. GOVERNMENTAL CONTROL.

I. What constitutes; in general.

(§ I—2)—COMBINE DEFINED.

A "combine" within the meaning of the Combines Investigation Act is any compact about the making or selling of one article which would fix the price not only of that one article, but of any other article, to the detriment of consumers or producers of the last mentioned article.

United Shoe Machinery Co. v. Laurendeau and Drouin, 2 D.L.R. 77.

II. Combinations in restraint of trade, commerce or competition.

B. Of manufacturers of, or dealers in, various products.

(§ II B—16)—OTHER PRODUCTS.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is void and unenforcable under the Criminal Code of 1906, sec. 498, declaring everyone to be guilty of an indictable offence who conspires, combines, agrees or arranges with any other person to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any article or commodity which may be a subject of trade or commerce. [R. v. Elliott, 9 Can. Cr. Cas. 505; R. v. Gage (No. 1), 13 Can. Cr. Cas. 415; R. v. Gage (No. 2), 13 Can. Cr. Cas. 428; Mogul Co. v. McGregor, [1892] A.C. 25, specially referred to.]

Weidman v. Shragge, 2 D.L.R. 734, 46 Can. S.C.R. 1.

III. Governmental control.

(§ III—51)—COMBINES INVESTIGATION ACT.

It is for the Judge to whom application is made for an order under the Combines Investigation Act (Can.) to decide whether the applicants have shewn primâ facie cause, and his discretion as to whether there is "reasonable ground" for considering the applicants as "consumers" or "producers" cannot be revised by prohibition, especially after the board itself has been constituted.

United Shoe Machinery Co. v. Laurendeau and Drouin, 2 D.L.R. 77.

MORTGAGE.

I. NATURE, VALIDITY AND EFFECT.
A. In general; delivery.
B. What constitutes.
C. What property covered; description of property.
D. Validity.
E. Rights and liabilities of parties generally.
F. Trustees and bondholders.

II. PRIORITY.
A. As to other mortgages.
B. As to judgments and other liens and equities.

III. VENDEE OF MORTGAGOR; ASSUMPTION OF DEBT.

IV. ASSIGNMENT.

V. SATISFACTION; DISCHARGE; RELEASE.

VI. ENFORCEMENT.
A. Generally; effect.
B. On default of interest, instalment, taxes, etc.
C. Who may foreclose; parties.
D. Defences.
E. Relief; decree; effect as to fund.
F. Strict foreclosure; foreclosure by advertisement.
G. Sale.
H. Surplus; proceeds.
I. Deficiency and judgment therefor.
J. Subsequent suit.

VII. REDEMPTION.
A. In general; right of.
B. Who may redeem.
C. Time; amount.
D. Mode and effect.

Adverse possession of mortgaged property.

Deed of trust for creditors, see Assignment for Creditors.

As to chattel mortgage, see Chattel Mortgage.

Of infant's land, see Infants, II.

Recording of, see Records and Recording Laws, III.

Sale of land at auction under power in mortgage, see Vendor and Purchaser, I.

Possession by mortgagee for statutory period, see Limitation of Action.

I. Nature, validity, and effect.

B. What constitutes.

(§ I B—6)—EQUITABLE MORTGAGE.

Where an instrument covering certain lands purports to be an absolute assignment and power of attorney but is really given only to secure a loan for which the borrower gives his promissory note, such instrument is merely an equitable mortgage, and under the maxim "once a mortgage always a mortgage" the grantee will be limited strictly to his rights as a mortgagee. [London and Globe Finance Corporation v. Montgomery, 18 Times L.R. 661, distinguished; Samuel v. Jarrah, [1904] A.C. 324, followed.]

Arnold v. National Trust Co., Ltd., 7 D.L.R. 754.

A good equitable mortgage by deposit of documents of title may be created, although the legal estate is outstanding in

another than the depositor. [See Ex p. Glyn, 1 Mont. D. and DeG. 25, at p. 38; Ex p. Bisdee, re Baker, 1 Mont. D. and DeG. 333; Lacon v. Allen, 3 Drew. 579; and Goodwin v. Waghorn, 4 L.J. (N.S.), Ch. 172.]

Zimmerman v. Sproat, 5 D.L.R. 452, 3 O.W.N. 1361, 26 O.L.R. 448.

The law of Ontario in respect of equitable mortgages by deposit of documents of title is the same as the law of England. [Royal Canadian Bank v. Cummer, 15 Gr. 627; and Masuret v. Mitchell, 26 Gr. 435, referred to.]

Zimmerman v. Sproat, 5 D.L.R. 452, 3 O.W.N. 1361, 26 O.L.R. 448.

C. What property covered; description of property.

(§ I C—13)—To secure bonds.

Where a mortgage to secure bonds excepts from its operations logs on the way to the mill, logs which have once been started on the way to the mill do not cease to fall within the exception because they are delayed through lack of water to float them or from any other cause.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

Where a mortgage is made to secure bonds upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

D. Validity.

(§ I D—17)—Amount of debt.

The "true value" of a mortgage under sec. 176 of the British Columbia Land Registry Act, R.S.B.C. 1911, ch. 127, does not necessarily mean the nominal amount secured by the mortgage, and, if the registrar is not satisfied with the value as affirmed, he must proceed as directed by sec. 176 to ascertain the true value.

Re Land Registry Act; Re The Royal Trust Co., Ltd., 5 D.L.R. 628, 22 W.L.R. 5.

(§ I D—18a)—Charge without interest.

Registration—Absence of interest in creator of charge—Cloud on title—Damages.

Fee v. MacDonald Manufacturing Co. (No. 2), 6 D.L.R. 852, 4 O.W.N. 63, 23 O.W.R. 189.

Charge on land—Absence of interest in creator of charge—Cloud on title—Damages.

Fee v. MacDonald Manufacturing Co. 3 D.L.R. 884, 3 O.W.N. 1378, 22 O.W.R. 314.

E. Rights and liabilities of parties generally.

(§ I E—22)—Mortgagee in possession.

Only ordinary and necessary repairs to encumbered property are within the purview of an agreement by which a mortgagee was placed in possession of a sawmill property, as a mortgagee in possession, the mortgagor reserving the right to redeem upon paying the costs of improvements made by the mortgagee while in possession, and the mortgagor cannot be required to pay, either under the terms of such agreement, nor as appurtenant to the rights of a mortgagee in possession, $106,000 for improvements consisting of the erection of a new and different mill in place of a practically new one that was torn down, a large portion of such expense being incurred after the expiration of the time for redemption and notification by the mortgagor of his intention to redeem, and his repudiation of liability for such extensive improvements, and after the launching by him of an action for redemption. [Carrol v. Robertson, 15 Gr. Ch. (Ont.) 173; Brotherton v. Hetherington, 23 Gr. Ch. (Ont.) 187; Shepard v. Jones (1882), 21 Ch.D. 469; Henderson v. Astwood, [1894] A.C. 150, distinguished.]

Manitoba Lumber Co., Ltd. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

(§ I E—24)—Form of mortgage.

A mortgagee cannot lawfully provide at the same time as the loan is made, for any event or condition on which the equity of redemption shall be discharged and the conveyance become absolute, nor for an option to purchase, although the option price is far in excess of the loan; and this, although it appears that the lender was not willing to lend unless he had both the security and the option and that the lender and borrower were dealing at arm's length. [Vernon v. Bethel (1761), 2 Eden 110, 113; Noakes v. Rice, [1902] A.C. 24; Salt v. Northampton, [1892] A.C. 1, followed.]

Arnold v. National Trust Co., Ltd., 7 D.L.R. 754.

In the absence of any stipulation to the contrary in an agreement to give a mortgage on lands, the general form and terms of the mortgage must be in conformity with the form provided in the Short Forms of Mortgages Act.

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838.

II. Priority.

B. As to judgments and other liens and equities.

(§ II B—44)—Substituted mortgage.

Where one to whom a voluntary conveyance of land was made, which was void as to the creditors of the grantor, upon retiring an existing mortgage thereon, gave a new one to the mortgagee for a

larger amount, such mortgage is not affected by a subsequent proceeding to set aside such conveyance, to which the mortgagee was not a party.

Jack v. Kearney, 4 D.L.R. 836, 10 E. L.R. 298.

III. Vendee of mortgagor; assumption of debt.

(§ III—45)—VENDEE OF MORTGAGOR; ASSUMPTION OF DEBT.

1. Under secs. 114 and 126 of the Real Property Act, R.S.M. 1902, ch. 148, as they stood prior to the amendments of the Act by 1 Geo. V. ch. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and, therefore, in such a case, a mortgagor who has transferred the property may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him set forth in sec. 89 of the Act. [Williams v. Box (1910), 44 S.C.R. 1; Platt v. Ashbridge (1865), 12 Gr. at p. 106; Campbell v. Holyland (1877), 7 Ch.D. 166, and Blunt v. Marsh (1888), 1 Terr. L.R. 126, followed.] 2. Payment by the mortgagor in such a case is not a condition precedent to his right of action on the purchaser's obligation to indemnify. Protection may be afforded to the purchaser by payment into Court for the proper application of the money. [Cullin v. Rinn (1888), 5 M.R. 8, and Mewburn v. Mackelcan (1892), 19 A.R. 729, followed.]

Noble v. Campbell, 21 Man. R. 597, 18 W.L.R. 591.

(§ III—47)—GRANTEE'S LIABILITY TO GRANTOR.

Where land is conveyed subject to a mortgage, and the grantee assumes and covenants to pay and to indemnify the grantor against the mortgage, the grantor, if sued upon his covenant in the mortgage, is entitled, in third party proceedings against the grantee, to immediate judgment and execution for the amount of the judgment obtained against him, by the mortgagee, with costs, but the grantee, if he has disposed of the equity of redemption, is entitled to notice of proceedings for foreclosure.

McMurtry v. Leushner, 3 D.L.R. 549, 3 O.W.N. 1176, 21 O.W.R. 996.

(§ III—48)—GRANTEE'S LIABILITY TO MORTGAGOR.

Where a person purchases part only of the lands comprised in a mortgage made by his vendor and takes a covenant against incumbrances, for further assurance and for quiet possession, he is entitled as against the mortgagor and as against a subsequent purchaser of the remainder of the mortgaged lands with notice of rights, to be indemnified against the amount due on the mortgage. [Fisher on Mortgages, 6th ed., sec. 1350; In re Jones, [1893] 2 Ch. 461; In re Darby's Estate, [1907] 2 Ch. 465, 470; Maitland v. McLarty (1850), 1 Gr. 576; Tully v. Bradbury (1861), 8 Gr. 561; Heap v. Crawford (1864), 10 Gr. 442; Henderson v. Brown (1871), 18 Gr. 79; Egleson v. Howe (1879), 3 A.R. 566; and Ker v. Ker (1869), 4 Ir. Eq. 15 at 28, referred to; see also Bell and Dunn on Mortgages 424, and 27 Cyc. 1367.]

Home Building and Savings Association v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137.

IV. Assignment.

(No cases.)

V. Satisfaction; discharge; release.

(No cases.)

VI. Enforcement.

A. Generally; effect.

(§ VI A—72)—CUTTING TIMBER AS GROUNDS FOR FORECLOSURE.

A mortgagee is not entitled under Quebec law to foreclose on a mortgage on the ground that the mortgage debtor has cut down timber on the property mortgaged, unless he can establish that the timber was cut to defraud him and for the purpose of diminishing or deteriorating his security.

Davis v. Smith, 8 D.L.R. 486.

B. On default of interest, installment, taxes, etc.

(§ VI B—75)—DEFAULT OF INTEREST, ETC.

The relief against acceleration clauses in mortgages provided for by sub-sec. 10 added to sec. 93 of the Land Titles Act (Sask.), applies to the general law relating to mortgages and not to a particular kind of foreclosure, and as soon as enacted it became in effect a part of every mortgage in the same way as if it had been inserted in the mortgage by the parties. [Wasson v. Harker (No. 2), 7 D.L.R. 526, reversed in part; sub-sec. 10 added to sec. 93 of Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, construed.]

Wasson v. Harker (No. 4), 8 D.L.R. 88, 22 W.L.R. 609.

The words "together with costs to be taxed by the registrar" in sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7 (which sub-section gives relief against a mortgage acceleration clause in proceedings before the registrar of land titles), have not the effect of limiting the right of relief to a proceeding before the registrar, but the remedy may be had in Court proceedings, ex. gr., a foreclosure action. [Wasson v. Harker (No. 2), 7 D.L.R. 526, reversed in part; see also McGregor v. Hemstreet, 5 D.L.R. 301; sub-sec. 10 added to sec. 93 of Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

Wasson v. Harker (No. 4), 8 D.L.R. 88, 22 W.L.R. 609.

A sale of land under a mortgage for non-payment of monthly instalments of principal was ordered in a foreclosure action in Saskatchewan in terms of an acceleration clause in the mortgage although the defendant offers to pay the sum which is in arrear without reference to the acceleration clause.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642.

Sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, whereby relief may be given against a mortgage acceleration clause in proceedings before the registrar of land titles does not apply to Court proceedings, ex. gr., a foreclosure action. [McGregor v. Hemstreet, 5 D.L.R. 301, followed.]

Wasson v. Harker (No. 2), 7 D.L.R. 526, 22 W.L.R. 320.

(§ VI B—76)—SPECIAL COVENANTS.

The "special covenants" which may be introduced into a statutory mortgage under the Torrens or "New System" title registration (the Real Property Act, R.S.M. 1902, ch. 148), must not be such as are repugnant to the imperative provisions of the statute itself.

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

While at common law the rights and powers of a mortgagee of land are incident to the legal or equitable estate vested in him as mortgagee, the statutory mortgage under the Torrens or "New System" registry law in Manitoba, R.S.M. 1902, ch. 148, does not vest any estate in the lands in the mortgagee, but takes effect as a security only, with statutory powers for enforcement; the mortgagee's rights and powers are consequently dependent directly upon the statutory provisions, and any additional stipulations in a mortgage made under that statute, which purport to authorize the mortgagee or his assigns to sell the lands, are not effective to pass the registered title merely on a transfer by the mortgagee in purported exercise of the conventional power of sale without the judgment of a Court or the compliance with the statutory proceedings for enforcing the security. [Smith v. National Trust Co., 20 Man. R. 522, affirmed.]

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, 21 W.L.R. 97.

Sub-sec. (a) (IV.) of sec. 6 of 10 Edw. VII. (Ont.) ch. 51, providing that in a conveyance by way of mortgage a covenant by the grantor who conveys and is expressed to convey as beneficial owner that on default the mortgagee shall have quiet possession of the land free from all incumbrances, does not apply to a mortgage which does not expressly state that the grantors or mortgagors convey as beneficial owners.

National Trust Co. v. Brantford Street R. Co., 4 D.L.R. 301, 3 O.W.N. 1615.

In an action for the foreclosure of a mortgage, for possession of the property mortgaged and for a receiver, which mortgage was executed by a street railway company for the purpose of securing payment of an issue of bonds and which expressly provided that until default should be made in payment of the interest on the bonds or some part thereof, the mortgagors or their assigns should be suffered to use, occupy, possess, manage, operate, etc., the property covered by the mortgage and contained no express provision entitling the mortgagees to possession or to a receiver on the non-performance or non-observance of the covenants in the mortgage, and the interest in arrears which had caused the mortgagees to bring the action having been paid to, and received by, them after the commencement of the action on the day preceding the trial, the mortgagees could not contend that they were entitled to possession of the mortgaged property and to the appointment of a receiver on the grounds that the mortgagors had committed breaches of their covenants contained in the mortgage, their remedy being on the covenants themselves.

National Trust Co. v. Brantford Street R. Co., 4 D.L.R. 301, 3 O.W.N. 1615.

C. Who may foreclose; parties.

(§ VI C—80) — WHO MAY FORECLOSE; PARTIES.

A mortgagee under a second mortgage cannot claim a judicial sale of the interest of the first mortgagee without the latter's consent, but he may sell the equity of the mortgagor subject to the prior mortgage without making the first mortgagee a party.

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

(§ VI C—82)—PARTIES DEFENDANT; PARTIES ADDED IN MASTER'S OFFICE.

Under rule 118 of the Manitoba King's Bench Rules, R.S.M. 1902, ch. 40, providing that upon a reference under a judgment for foreclosure or sale the master is to inquire and state whether any person other than the plaintiff has any charge upon the land subsequent to the plaintiff's claim, a party is added in the master's office on the assumption that he is a subsequent encumbrance, and if he claims priority over the plaintiff he must move to discharge the order making him a party, or to add to, vary or set aside the judgment, and upon his failure so to do he is bound by the judgment to the same extent as an original party. [McDougall v. Lindsay, 10 P.R. (Ont.) 247, and McDonald v. Rodger, 9 Gr. 75, specially referred to.]

McDermott v. Bielschowsky, 3 D.L.R. 319, 22 Man. L.R. 319, 21 W.L.R. 77.

Plaintiffs brought action for foreclosure of a mortgage, joining the mortgagor and the registered owner as parties defendant, and claimed judgment on the covenant against the mortgagor and the registered

owner. It was not expressly alleged that the present registered owner was a transferee through the mortgagor. On motion for judgment:—Held, where a proceeding is taken against a transferee of land subject to a mortgage, and it is sought to hold him personally liable under the provisions of the Land Titles Act respecting implied covenants, there should be an express allegation setting forth that he is so liable, and, there being no such allegation in this case, the plaintiff was not entitled to personal judgment against the registered owner.

Colonial Investment and Loan Co. v. Foisie et al., 4 S.L.R. 392.

(§ VI C—83)—INTERVENTION.

Where some of the defendants, against whom no claim was made in a proceeding to foreclosure a mortgage, asked that a sale of the encumbered premises be made, and offered a satisfactory guarantee for the costs thereof, a sale, instead of a foreclosure, will be ordered.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642.

E. Relief; decree; effect as to fund.

(§ VI E—90)—RELIEF; DECREE; EFFECT AS TO FUND.

Final order of sale—Motion to open up master's report—Assignees of equity of redemption—Parties.

Home Building and Savings Association v. Pringle, 3 D.L.R. 896, 3 O.W.N. 1595, 22 O.W.R. 791.

The Case Company sold certain land under mortgage, proceedings being carried on under the provisions of the Land Titles Act. After payment of its own claim and that of the second mortgagee, a balance remained to be divided among sundry execution creditors. The Independent Lumber Company also claimed under an unregistered instrument, in respect of which a caveat had been filed. An action had been taken to establish this claim, but it was not yet completed. The mortgagee alleging doubt as to the status of the Independent Lumber Company, and lack of knowledge of the amounts due the execution creditors paid the money into Court, under the provisions of the Trustee Act, R.S.S. ch. 46, sec. 28. One of the execution creditors having applied for payment out, and a doubt having been suggested as to the regularity of the mortgagee's procedure in paying the money into Court, and of the right of the creditor to apply for payment out:—Held, that the lack of knowledge of the amount due to the execution creditors would not justify the mortgagee in paying the money into Court, and thus evading the responsibility cast upon him of distributing the money, unless some difficulty should arise, but the position of the Independent Lumber Company's claim was sufficient to justify the mortgagee in taking advantage of the provisions of the Trustee Act, and paying the surplus into Court. (2) That having paid the money into Court, the mortgagee's responsibility did not end there, but he should then have proceeded to apply for directions. (3) But the mortgagee not having applied for such directions, it was open to any person claiming the money to apply for the distribution thereof. (4) While the Independent Lumber Company were not in a position to secure payment out of the amount claimed, yet, as it had brought an action for the purpose of establishing its claim, a stay should be directed until the determination of that action.

In re Fisher Mortgage Sale, 4 S.L.R. 374.

F. Strict foreclosure; foreclosure by advertisement.

(§ VI F—95)—STRICT FORECLOSURE.

Sec. 7 of ch. 12, Sask. Statutes 1910-1911, adding sub-sec. 10 of sec. 93 of the Land Titles Act, R.S.S. 1909, ch. 41, providing that if default has occurred in making any payments due under any mortgage, or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default, the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to sale or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage, together with costs to be taxed by the registrar of land titles, and that he shall thereupon be relieved from the consequence of such default, applies only to proceedings taken before the registrar of land titles and not to a foreclosure action, as the provision as to taxation by the land titles registrar could not have been intended to apply to the taxation of the costs of Court proceedings.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642.

G. Sale.

(§ VI G—100)—SALE.

If in the bonâ fide exercise of his discretion where there is a doubt as to whether the land would sell more advantageously en bloc or in parcels a mortgagee prefers one way and sells accordingly, he is not to be charged on the ground of wilful default if it is made to appear after the sale that the other way might have been more advantageous. [Haddington Island Quarry Co. v. Huson, [1911] A.C. 722, followed.]

Wilson v. Taylor, 7 D.L.R. 317, 4 O.W.N. 253, 48 C.L.J. 707, 23 O.W.R. 359.

A mortgagee selling under the power of sale in the mortgage is not a trustee for the mortgagor, and is not liable for any loss by reason of the sale unless guilty of wilful negligence and default, and when such wilful negligence and default occurs, and the land is sold at an undervalue, the

mortgagee is chargeable with the full value of the land.

Wilson v. Taylor, 7 D.L.R. 317, 4 O.W.N. 253, 48 C.L.J. 707, 23 O.W.R. 359.

(§ VI G 2—105)—SALE UNDER POWER.

A mortgagor who consents to an abandonment of foreclosure proceedings and a sale of the encumbered property by the mortgagee without an order of Court, cannot, four years later, have the sale set aside as against a purchaser from the mortgagee, where, with full knowledge of all the facts, the mortgagor, without questioning the regularity of the sale, but treating it as regular, remained passive while the purchaser made extensive improvements in the property and treated it as his own. [Jones v. North Vancouver L. and I. Co., [1910] A.C. 317, specially referred to; see also Halsbury's Laws of England, vol. 13, p. 166.]

Williams v. Sun Life Assurance Co., 4 D.L.R. 655, 21 W.L.R. 271.

(§ VI G 2—106)—SUSPENSION OF POWER.

A mere extension of the time of payment and not an absolute sale of encumbered property to a mortgagee, was effected where a saw-mill and its appurtenances were turned over to him under an agreement whereby his power of sale was suspended, and he was to operate the mill, paying the mortgagor a fixed monthly rental, the latter retaining an option to take back the property within nine months on certain conditions, and it was also agreed that a transfer of such property, which was given the mortgagee, should not be recorded except in the event of a sale of the property in the manner specified in such agreement, or upon the institution of suits against the mortgagor, or upon his not redeeming the property, and it was further stipulated that the mortgagee's rights should be those of a mortgagee in possession, and that nothing in the agreement should impair such right. [Davis v. Thomas, 1 R. & My. 506, and Bastin v. Bidwell, L.R. 18 Ch. D. 238, 247, distinguished.]

Manitoba Lumber Co., Ltd. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

H. Surplus; proceeds.

(§ VI H—131)—SURPLUS.

The vendor of goods or chattels who, in addition to taking a lien note or conditional sale agreement, obtains a second mortgage on land as additional security, if there is a deficiency upon a re-sale of the goods or chattels for the vendee's default, is entitled to have it satisfied from the surplus arising from the sale of the land under the first mortgage.

The Great West Life Assurance Co. v. Leib, 4 D.L.R. 392, 21 W.L.R. 877.

I. Deficiency and judgment therefor.

(§ VI I—135)—DEFICIENCY AND JUDGMENT THEREFOR.

Where after foreclosure and sale an order was applied for for judgment for the deficiency, the Court granted the order applied for but without costs.

The Acadia Loan Co. v. Legere, 45 N.S.R. 328.

VII. Redemption.

B. Who may redeem.

(§ VII B—150)—WHO MAY REDEEM.

A purchaser pendente lite of the mortgaged premises added as a party defendant in a foreclosure action has a locus standi to apply to redeem without first entering an appearance.

Wasson v. Harker (No. 2), 7 D.L.R. 526, 22 W.L.R. 320.

A purchaser pendente lite of the mortgaged premises added as a party defendant in a foreclosure action has a locus standi to apply to redeem without first entering an appearance. [Wasson v. Harker (No. 2), 7 D.L.R. 526, affirmed in part.]

Wasson v. Harker (No. 4), 8 D.L.R. 88, 22 W.L.R. 609.

An assignee of the equity of redemption purchasing after an order nisi for foreclosure has been made at the suit of the mortgagee, is bound by the order nisi, and, when added as a party defendant, he is limited by the period fixed for redemption by the order nisi. [Wasson v. Harker (No. 2), 7 D.L.R. 526, affirmed in part; Re Parbola, Ltd., [1909] 2 Ch. 437, followed.]

Wasson v. Harker (No. 4), 8 D.L.R. 88, 22 W.L.R. 609.

Plaintiff gave a second mortgage on certain land to defendant. Default being made, defendant instructed his solicitor to foreclose. On the day on which the summons was issued the mortgagor remitted the bulk of the amount due, leaving only a small balance due, together with the costs. Defendant's solicitors asked for payment of the amount, repeatedly, and finally obtained an order nisi for foreclosure. The plaintiff then arranged with a party who was indebted to him to pay off the claim, but this party neglected to do so, and foreclosure was made absolute. Defendant then sold the land to one A., apparently at a price less than the true value, but otherwise there was no collusion or fraud shewn. In an action to re-open the foreclosure:—Held, that Adamson having acquired title from the registered owner of the land and being an innocent purchaser for value was protected by sec. 65 of the Land Titles Act and his title could not be questioned.

Richards v. Thompson, 4 S.L.R. 213.

An assignee of the equity of redemption purchasing after an order nisi for foreclosure has been made at the suit of the mortgagee, is bound by the order nisi, and, when added as a party defendant, he is limited by the period fixed for redemption by the order nisi. [Re Parbola, Ltd., [1909] 2 Ch. 437, followed.]

Wasson v. Harker (No. 2), 7 D.L.R. 526, 22 W.L.R. 320.

C. Time; amount.

(§ VII C—155)—TIME; AMOUNT.

Redemption—Extension of time for.

Brodie v. Patterson, 1 D.L.R. 901.

D. Mode and effect.

(§ VII D—162)—EFFECT GENERALLY.

A mortgagor upon redeeming, is not entitled to an account of the rents and profits from a saw-mill property of which the mortgagee was in possession under an agreement which required him to pay the mortgagor a stated monthly rental for the property during the time he was in possession.

Manitoba Lumber Co., Ltd. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

MOTIONS AND ORDERS.

I. IN GENERAL.

II. ORDERS.

I. In general.

(§ I—2)—NOTICE OF MOTION.

Leave reserved to a defendant to move to set aside a verdict in favour of the plaintiff and to enter one for the defendant and judgment for non-suit will not be set aside for delay in prosecution within a period in which a stay of proceedings was granted to the defendant.

Giberson v. The Toronto Construction Co., Ltd., 40 N.B.R. 307.

Examination of party as witness on "pending" motion—No notice of motion served.

McLaren v. Tew, 3 D.L.R. 881, 3 O.W.N. 1376, 22 O.W.R. 617.

It will be implied in a statute authorizing proceedings by summons to quash a municipal by-law or ordinance that the grounds for the motion are to be stated in the summons, but leave will be given to amend, if no statutory limitation interferes and the respondent is not prejudiced by the delay.

Re St Boniface By-law (No. 1), 1 D.L.R. 221, 19 W.L.R. 943, 48 C.L.J. 154, 22 Man. L.R. 27.

Where notice of motion for interim alimony is given, and affidavits pro. and con. are filed, but the motion lapses, a second application, even a year later, is not irregular because for the same relief and on the same material as the former application, no judicial decision having been rendered on the earlier motion. [Smith v. Edmunds, 10 Man. L.R. 240; Sayer v. O'Flynn, 5 W.L.R. 524; Payne v. Newberry (No. 2), 13 P.R. 392; Dombey v. Playfair, [1897] 1 Q.B. 368, referred to.]

Standall v. Standall, 7 D.L.R. 671.

(§ I—3)—SERVICE OF NOTICE OF MOTION.

A notice of a motion, on behalf of a subsequent mortgagee, to obtain payment out of the proceeds of the sale of encumbered property which had been paid into Court, cannot be served upon the mortgagor and the other defendants by filing a copy of the notice of motion in the office of the local registrar.

Allin v. Ferguson, 5 D.L.R. 19, 21 W.L.R. 246.

(§ I—4)—AFFIDAVITS; FILING OF, SWEARING.

It is essential that the respondent on a preliminary motion in Chambers shall file his affidavits in answer before using them on the motion, under rule 417 of the Saskatchewan Judicature Rules, 1911.

Peat v. Sexton, 8 D.L.R. 761, 22 W.L.R. 736.

An affidavit which was not filed until after the service of a notice of motion which stated that a filed affidavit of a named deponent would be read in its support, cannot, without leave, be read on the hearing of the motion, as it does not answer the description given by the notice which specified the affidavit as one already filed.

Allin v. Ferguson, 5 D.L.R. 19, 21 W.L.R. 246.

In an examination of an officer of a railway company in an action against the company for personal injuries on a motion to require the production of certain reports of the company as to the happening of the accident on which the action was based, made by the company's officials who investigated the same, an affidavit filed by the officer being examined as to the privileged character of such reports, must set forth and so clearly identify such reports and give names of the officials investigating the accident so that there will be no difficulty in procuring the conviction of the deponent for perjury should it afterwards appear that his affidavit was untrue.

Swaisland v. Grand Trunk R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

Where a notice of a motion for an interim injunction states that certain affidavits and exhibits will be read on the hearing thereof, other affidavits and exhibits cannot be read on a subsequent motion to continue such injunction, except with the leave of the Court.

Pigeon v. Preston, 4 D.L.R. 483, 21 W.L.R. 875.

A motion to suspend the proceedings until judgment has been rendered in another case between the same parties will not be granted if a plea is not filed in the case and if the motion is unsupported by affidavit.

Rousseau (plaintiff) v. Marcotte et al. (defendants) and Lefebvre et al., mis-en-cause, 13 Que. P.R. 219 (Sup. Ct.).

An affidavit that was sworn on the day before a summons was issued in an action, cannot be read in support of a subsequent application for an interim injunction, unless, with the permission of the Court, it

is taken from the files and re-sworn. [Green v. Prior (1886), W.N. 50, specially referred to.]

Pigeon v. Preston, 4 D.L.R. 483, 21 W.L.R. 875.

The failure to file, at the time of making a motion, affidavits which were read, with leave of the Court, on the hearing, is, at most, an irregularity, which misled no one, and, under rule 747, Sask. Judicature Act, may be disregarded by the Court.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

Affidavits that are read, pursuant to leave granted, on the hearing of an application, need not be filed before service of notice of the motion, as required by rule 418 of the Judicature Ordinances in the case of affidavits upon which the motion was originally based.

Re F. H. Price 4, D.L.R. 407, 21 W.L.R. 299.

The objection that affidavits in support of a motion were not filed in the proper office or department of the Court although they were in fact filed and in the custody of the Court and, copies were supplied in pursuance of a demand, is waived if the motion was enlarged without objection being taken; under such circumstances, the Court will allow the affidavits to be refiled in the proper office nunc pro tunc. [See also Yearly Practice (1912), p. 1136.]

Re West Nissouri School, 1 D.L.R. 252, 3 O.W.N. 478, 21 O.W.R. 533, 25 O.L.R. 550.

II. Orders.

(§ II—5)—Orders.

A caveat based on a primâ facie valid document will not be vacated on a summary application to a Judge in Chambers where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party; the application might be entertained if the facts were undisputed and the issue rested on the interpretation or validity of the written document on which the caveat is founded.

McGreevy v. Murray, 1 D.L.R. 285, 19 W.L.R. 947, 22 Man. L.R. 78.

(§ II—6)—Setting aside.

Where an extra-provincial corporation, made a co-defendant with an individual, obtains an order setting aside the service of process upon it on the ground of want of jurisdiction, and notice of the application was served on the plaintiff only and not upon the individual defendant, the order is as to the latter an ex parte order and is subject to rescission as such. [Re Doyle and Henderson, 12 P.R. 38, referred to.]

Swanson v. McArthur, 7 D.L.R. 680, 22 W.L.R. 317.

An ex parte order of a referee may be rescinded by himself under Manitoba K.B. rule 438 if it appears, on the motion made to rescind, that such ex parte order was improperly made, and this notwithstanding that the application to rescind was not made within the four-day limitation of that rule, if it appears that the interests of the objecting party were not affected (Man. K. B. rule 342).

Swanson v. McArthur, 7 D.L.R. 680, 22 W.L.R. 317.

(§ II—8)—Defeating through irregularities.

The erroneous statement in a sheriff's transfer of land under an execution sale, that the writ was issued out of the Supreme Court, instead of the District Court, will not defeat an application to confirm the sale, notwithstanding a new transfer will be necessary.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

A statement in an affidavit of the sheriff that an execution was renewed in the office of the "local registrar" of the District Court, instead of that of the registrar of the land titles office, will not defeat an application to confirm a sale of land under the writ, since, as there was no such office as the local registrar of such Court, no one could have been misled by such error.

Re F. H. Price, 4 D.L.R. 407, 21 W.L.R. 299.

MOTOR VEHICLES.

See Automobiles; Motorcycles.

MUNICIPAL CORPORATIONS.

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As to liability for injuries on highways, see Highways, IV A.

As to water supply and rating for same, see Waters.

I. In general.

A. Incorporation.

(§ I A—7)—Territory.

The prohibition contained in sec. 3, subsec. (d) of the Municipalities Incorporation Act, ch. 143, R.S.B.C. 1897, against a district municipality including, at its incorporation, land sub-divided into town lots, etc., is not absolute, but such lands may be included if all the conditions and provisions of sec. 3, except sub-sec. (c) of that Act, have first been complied with.

Municipality of Saanich v. French, 8 D.L.R. 637.

In a proceeding collaterally attacking the validity of the incorporation of a district municipality, on the ground that it included within its area at the time of incorporation land sub-divided into town lots, in violation of sec. 3, sub-sec. (d) of the Municipalities Incorporation Act, ch. 143, R.S.B.C. 1897, it will be assumed in the absence of evidence to the contrary that all the conditions and provisions of sec. 3, except subsec. (c), making such inclusion valid, have been complied with and that therefore the land in question, whether town lots or not, are properly included in the municipality.

Municipality of Saanich v. French, 8 D.L.R. 637.

B. Division or annexation.

(§ I B—10)—Division or annexation.

A petition for incorporation of a part of a municipality as a village signed by two-thirds of those qualified under the provisions of art. 52, M.C., which has been presented to the County Council remains valid notwithstanding the withdrawal of some of the signatures. The husbands of female owners of immovables of the value necessary to give the right to vote are electors and qualified to sign said petition. When an action has been brought to have the homologation by the County Council under art. 57 M.C., of the report of a special superintendent annulled a resolution of the council revoking the homologation filed with an offer to pay the costs, supplies a defence which justifies the dismissal of the action.

Tremblay v. County of Chicoutimi, 41 Que. S.C. 333 (Ct. Rev.).

II. Powers, duties and liabilities.

A. In general.

(§ II A—30)—Powers to municipality, restriction as to cancelling signature.

A signatory to a petition praying a municipal body to exercise statutory powers cannot remove his name from the signature where no statutory provision is made for such removal.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

The powers conferred by arts. 758 and 759 of the Municipal Code, on the County Council and on the board of delegates, may be exercised by them in regard to a road to be made as well as to one already made; nevertheless, the declarations mentioned in arts. 758 and 759 may be made legally only after a public notice should be given to that effect (761 M.C.); and, moreover, these same declarations must be published after the adoption of a resolution or approval of the procès-verbal which contains them.

Brunet et Hainault v. Corp. Du Comte de Beauharnois, 18 Rev. de Jur. 141.

For the decision on the merits of the appeal from the resolution of a local council on the subject of a by-law, the County Council has the power to accord costs either to the party appellant or to the party respondent, and such costs may comprise all those incurred by such an appeal. The council will not be compelled to tax such costs at the same session when decision was rendered, but they may validly do so at the next general session.

La Corporation de Ste. Foye v. La Corporation du Comte de Quebec, 18 Rev. de Jur. 99.

(§ II A—32)—Legislative control of.

A municipal by-law is ultra vires where it purports to provide a penalty for the identical offence which is already subject to penalty under a provision of the criminal law.

Rex v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 W.L.R. 199.

(§ II A—33)—Power over school funds.

Under sec. 7 of the Continuation Schools Act of Ontario, a school board has the right of determining the amount to be raised for maintenance purposes for the current school year, and the municipal council is under an absolute obligation to comply with a requisition of the board in that behalf. [See also Canadian Pacific R. Co. v. City of Winnipeg, 30 Can. S.C.R. 563.]

Re West Nissouri School, 1 D.L.R. 252, 3 O.W.N. 478, 21 O.W.R. 533, 25 O.L.R. 550.

(§ II A—34)—Power to grant use of street.

A resolution of a township council is not an authorized municipal method granting a telephone company the privilege under certain conditions of constructing its telephone line, a by-law being necessary. (Per Middleton, J.)

Howse v. Township of Southwold, 5 D. L.R. 709, 3 O.W.N. 1295 and 1592, 22 O. W.R. 797, 27 O.L.R. 29.

(§ II A—34a)—Power over officers.

The Provisions of the Towns Incorporation Act (R.S.N.S. 1900, ch. 71, secs. 121 to 124) empowering a Judge of the Supreme Court to reinstate, when improperly removed, a town officer whose appointment

is during good behaviour, or to rescind a resolution reducing his salary where such resolution is not passed in the exercise of the bonâ fide discretion of the Town Council, do not apply to stipendiary magistrates appointed by the Lieutenant-Governor-in-Council, although the magistrate's salary is fixed by the Town Council.

Re Pelton, 7 D.L.R. 465.

B. Delegation of power.

(§ II B 1—41)—To MUNICIPALITY.

The rights of the city of Montreal by its charter are not proprietary rights, but are merely delegated rights conferred by the Legislature; hence the city cannot grant privileges or rights beyond what are delegated to it.

Montreal Street Railway Co. v. The City of Montreal, 3 D.L.R. 812.

(§ II B 2—49)—By MUNICIPALITY.

A corporate body created by statute to own in trust, improve and manage a harbour bounded by its high-water mark, with a proviso that "it shall be incumbent upon it to erect land-marks," with general powers to alienate its property, has both implied and express power to contract with owners of land contiguous to the harbour and bounded by the same high-water mark, involving the alienation of land on the harbour side, and the acquisition of land on the other.

Harbour Commissioners of Montreal (plaintiffs, appellants) v. Record Foundry and Machine Co. et al. (defendants, respondent), 21 Que. K.B. 241.

C. Legislative functions; ordinances; by-laws.

(§ II C 1—50) — LEGISLATIVE FUNCTIONS; ORDINANCES.

There is no provision of law compelling a municipal council to submit a by-law to the electors for the repeal of a local option by-law in respect of the sale of intoxicating liquors.

Stoddart v. Town of Owen Sound, 8 D. L.R. 932, 27 O.L.R. 221, 4 O.W.N. 83.

The illegality of a resolution providing for indemnifying a municipal council against the costs of upholding a by-law if attacked, even though such resolution has induced the council to pass the by-law, does not invalidate the by-law.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

Where a municipal corporation by its municipal council has determined on the course to be taken in connection with pending litigation, that determination binds all the ratepayers, because the voice of the council is the voice of the municipality which, under the Ontario municipal system, is represented by its council and municipal action or inaction must be determined thereby.

Stoddart v. Town of Owen Sound, 7 D. L.R. 377, 4 O.W.N. 171.

A municipality cannot issue a license for the exhibition of wild animals within the municipality where there is an existing by-law of the municipality prohibiting the keeping of wild animals within its boundaries.

Municipality of Saanich v. French, 8 D.L.R. 637.

Before a municipality can establish a claim that a license fee is payable to it, it must shew that it had intended to make such claim either by the production of the collector's roll, or by evidence of a demand upon the defendant for the amount or a notice to him that it would be exacted. [City of Victoria v. Belyea, 13 B.C.R. 5, referred to.]

Municipality of Saanich v. French, 8 D.L.R. 637.

(§ II C 1—53)—AMENDMENT.

The power given to the common council of the city of Montreal, by the city charter, to amend by a two-thirds vote a report from the Board of Control respecting the expenditure of money authorizes the amendment to a report, approving of the lowest tender put in for furnishing supplies, by substituting the name of a higher tenderer at the price of the one approved.

West v. City of Montreal, Q.R. 21 K.B. 289.

(§ II C 2—55) — ENACTMENT; ENTITLING; PUBLICATION.

When a by-law is prescribed by the statute as the method by which a municipal corporation may exercise the power of closing a highway, such power can only be exercised in that way and effect cannot be given to a mere resolution of the municipal council.

Re Bassano, 7 D.L.R. 601.

Under the provisions of the Liquor License Act, the council of the district prepared for submission a local option by-law. Notice of intention to submit such by-law was published in the proper paper in the issues of the 10th, 17th and 20th days of November, and the first day of December, voting being fixed for the 12th of December. The notice did not state the location of the polling places, of the secretary's office where it was stated the by-law might be inspected, nor of the council chamber where the by-law would be considered, and passed if approved by the electors. The by-law, having been approved by the electors, was finally passed by the council within the time limited, but was not signed nor sealed until after such time, but was signed and sealed before the date when the by-law was to come into force. On a motion to quash the by-law:—Held, that the time of publication of notice was sufficient under the Act 2. Inasmuch as the voting is stated to be held at the time and place fixed for the holding of the regular municipal elections, and as the polling places for such elec-

tions are determined by the returning officer who need not be appointed three weeks before the election, the Legislature could not have intended to require the location of the polling places to be specified in the notice. 3. The notice in question sufficiently complied with the provisions of the Act in indicating the office of the secretary-treasurer as the place where the by-law might be inspected, and the council chamber as the place where the by-law would be finally considered, without specifically stating the location of such places. 4. That the word "passed" where used in the Act, referring to the passing of the local option by-law by the council, refers to the final motion of the council in enacting the by-law and has no reference to any signing or sealing of the same. 5. That the omission of the officials of the district to sign and affix the seal to the by-law in question within the time limited for passing it, the by-law having been duly passed by the council, did not in any way invalidate it.

In re Local Improvement District No. 189, 4 S.L.R. 522.

(§ II C—56)—APPROVAL OR DISAPPROVAL OF MAYOR.

The affixing of a schedule read at the meeting at which a by-law is passed, and the signing and sealing of the by-law, need not be done at the meeting; they are matters of routine only and can be done by the proper officers at a later date. [Brock v. Toronto, etc., R. Co., 17 Gr. 425; McLellan v. Assiniboia, 5 Man. R. 127, referred to.]

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

(§ II C 2—59)—PUBLICATION.

Notice of motion to quash a local option by-law and stated to be returnable on the 14th of February, was served on the secretary of the municipality on the 4th of February, and on the reeve and councillors on the 7th of February. The affidavits in support of the application were served with the notice, except in the case of the secretary, upon whom they were not served until some days afterwards. On the return date of the motion it was enlarged to the following day at the request of the applicant, and on the adjourned date for a considerable time at the request of the municipality, the ground of the application for adjournment being stated to be that the municipality had had no opportunity of answering the affidavits. Before the date of the adjourned hearing the municipality obtained a summons to set the notice of the motion aside and the whole matter came on to be heard, when the by-law was quashed. The ground for quashing the by-law was that the publication was insufficient; but in the notice of motion the ground under which the objection was raised was stated as follows, "that the petition was never published in a newspaper." The affidavit served, however, proved the insufficient publication. The municipality appealed alleging that the procedure was irregular and should have been under the Controverted Municipal Elections Act, and that the service was irregular; and also that the ground on which the by-law was quashed was not raised in the notice of motion:—Held, by the Liquor License Act the provisions of the Rural Municipalities Act as to quashing by-laws are made applicable to local option by-laws; but this does not make the procedure of the Controverted Municipal Elections Act applicable; that Act applying only where an election is contested or a vote questioned and not where a by-law is attacked for irregularity. 2. As the District Court Judge is acting as persona designata in the proceedings, the rules of Court do not apply and no provision having been made as to how service should be effected the head officer of the municipality, in this case the reeve, is the only person who can be served. 3. The reeve being the proper person to be served the municipality was not served with the notice or material in support thereof, within the time limited. 4. But, by appearing on the return day and making application for an adjournment which was granted, giving the municipality ample time to meet the applicant's case, the irregularity was waived. 5. As it did not appear that the municipality had been in any way misled by the error of alleging non-publication of the petition instead of notice of the petition, there was no merit in the objection that this ground was not raised in the notice of motion.

In re Devitt and the Rural Municipality of Usborne, 4 S.L.R. 479.

(§ II C 3—60)—VALIDITY; EXTENT OF POWER.

Where legal proceedings are taken to set aside or declare invalid a proceeding taken by a municipal council in alleged exercise of its statutory powers, the party called upon to defend the impeached proceedings is entitled ex debito justitiae to notice of the grounds of attack in due time to prepare the defence.

Re St. Boniface By-law (No. 1), 1 D. L.R. 221, 19 W.L.R. 943, 48 C.L.J. 154, 22 Man. L.R. 27.

Where a city charter makes provision for a judicial inquiry as to the probable grounds for a motion to quash a by-law of the municipality, the order for an inquiry may be made upon an affidavit of information and belief, if it seems likely that facts will be elicited on the inquiry bearing upon the facts alleged.

Re St. Boniface By-law (No. 2), 1 D. L.R. 366, 20 W.L.R. 332.

A ratepayer in a municipality which passes a by-law purporting to bind lands

in an adjoining municipality has no status to object to the by-law on that ground.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

Highway—Municipal by-law closing street—Motion to quash—No provision for compensation—Municipal Act, sec. 632 (1)—Notice under—Unnecessary by-law—Damages—Suggested assessment of, by arbitration—Order of Railway Board.

Re Seguin and Village of Hawkesbury, 4 O.W.N. 521, 23 O.W.R. 857.

(§ II C 3—62)—Reasonableness generally.

The fact that a municipal by-law may have the effect of preventing a resident of the municipality from making the most profitable use of his property is not any ground for holding the by-law invalid for unreasonableness, so long as it is within the powers of the municipality and honestly passed in the public interest.

Re Dinnick v. McCallum, 5 D.L.R. 843, 3 O.W.N. 1463, 22 O.W.R. 546, 26 O.L.R. 551.

If a municipality have power to pass a certain by-law, the question of its reasonableness is, generally speaking, one for the judgment and conscience of the council, and, except in extreme cases, the Court will not hold by-laws passed by municipal bodies within the limits of their authority to be invalid for unreasonableness. [Kruse v. Johnson, [1898] 2 Q.B. 91; Stiles v. Galinski, [1904] 1 K.B. 615, referred to.]

Re Dinnick v. McCallum, 5 D.L.R. 843, 3 O.W.N. 1463, 22 O.W.R. 546, 26 O.L.R. 551.

(§ II C 3—66)—Want of jurisdiction.

The city of Toronto has power under sec. 6 of its building by-law, No. 4861, to revoke a building permit already given, where the erection of the building in question would be an infringement of such by-law passed under the authority of clause (c) of sec. 541a of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.), ch. 40, sec. 10, if the permit previously granted has not been followed up by acts as constituting a "location" of the building in question, ex. gr. the actual construction, in whole or in part, of the building for which the permit was granted. [City of Toronto v. Williams (No. 1), 5 D.L.R. 659, reversed.]

City of Toronto v. Williams (No. 2), 8 D.L.R. 299, 4 O.W.N. 58.

Vested rights cannot be interfered with by municipal by-laws except where the language of legislation conferring power to enact them clearly discloses such intent.

City of Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, 22 O.W.R. 326.

The city of Toronto has no power under sec. 6 of its building by-law, No. 4861, to revoke a permit already given, on the ground that the erection of the building in question is an infringement of a by-law passed under the authority of clause (c) of sec. 541a of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.), ch. 40, sec. 10.

City of Toronto v. Williams, 5 D.L.R. 659, 3 O.W.N. 1643, 22 O.W.R. 899, 27 O.L.R. 186.

(§ II C 3—67)—Retroactive.

Clause (c) of sec. 541a of the Ontario Municipal Act, 1903, as enacted by 2 Geo. V. (Ont.), ch. 40, sec. 10, does not authorize the prohibition by by-law of an apartment or tenement house or garage which has already been located. [City of Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, referred to.]

City of Toronto v. Williams, 5 D.L.R. 659, 3 O.W.N. 1643, 22 O.W.R. 899, 27 O.L.R. 186.

The completion of a building on a certain street, which was begun under a permit from a city, for use as a garage for hire and gain, cannot be prevented by a municipal by-law prohibiting the "location" of structures of that character on such street, which was adopted subsequently to the granting of such permit.

City of Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, 22 O.W.R. 326.

(§ II C 3—70)—As to use of streets.

Where a municipal council has jurisdiction to deal with the subject of opening up a new road, mere irregularities in the procedure cannot be relied on by way of collateral attack. The task of locating the new road belongs in the first place exclusively to the commissioner. Objections to the project as a whole, or as to the location or payment of damages, etc., may be urged when the council is asked to confirm or adopt the proceedings, and where such objections are not then urged they cannot be afterwards raised as ground for invalidating the prior proceedings. The municipal authorities having entered, or being entitled to enter, have the right, especially after notice, to remove obstructions from the way.

Carr v. Ferguson, 45 N.S.R. 132; 9 E. L.R. 218.

A municipal council is a legislative body with certain statutory powers; it is not subordinate to the Courts, and the exercise of its statutory powers is in the discretion of the council; and if there is good faith the Court cannot interfere.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

(§ II C 3—81) — Animals running at large.

Under the authority of sub-secs. 1 and 2 of sec. 540 of the Consolidated Municipal Act, 1903, a municipality has power to pass a by-law justifying the killing of dogs found running at large anywhere in the municipality and the by-law need not

be limited to dogs found in a street or public place.

McNair v. Collins, 6 D.L.R. 510, 3 O. W.N. 1639, 22 O.W.R. 891, 27 O.L.R. 44.

(§ II C 3—99)—Gas works or holders.

Three city by-laws, one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the City Council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued, have within the territorial limits of the city the same effect as an Act of Parliament has upon the subjects at large. [Hopkins v. Swansea, 4 M. & W. 621, per Lord Abinger, C.B., at p. 640, followed; Yabbicon v. King, [1899] 1 Q.B. 444, per Day, J., at p. 448; Dillon on Municipal Corporations, par. 573; Biggar's Municipal Manual 327, referred to.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

(§ II D—105)—Regulation of business.

Under an ordinance authorizing a council to pass by-laws for "licensing, regulating and governing auctioneers," and for fixing the sum to be paid for every such license, the council of the city of Calgary passed a by-law requiring all auctioneers within the city to obtain a license and fixing the fee therefor at $20 in the case of bonâ fide residents and at $1,000 in other cases:—Held, that the by-law was void for discrimination.

Rex v. Pope, 7 Terr. L.R. 314.

(§ II C 3—110)—Teamsters.

The municipal regulations which require carters and contractors doing business within the municipality who use teams, to take out licenses do not apply to one who, under an agreement with the municipality, contracts to raise the carcasses of dead animals in order to convey them beyond the municipal limits. Therefore, a conviction by the Recorder imposing on the latter a fine for violating these regulations is a nullity and a certiorari will be granted to have it quashed.

Lesage v. City of Montreal, Q.R. 42 S.C. 144 (Sup. Ct.).

(§ II C 3—111a)—Peddlers and hucksters.

A person is not a "transient trader" requiring a municipal license as such under the Ontario Municipal Act, 1903, 3 Edw. VII., ch. 19, sec. 583, where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (ex gr. an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business. [Rex v. St. Pierre (1902), 4 O.L.R. 76, followed; Rex v. Pember (Decision No. 1), 2 D.L.R. 542, affirmed.]

Rex v. Pember (No. 2), 3 D.L.R. 347, 3 O.W.N. 1216, 21 O.W.R. 915, 20 Can. Cr. Cas. 60.

One who, though not a resident in a municipality, merely exhibits samples of, and takes orders for, his goods therein, the goods themselves not being within the municipality, does not "offer goods for sale," and is not a "transient trader," within the meaning of the provisions of the Municipal Act, 1903 (Ont.), or of a municipal by-law passed thereunder.

Rex v. Pember (No. 2), 3 D.L.R. 347, 3 O.W.N. 1216, 21 O.W.R. 915, 20 Can. Cr. Cas. 60.

In order to constitute an offence against a municipal by-law passed under the authority of the provisions of the Municipal Act relating to "transient traders," 3 Edw. VII. (Ont.), ch. 19, sec. 583 (30 and 31), the goods offered for sale must be goods in the municipality. (Per Britton, J.)

Rex v. Pember (No. 2), 3 D.L.R. 347, 3 O.W.N. 1216, 21 O.W.R. 915, 20 Can. Cr. Cas. 60.

(§ II C 3—112)—Closing stores.

A municipal council in Ontario has power under the Shop Regulation Act, R.S.O. 1897, ch. 257, sec. 44, to pass a by-law regulating the time of closing of shops not earlier than 7 p.m., within the municipality, independently of the presentation to the council of a petition of electors.

Re Simpson and Village of Caledonia, 1 D.L.R. 15, 3 O.W.N. 503, 20 O.W.R. 874.

Where various petitions are presented to a municipal council under the Shop Regulation Act (Ont.) for an early closing by-law, but the petitions together contain the signatures less than the requisite three-quarters in number of the occupiers of shops to be affected by the proposed by-law, the petitions may be treated as supererogatory, and the council may, without reference thereto, pass a by-law for closing of shops, and may therein provide for closing at the same or a different time than had been petitioned for, subject to the restriction in such case of the closing hour being not earlier than 7 p.m., which restriction does not apply, where the by-law is made upon a duly signed petition under sec. 44 (3). [For other cases, see 2 Canadian Ten Year Digest, 2626, 2627, 2637, 2639, 2641, 2649.]

Re Simpson and Village of Caledonia, 1 D.L.R. 15, 3 O.W.N. 503, 20 O.W.R. 874.

Under an Act empowering a City Council to pass by-laws for "fixing, altering

and regulating'' the hours of opening and closing retail stores, the council of the city of Calgary passed a by-law fixing the hours for opening and closing retail stores in that city, but provided therein that before any person should be convicted thereunder it must be proven that he transacted business during the prohibited hours:—Held, that the by-law was ultra vires.

Rex v. Doll, 7 Terr. L.R. 472.

(§ II C—113)—Regulating Sunday business.

Whether or not a by-law under the Montreal charter, passed by the Quebec Legislature, purporting to authorize certain Sunday sales by traders is ultra vires as dealing with a question of criminal law, the Provincial statute is a protection to those who exercise the privileges or exemptions, which it purports to confer; and until such statute has been declared invalid by a Court of superior jurisdiction after due notice to the Attorney-General, a police magistrate's summary conviction, based upon his finding that such Provincial legislation was ultra vires, will be quashed. Where the by-law passed in conformity with a Provincial statute purports to authorize certain Sunday sales of fruit and temperance beverages, the Provincial statute operates as a de facto authority, which constitutes a good defence to a penal prosecution in respect of acts which such legislation purports to authorize, committed prior to the legislation being so declared ultra vires.

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495.

(§ II C 3—114b)—Fixing license fee of pool-rooms.

Regulation of pool-rooms—By-law fixing license fee—Reasonableness—Quashing conviction.

Crookston v. Miller, 7 D.L.R. 771.

(§ II C 3—126a)—Unprotecting wells.

In a municipal by-law requiring the ''owner or occupant'' to guard or cover a well when not in use, the word ''owner'' must be read ''owner in occupation,'' and the by-law would not apply to render the equitable owner of the fee in lands let to a tenant liable for breach of the by-law by the tenant resulting in the loss of plaintiff's horse of which the tenant was bailee.

Love v. Machray, 1 D.L.R. 674, 20 W.L.R. 505, 22 Man. L.R. 52.

(§ II C 3—130)—Exclusive franchise.

A municipal by-law giving a person exclusive power to carry on a certain business in the municipality, which is approved and ratified by the Legislature does not affect a company subsequently incorporated and given the right to carry on the same kind of business in a territory within said municipality.

St. Paul Electric Light and Power Co. v. Montreal Light, Heat and Power Co., 42 Que. S.C. 289 (Sup. Ct.).

(§ II C 3—134a)—Ten-pin alleys.

A municipal by-law prohibiting the erection of buildings upon the lots fronting or abutting on a residential street within a certain distance from the street line is within the authority conferred by sec. 541 (a) of the Consolidated Municipal Act 1903, as enacted by 4 Edw. VII. (Ont.), ch. 22, sec. 19.

Re Dinnick v. McCallum, 5 D.L.R. 843, 3 O.W.N. 1463, 22 O.W.R. 546, 26 O.L.R. 551.

D. Contracts generally; ultra vires contracts.

(§ II D—142)—Ultra vires contract.

Where a municipal by-law and a contract based upon it for the construction of certain works have both been annulled by the Courts for non-observance of the necessary formalities in regard to the publication of the by-law, but the subject-matter of the by-law and contract are within the powers of the municipality, the opposite party is entitled to recover from the municipality the damages he has suffered from the inexecution of the contract.

Poutres Siegwart v. Deschambault, 5 D.L.R. 395, 41 Que. S.C. 453.

(§ II D—143)—Execution; mode of contracting.

A contract by a municipal corporation for carrying out permanent improvements to streets and the construction of sewers and contemplating a large expenditure is within sec. 325 of the Municipal Act 1903, and a by-law is essential to its validity. [Waterous Engine Works v. Township of Palmerston, 21 Can. S.C.R. 556, followed.]

O'Donnell v. Township of Widdifield, 1 D.L.R. 271, 3 O.W.N. 597, 21 O.W.R. 1.

(§ II D—146)—Ratification; rescission; cancellation.

Where a settlement of a claim for water rates by a municipal corporation against a consumer is made by unanimous resolution of the council, and the terms of the settlement are in part carried out by payment to and acceptance by the treasurer of the municipal corporation of successive instalments of money due to the municipality under the settlement, there is such ratification of the contract as to preclude a successful attack upon it by reason of the settlement not having been formally adopted by the council.

Brandon Electric Light Co. v. City of Brandon, 1 D.L.R. 793, 20 W.L.R. 658.

The ratepayers' right to prevent an expenditure of municipal funds for purposes ultra vires the corporation does not justify an action to rescind a completed purchase and to compel the vendor to repay the price he has received; his remedy in such case is to hold the individual councillors responsible for the loss.

Verner v. City of Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

(§ II D—149)—INADEQUACY OF PRICE ON SALE.

The Court will not sit in review of the action of municipal councils while acting within the scope of its authorized powers, except upon the ground of fraud; and a sale of municipal property cannot, in the absence of fraud, be impeached on the ground that the council did not obtain as much for the property as it should have received in the exercise of its duty towards the ratepayers.

Parsons v. City of London, 1 D.L.R. 756, 3 O.W.N. 604, 21 O.W.R. 205, 25 O.L.R. 442.

E. Borrowing money; indebtedness.

(§ II E—151)—POWER TO BORROW GENERALLY.

Under sec. 17 (1) of the Ontario Telephone Act (2 Geo. V., ch. 38) a municipality may fix any convenient date as the date of issue of the debentures issued thereunder.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

(§ II E—152)—VOTE FOR.

The power to issue debentures under the Ontario Telephone Act, 2 Geo. V., ch. 38, sec. 17 (1), may be exercised without a vote of the ratepayers.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274, 23 O.W.R. 325.

F. As to lights, water supply and other property and privileges.

(§ II F 1—172)—PURCHASE OF EXISTING PLANT.

Under sec. 5281, R.S.Q. 1909, providing that a municipal corporation shall have "jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it," a town has no authority to establish a light and power plant beyond its boundary unless there is something in the special Act by which the power is conferred indicating an intention that it is to be exercised beyond the municipal limits, and, therefore, a by-law of the town authorizing the purchase of such plant so situated is invalid in the absence of statutory authority.

The Shawinigan Hydro-Electric Co. v. The Shawinigan Water and Power Co., 4 D.L.R. 502, 10 E.L.R. 521, 45 Can. S.C.R. 585.

(§ II F 2—175)—WATER SUPPLY.

Where a contract is made between a municipality and a water company to furnish water for fire purposes and of a particular pressure, and a violation of the contract is committed by the water company, the liability for such violation is limited to the penalty in the contract, and to be enforced only by the municipal council.

Belanger v. Town of St. Louis, 8 D.L.R. 601.

(§ II F 2—176)—BUILDING OR PURCHASING WATERWORKS.

A city has power under the Municipal Public Works Act 1909, ch. 91, R.S.S., to construct waterworks and to acquire necessary land therefor either within a city or in the neighbourhood thereof.

Ex parte Young, 5 D.L.R. 83, 21 W.L.R. 860.

(§ II F—192)—PURCHASE OF LAND.

A municipal council is not restricted as to the price to be paid for land purchased for administrative purposes, and it may be determined upon between the corporation and the vendor without any reference to the values appearing on the assessment roll.

Birchenough v. City of Montreal, 3 D.L.R. 299, 21 Que. K.B. 467.

In the absence of special provisions as to the procedure to be followed, a municipal corporation (e.g., the City of Montreal) desirous of purchasing realty for administrative purposes, may do so on resolution of its municipal council as in ordinary cases of administrative functions.

Birchenough v. City of Montreal, 3 D.L.R. 299, 21 Que. K.B. 467.

Whether or not the price paid for an immovable by the city of Montreal is justified by the necessity for such purpose is a matter of pure discretion and should be left entirely to the Board of Control and the council under positive proof has been made of a conspiracy to defraud the public. The city of Montreal, under sec. 4 of its charter, may purchase the land necessary for enlarging the terminus of a sewer without having recourse to the formalities required by the sections relating to expropriation.

Birchenough v. City of Montreal, 13 Que. P.R. 179 (Sup. Ct.).

Whether a municipal corporation with power to purchase and hold real estate for certain purposes has acquired and is holding said property for other purposes is a question that can only be determined in a proceeding at the instance of the Crown.

Verner v. City of Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

(§ II F 4—193)—MUNICIPAL TELEPHONES.

A municipality may establish a telephone system under 2 Geo. V., ch. 38, upon being properly petitioned to do so, without giving effect to all the prayers of the petition, if the system complies with the Act in question.

Re Robertson and Township of Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

G. Liability for damages.

Secs. 149 and 157 of the charter of the City of Hull (56 Vict., ch. 52) which provide that persons suffering damage through

the change of level of streets and sidewalks shall receive compensation to be settled by arbitrators, do not deprive a proprietor of his recourse to the ordinary civil tribunals of the Province, nor affect the jurisdiction of such tribunals. Leclerc v. Legault, 16 Que. K.B. 138; Endlich's Interpretation of Statutes, sub-sec. 151 et seq. Under the circumstances of this case, the construction by defendant of the sidewalk in question on a higher level than the old sidewalk, opposite plaintiff's property, and the raising of the level of the street in the same vicinity, have damaged plaintiff's said property, and are of the nature of a partial expropriation by defendant, of plaintiff's acquired rights therein, and that defendant is responsible for such damages.

Bergeron v. City of Hull, 18 Rev. de Jur. 167.

(§ II G 1—195)—LIABILITY FOR DAMAGES.

Plaintiff was injured by stepping into a hole in a sidewalk within the municipal limits, there being no evidence of how the hole came to be there, or whether the municipal authorities had actual knowledge of its existence. Under their Act of incorporation, the control of the thoroughfares is vested in the corporation, and there is also imposed upon them the duty of keeping them in repair, and it is also made unlawful for a third person to interfere with the streets or sidewalks without permission:—Held, on appeal, affirming the verdict and judgment at the trial, that the breach of the duty to repair gave a right of action to a person injured; that in the circumstances the jury might infer that the sidewalk was broken by defendant corporation, or with their permission; and that where by reasonable care and diligence they could and ought to know that streets require repairing, the corporation are liable if they neglect to do so. The existence of the defect here might be strong evidence of neglect to discover it. Per Martin, J.A. (expressing no opinion on the question of liability): There was no evidence from which it might be proved or reasonably inferred, that the hole was made by defendant corporation; nor that they had, or ought to have had, notice of it. The case should, therefore, have been withdrawn from the jury.

Cummings v. The Corporation of the City of Vancouver, 16 B.C.R. 494.

(§ II G 1—203)—PREPARING MATERIALS FOR REPAIRING STREETS.

Where a municipal corporation is guilty of negligence default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (e.g., 64 Vict., ch. 54 (B.C.)), persons suffering injuries in consequence of such omission may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself, or in the circumstances in which it was enacted, justifies the inference that no such right of action was to be conferred. Judgment of the Court of Appeal for British Columbia, McPhalen v. City of Vancouver, 15 B.C.R. 367, 14 W.L.R. 424, affirmed. Per Fitzpatrick, C.J.C., and Duff, J.:—The common law obligation under which the inhabitants of parishes in England, through which highways passed, were responsible for their repair, has no application in the Province of British Columbia.

City of Vancouver v. McPhalen, 20 W.L.R. 263.

(§ II G—205)—EXCAVATION ON STREETS.

Where the municipal charter imposes a duty to keep its streets in repair, and the facts demonstrate an actual want of repair causing damage, an action is primâ facie shewn to be well founded, and the defaulting municipality is called upon for excuse. [Vancouver v. McPhalen, 45 Can. S.C.R. 194, specially referred to.]

City of Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194.

(§ II G—205a)—POLE ON STREET.

The only liability upon a township for injuries to a person caused by a collision while driving on a highway in a township with a pole erected upon the highway, not by the municipality but by a telephone company which had no statutory or other right to erect poles upon the highway, is that imposed by sub-sec. 1 of sec. 606 of the Municipal Act, R.S.O. 1897, ch. 223, making municipal corporations civilly responsible for all damages sustained by any person through the municipality's negligent failure to repair the highway by removing the pole.

Howse v. Township of Southwold, 5 D.L.R. 709, 3 O.W.N. 1295 and 1592, 22 O.W.R. 797, 27 O.L.R. 29.

(§ II G 2—222)—NEGLIGENT USE OF MACHINE IN REPAIRING STREET.

Where a municipal corporation allowed an independent contractor, engaged in repairing a street, to negligently place a caldron of boiling pitch in a busy street without taking any precautions to protect the public, and where it might be an attraction to children, the municipal corporation is liable in damages for injuries sustained by a child who, while playing in the street, was splashed with the boiling pitch, by reason of the breaking of the wooden handle of a ladle used by an employee of the independent contractor in handling the pitch.

Waller v. Corporation of Sarnia, 8 D.L.R. 629, 4 O.W.N. 403, 23 O.W.R. 831.

(§ II G 2—223)—IN FIRE DEPARTMENT.

A municipal corporation is not liable at law for damages resulting from the destruction of the property of its ratepayers by fire as a result of an inefficient fire de-

partment, unless such fire were the direct result of a tort formally authorized by such municipality.

Quesnel v. Emard and City of Montreal; Cote v. Emard and City of Montreal, 8 D.L.R. 537.

(§ II G 2—224)—IN SEWER DEPARTMENT.

It is actionable negligence for the servants of a municipality to leave a trench connecting the plaintiff's premises with a public sewer, in a street, partly filled with frozen chunks of earth so that water caught therein during a sudden thaw, percolated through them and followed the trench into the plaintiff's cellar, causing damage therein, notwithstanding that the last few feet of the trench were filled in the same manner by the plaintiff. [Renwick v. Vermillion Centre School District, 15 W.L.R. 244, and Ashley v. Port Huron, 35 Mich. 296, specially referred to.]

Davidson v. City of Lethbridge, 4 D.L.R. 523, 21 W.L.R. 273.

The City of Moose Jaw employed a contractor to construct and instal a sewer along one of the principal streets of the city, where the public were in the habit of passing. The plaintiff, a livery stable keeper, had hired a team and rig to four men who drove along the street with the result that one horse was killed and the other horse, together with the rig and harness, were damaged by falling into an open ditch:—Held, per curiam, that the city was bound to see that proper precautions were taken by the contractor to guard against danger, and the accident having been caused by the negligence of the contractors, the city was liable. Held, also, that it is misfeasance on the part of a municipality to attempt to do work and do the same negligently so that damage is caused thereby. Held, also, that where the question is not one of the veracity of witnesses, but one of the proper inference to be drawn from truthful evidence, an Appellate Court is in as good a position as the original tribunal to draw such inferences, and is at liberty to draw inferences so as to reach a conclusion different from that of the trial Judge. Per Stuart, J., that on the evidence the drivers of the horses were guilty of contributory negligence, but that such negligence could not be imputed to the plaintiff.

McGillivray v. City of Moose Jaw, 7 Terr. L.R. 465.

(§ II G 2—225)—IN POLICE DEPARTMENT.

Where constables in the ordinary course of their duty and in pursuance of civic by-laws take into custody a person in a state of intoxication, they are bound to exercise every reasonable care and precaution to afford their charge proper protection, and failure to do so renders the city which employs them liable in damages for injuries that may result from imprudence and negligence.

Dubé v. City of Montreal, 7 D.L.R. 87.

(§ II G 3—235)—AS TO DRAINS, SEWERS, WATERS GENERALLY.

In the circumstances of this case it was:—Held, on appeal, Macdonald, C.J.A., dissenting (reversing the finding of Morrison, J., at the trial), that the corporation of the city of Vancouver were under no statutory or common law liability to provide means of drainage to plaintiff's basement, and that the latter voluntarily assumed the risk, which resulted in the damage complained of, by connecting with the drain in the manner he did.

Woodward v. Corporation of the City of Vancouver, 16 B.C.R. 457.

(§ II G 3—235)—AS TO DRAINS, SEWERS AND WATERS GENERALLY.

Where under the Municipal Drainage Act, one township initiates proceedings for the building of a drain which would invade another township, whether what is proposed to be done is more than is required for the purpose is not a question of law but of fact, depending upon the evidence. [Municipal Drainage Act, 10 Edw. VII. (Ont.), ch. 90, referred to.]

Re Township of Anderdon and Townships of Malden and Colchester, 8 D.L.R. 812, 4 O.W.N. 327, 23 O.W.R. 320.

(§ II G 3—236)—DEFECTS IN SEWERS GENERALLY.

A municipality is answerable where the waters of a ditch constructed along a highway undermined the land of the abutting owners and caused the fall of fences thereon.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881.

(§ II G 3—237)—OBSTRUCTIONS OF SEWER.

The neglect of a town to clean out an open drain which it had defectively constructed adjacent to the land of the plaintiff in such a manner that the drain would fill up, will render the municipality liable for injuries sustained because of the water of the drain backing up and flooding the plaintiff's land, and also for causing a more continuous seepage of water into it, notwithstanding that some small portion of the injury was occasioned by the backing up of the waters of a creek, and that the plaintiff might have diminished the damage by digging a watercourse, where, on the whole, the greater portion of the injury was due to the negligence of the town. [Smith v. Township of Eldon (1907), 9 O.W.R. 963, specially referred to.]

Moore v. Town of Cornwall, 7 D.L.R. 413, 4 O.W.N. 145, 23 O.W.R. 113.

(§ II G 3—240)—FOR COMPLETION OF DRAINAGE WORKS.

Non-completion of drain—Negligence—Damages—Mandatory order—Referee's report—Appeal.

Moshier v. Township of Eastnor, 6 D.L.R. 853, 4 O.W.N. 114, 23 O.W.R. 96.

(§ II G 3—241)—As to surface waters.

If a municipal corporation, about to drain into a natural watercourse, proceeds, without due regard to the rights of an adjoining property owner and without any attempt at preliminary amicable negotiations with a view to obviating or lessening the damage to adjoining lands, to overflow the course and damage neighbouring lands, the municipality which committed the wrong cannot complain if the damages awarded against it for both past and future injury in lieu of an injunction, should slightly exceed a sum which would compensate the land owner, the situation having been brought about by its own wrongdoing.

McGuire v. Township of Brighton, 7 D.L.R. 314, 4 O.W.N. 137, 23 O.W.R. 223.

Where a drainage ditch is constructed by a defendant municipal corporation opposite the plaintiff's farm so as to drain surface-water into a natural watercourse, it may not, apart from statutory authority, bring into it a larger volume of water than can be carried at its natural capacity, and if it does so, the injured party has a remedy in damages or by injunction. [See also Kenny v. Rural Municipality of St. Clements, 4 D.L.R. 304.]

McGuire v. Township of Brighton, 7 D.L.R. 314, 4 O.W.N. 137, 23 O.W.R. 223.

A rural municipality is answerable in damage for a failure to provide a sufficient outlet for a ditch opened by it adjacent to the plaintiff's land, by reason of which water backed up and inundated the land so as to destroy the fertility thereof, and render it useless for cultivation.

Sarah Kenny v. The Rural Municipality of St. Clements, 4 D.L.R. 304, 21 W.L.R. 821.

A municipality is answerable in damages where it entered upon the land of the plaintiff and enlarged a ravine that was not a natural watercourse, into which it wrongfully carried water by the construction of a drainage ditch.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881.

(§ II G 3—242)—As to water works.

Liability of municipal corporation for damages—Water leaking from service pipe—Inability by reason of wet to operate bake oven—Notice of complaint—Absence of negligence—Statutory defences.

Gatto v. City of Toronto, 4 O.W.N. 356, 23 O.W.R. 350.

(§ II G 4—255)—Condition or use of public buildings and grounds.

Where, by reason of the negligence of a municipality in failing to keep its market-place in a sanitary condition, a huckster renting a stall therein suffers damages by reason of illness due to such unsanitary conditions, the fact that the huckster knew the conditions were unsanitary and remains there, is not contributory negligence as a matter of law, where it appears that he gave notice of the condition to the proper officers of the municipality, who promised from time to time to repair the defects, and he, relying on these promises, remained on the premises, not fully realizing the danger.

Wood v. City of Hamilton, 8 D.L.R. 824, 23 O.W.R. 627, 4 O.W.N. 427.

Where, by reason of the failure of a municipality to keep its market-place in a sanitary condition, one of the hucksters renting a stall therein became ill as a result of the unsanitary condition of the place, the huckster has a right of action against the municipality.

Wood v. City of Hamilton, 8 D.L.R. 824, 23 O.W.R. 627, 4 O.W.N. 427.

(§ II G 4—255a)—Gaol supervision.

A small rural municipality whose only police officer arrests a person for drunkenness and disorderly conduct, and, after taking away from the prisoner the matches found upon him, imprisons him in a frame "lock-up" building to await his trial before a magistrate, is under no legal obligation to keep a caretaker or watchman in constant supervision over the prisoner; and the municipality is not liable to the prisoner's relatives for his death by a fire which burned up the lock-up in an interval between the police officer's hourly calls of inspection, where the cause of the fire is not shewn. [McKenzie v. Chilliwack, 15 B.C.R. 256, affirmed on appeal.]

McKenzie v. Township of Chilliwack, 8 D.L.R. 692, [1912] A.C. 888.

H. As to taxes.

(§ II H 1—265)—As to taxes.

Held, per Fitzpatrick, C.J.C., Idington and Anglin, JJ., that, prior to the amendment of the British Columbia Municipal Act 1892, by the Municipal Amendment Act 1894, 57 Vict., ch. 34, sec. 15, municipal councils, subject to those statutes, had no power to hold meetings for the transaction of any administrative, legislative or judicial business of the municipal corporation, at a place outside of the territorial boundaries of the municipality. Held, per Fitzpatrick, C.J.C., Idington, Duff and Anglin, JJ., that Courts of Revision, organized under the British Columbia municipal statutes, have no power to exercise their functions as such except at meetings held within the territorial limits of the municipality where the property, described in the assessment rolls to be revised by them, is situate. Section 15 of the Municipal Amendment Act 1894, inserted in the Municipal Act 1892, a new provision, sec. 83 (a), as follows: "All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality":—Held, Brodeur, J., dissenting, that there was no proof

of such a unanimous resolution as the statute requires. The council of the respondent municipality, without any formal resolution, as provided by the amended statute, held its meetings during several years at a place outside the limits of the municipality, and organized Courts of Revision there. These Courts held all their meetings at the same place as the council, and assumed to revise the municipal assessment rolls at those meetings. The council approved the rolls so revised, and enacted by-laws, from year to year, levying rates and authorizing the collection of taxes on the lands mentioned in the rolls, and, after notice as provided by the statutes, sold lands so assessed and alleged to be in arrear for the taxes so imposed:—Held, Brodeur, J., dissenting, that the assessment rolls were invalid, that the by-laws levying the rates and authorizing the collection of taxes on the lands mentioned therein were null and void, and that the sales of the lands so made for alleged arrears of taxes were illegal and of no effect. Per Duff and Anglin, JJ. (Brodeur, J., contra), that the default in payment of taxes, by the appellant, and his subsequent inaction and silence, while aware of the fact that his lands had been sold for alleged arrears of taxes, did not disentitle him from taking advantage of the statutory procedure respecting the contestation of sales for arrears of taxes, either by estoppel, acquiescense or laches. The provisions of sec. 126 (3) of the Municipal Act 1892 (now R.S.B.C. 1897, ch. 144, sec. 86 (2), have no application to invalid by-laws enacted by municipal councils on occasions when they cannot perform legislative functions. The judgment of the Court of Appeal for British Columbia, 18 W.L.R. 373, was reversed (Brodeur, J., dissenting), on the ground that, as the council had held its first meeting in each year within the limits of the municipality and adjourned for the purpose of holding its next meetings at the place outside of the municipality where all other meetings were held, the by-laws approving of the assessment rolls and those levying rates and authorizing the collection of taxes were valid and the sale of the lands in question for arrears of such taxes was legal and effective.

Anderson v. Municipality of South Vancouver. 45 Can. S.C.R. 425, 20 W.L.R. 434.

III. Powers of officers.

(§ III—285)—Powers of officers.

A meeting of a municipal council is not properly called or constituted if a member of the council, not in attendance thereat, has not been given any notice of it.

O'Donnell v. Township of Widdifield, 1 D.L.R. 271, 3 O.W.N. 597, 21 O.W.R. 1.

The council has the power to declare the original act, by virtue of which one has pretended to be a proprietor, occupant or lessee of real estate to be entered on the valuation roll, false or fictitious, but it has no right to pronounce it a nullity.

Herbert v. Corporation Du Village de Saint Michel, 18 Rev. de Jur. 228.

The municipal council exercises, at the time of annual revision of the valuation roll, or at the time of examining the triennial roll, functions of a judicial nature.

Herbert v. Corporation Du Village de Saint Michel, 18 Rev. de Jur. 228.

Under sec. 106 of the Municipal Ordinance C.O. 1898, ch. 70, there is an implied right given to a member of a municipal council in Alberta to resign, and this right, apart from a statutory disclaimer, may be exercised even before the member elect has taken full possession of the office for which he was a candidate.

Rex ex rel Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264.

MUNICIPAL BONDS.

See Bonds, III.

MURDER.

See Homicide.

MUTUAL BENEFIT SOCIETIES.

Insurance by, see Insurance.
In general, see Benevolent Societies.

NAME.

Amending indictment as to, see Indictment, etc.
As to trade-marks, see Trade-mark.
As to trade-name, see Trade-name.

NATURALIZATION.

See Aliens.

NAVIGABLE WATERS.

See Waters.

NAVIGATION.

Rights of navigation, see Waters.
Vessels as common carriers, see Carriers.
Procedure in Admiralty cases, see Admiralty.
Salvage of vessels and cargo, see Salvage.

NECESSARIES.

Husband's liability for, see Husband and Wife.

NECESSITY.

Easement by, see Easements, II.
Works of, on Sunday, see Sunday, II.

NEGLIGENCE.

I. As basis of action.
A. General rules.
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C. Dangerous premises.
D. On highways or waters.
II. CONTRIBUTORY.
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In operation of automobiles, see Automobiles.
Of bailee, see Bailment.
As to buildings, see Buildings.
Of carrier, see Carriers.
Matters peculiar to actions for death, see Death.
Opinion evidence as to, see Evidence, VII.
Relevancy of evidence as to, see Evidence, XI.
Sufficiency of evidence as to, see Evidence, XII.
In respect to highways, see Highways, IV.
As to negligent homicide, see Homicide.
Of master or servant, see Master and Servant.
As to liability of master for negligence of servant, see Master and Servant, III.
Of independent contractor, see Master and Servant, III.
As element of nuisance, see Nuisances.
Of physicians, see Physicians and Surgeons.
Pleading as to, see Pleading, II.
As to proximate cause, see Proximate Cause.
Of railroads, see Railroads.
In matters relating to shipping, see Shipping.
Of street railways, see Street Railways, II.
Of telegraph company, see Telegraphs.
As question for jury, see Trial, II.
Of warehousemen, see Warehouseman.
In navigation, rules of the road, see Waters, I.
In lumbering operations, see Logs and Logging.

I. As basis of action.

A. General rules.

(§ I A—1)—BASIS OF ACTION.

A verdict for the plaintiff for injuries received while in the employ of a railway company cannot be sustained where neither the evidence nor the answers of the jury to questions submitted them disclose, on the part of the defendant, negligence that contributed to the plaintiff's injury.

Stone v. Canadian Pacific R. Co., 4 D. L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

(§ I A—2)—GROSS, WANTON OR WILFUL NEGLIGENCE.

The gross negligence for which alone a gratuitous bailee can be made liable in the care of the goods which are the subject of the bailment must be such that any reasonable man would have considered insufficient the means of protection (if any) used by the bailee. [Giblin v. McMullen (1868), L.R. 2 P.C. 317 and Palin v. Reid (1884), 10 A.R. 63, discussed.]

Carlisle v. Grand Trunk R. Co., 1 D.L. R. 130, 3 O.W.N. 510, 20 O.W.R. 860, 25 O.L.R. 372.

(§ I A—4a)—BREACH OF STATUTORY DUTY.

Every one for whose benefit a duty is imposed by statute upon any person has a right to have that duty performed, and, if he suffer by reason of its non-performance, he has a right of action against the person guilty of such non-performance. [David v. Britannic Merthyr Coal Co., [1909] 2 K.B. 146, referred to.]

Stewart v. Steele, 6 D.L.R. 1, 22 W.L. R. 6.

B. Dangerous agencies.

(§ I B 1—6)—GUN.

A person who, on his own land, fires a gun for a lawful purpose, namely, to kill game, is not guilty of fault nor liable in damages to another driving by, whose horse is frightened by the report and runs away, breaks a trace, upsets the carriage, throwing the driver out and injuring him.

Bourgault v. Ferland, Q.R. 42, S.C. 543 (Sup. Ct.).

(§ I B 2—15)—LIABILITY OF SELLER, MANUFACTURER OR OTHER THIRD PERSON.

The defence of volenti non fit injuria is not available in an action for injuries sustained through a breach of a statutory duty imposed by the Factories Act. [Baddeley v. Earl Granville (1887), 19 Q. B.D. 423, and Rodgers v. Hamilton Cotton Co., 23 Ont. R. 425, and Love v. Fairview, 10 B.C.R. 330, specially referred to.]

Everett v. Schaake, 4 D.L.R. 147, 17 B. C.R. 271, 21 W.L.R. 525.

(§ I B 2—30)—GASOLINE ENGINES.

The seller of a gasoline engine who negligently installs it, and not the manufacturer thereof, is answerable to the purchaser for any damages resulting from its defective installation.

Tollington & Co. v. Jones, 4 D.L.R. 648, 21 W.L.R. 168.

C. Dangerous premises.

(§ I C 1—37)—FALLING BUILDING OR PORTION THEREOF GENERALLY.

Where a person orders to be done on his

premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented; and where he entrusts an independent contractor with the performance of such duty incumbent upon himself, and the contractor neglects its fulfilment, the liability for the resultant injury to the adjoining premises does not depend on the relation of master and servant; and the fact that he entrusted his own duty to another person (whether servant or independent contractor) who also neglected it, furnishes no excuse in law. [Pickard v. Smith, 10 C.B.N.S. 480; Mersey Docks Co. Trustees v. Gibbs, L.R. 1 H.L. 93, 114; Quarman v. Bennett, 6 M. & W. 509; Todd v. Flight, 9 C.B.N.S. 377, 30 L.J.C.P. 21, referred to.]

Cockshutt Plow Co., Limited v. MacDonald, 8 D.L.R. 112.

(§ I C—50)—Liability to licensees or trespassers.

In a negligence action under Lord Campbell's Act for personal injury resulting in death brought by the next of kin setting up that deceased was an employee, an invitee, a licensee, and a victim of a system, the only duty, in so far as the claim as to the deceased being a licensee is concerned, which an owner of premises owes such a person, is not to deceive him by means of a trap or to be guilty of any active negligence, and the licensee must otherwise take the premises as he finds them, and the fact that a gangway (across a steamboat belonging to the same owner leading to another of such owner's boats moored side by side at the dock) was opened for the first time on the morning of the accident to carry lumber across it, and that the hatchway was open for the necessary ventilation and left unprotected other than by some boards which had covered the hatch being left on edge over it, is not evidence of neglect of duty by the owner. (Per Garrow, J.A.) [Perdue v. C.P.R. Co., 1 O. W.N. 665, specially referred to.]

King v. Northern Navigation Co., 6 D. L.R. 69, 3 O.W.N. 1538, 22 O.W.R. 697, 27 O.L.R. 79.

Where the owner or occupier of a stable supplies stable accommodation and feed for horses at a fixed sum per day, but without giving the exclusive use of any part of the stable, he is under obligation to see that the stable is in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so, and this obligation subsists notwithstanding that the horses were fed and cared for by their owner. [Francis v. Cockrell, L.R. 5 Q.B. 501, and Stewart v. Cobalt, 19 O.L.R. 667, applied; see also annotation to this case.]

Gunn v. Canadian Pacific R. Co., 1 D.L. R. 232, 20 W.L.R. 219, 48 C.L.J. 153, 22 Man. L.R. 32.

D. On highways or waters.

(§ I D—70)—On highways or waters.

It is the duty of a driver of a vehicle on a public street to exercise prudence and care in order to avoid injuring pedestrians.

Baillargeon v. St. George's, 4 D.L.R. 894.

(§ I D—71)—Law of the road.

Driving in the dark on the wrong side of the road and so causing a collision the danger of which neither driver could foresee in time to avoid it, is actionable negligence. [See Oliphant on Horses, 6th Can. ed., 342.]

Compton v. Allward, 1 D.L.R. 107, 19 W.L.R. 783, 48 C.L.J. 109, 22 Man. L.R. 92.

(§ I D—73)—Liability of vessel improperly moored to dock.

The owner of a freight steamer from which grain was being unloaded into an elevator is liable for damages for breaking a part of the elevator caused by the steamer not being properly and sufficiently moored to withstand the strain upon her by the turning of another vessel in the harbour, the officer in charge of her knowing that the other boat was going to turn, and having the opportunity to moor her more securely or of obviating the danger.

Meaford Elevator Co. v. Playfair, 2 D. L.R. 577, 3 O.W.N. 525, 20 O.W.R. 931.

The owner of a steamer turning in a harbour in proximity to another vessel from which grain was being loaded into an elevator is not liable for the breaking of a part of the elevator caused by the surging back and forward of the steamer being unloaded due to insufficient mooring, where turning a vessel in the harbour is a common manœuvre well known and understood by those engaged in and about docks.

Meaford Elevator Co. v. Playfair, 2 D. L.R. 577, 3 O.W.N. 525, 20 O.W.R. 931.

II. Contributory.

A. Generally.

(§ II A—75)—Generally.

In an action for damages for personal injury caused by a car of the defendants, the jury found that defendants' negligence was the cause of the accident, but also that the plaintiff might, by the exercise of reasonable care, have avoided the accident. There was evidence sufficient to justify both these findings. The trial Judge dismissed the action, following London Street Railway Co. v. Brown (1901), 31 Can. S.C.R. 642. On appeal, the Court ordered a new trial on the ground that the jury's finding that the plaintiff might have avoided the accident by the exercise of reasonable care was not sufficient without their saying in what respect he failed to exercise reasonable care,

as the Court was unable to determine from the jury's finding whether the plaintiff was in law guilty of contributory negligence or not. The Court suggested that the proper course for the trial Judge to take in such a case would be to submit to the jury two questions such as, 1. Was the plaintiff guilty of negligence? 2. If yes, what was this act of negligence? and that it would probably be well to add a third question: Whose negligence really caused the accident?

Shondra v. Winnipeg Electric R. Co., 21 Man. R. 622.

One driving upon city streets knowing that there are crossings where street cars are passing but owing to the darkness is ignorant as to where the crossings exactly are, is bound to keep a good lookout and to be on guard as to conveyances coming his way, and his failure so to do and his blindly trusting to those driving ahead of him constitutes contributory negligence precluding him from recovering for injuries caused by collision with a street car even though those in charge of the car were negligent in its management. [See, to same effect, Carleton v. City of Regina, 1 D.L.R. 778, and annotation to same, ante pp. 783-786.]

Balke v. City of Edmonton, 1 D.L.R. 876, 21 W.L.R. 22.

(§ II A—76)—When contributory negligence a defence.

In order to disentitle a plaintiff to recover upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him. [Rowat v. Toronto Street Railway Co., 29 Can. S.C.R. 718, referred to.]

Dart v. Toronto R. Co. (No. 2), 8 D. L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

(§ II A—78)—What constitutes contributory negligence generally acting in emergency.

Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergencey as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part.

McDougall v. Grank Trunk R. Co., 8 D.L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

C. On highways.

(§ II C—95)—On highways.

Anyone who attempts to drive across the track of an electric street railway, where he knows that cars are constantly passing, without looking to see whether a car is approaching, is guilty of contributory negligence barring recovery for injuries caused by a car colliding with the buggy in which he was driving. [Danger v. London Street Ry., 30 O.R. 493; O'Hearn v. Port Arthur, 4 O.L.R. 209, followed.]

Carleton v. City of Regina, 1 D.L.R. 778, 20 W.L.R. 395.

(§ II C—96)—Speed.

Where bricks are piled upon a street by a contractor in the course of erecting a building, and the obstruction so created is insufficiently protected at night, both as to the number of lights thereon and as to the location or position of such lights, the contractor is liable in damages to one who drives into such obstruction at night without seeing it, where such driving cannot be said to be reckless or unusually fast, in an action of negligence based upon the failure to warn travellers by protecting lights, apart from any right or permit which the contractor may have had to pile the bricks on the street.

Turnbull v. Corbett, O'Brien v. Corbett, 8 D.L.R. 343, 11 East. L.R. 67.

(§ II C—98)—Contributory negligence; knowledge of icy condition of sidewalk.

Contributory negligence is not to be imputed to a plaintiff suing for personal injuries sustained by falling on an icy sidewalk in a city street, merely because the plaintiff had seen the condition of the walk, where the general condition of all the sidewalks in the city was the same and the municipality had made no attempt at improvement for many weeks of the winter season while the dangerous condition subsisted. [Bleakley v. Prescott, 12 A.R. 637; Gordon v. Belleville, 15 O.R. 29, and Burns v. Toronto, 42 U.C.R. 560, considered.]

Touhey v. City of Medicine Hat, 7 D.L. R. 759.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Cheques.

NERVOUS SHOCK.

See Damages, III.; Fright.

NEWSPAPER.

Injury to passenger at station by negligent use of truck by employee of newspaper publisher, see Carriers.

Contempt of Court by publication in, see Contempt, I.

Libel by, see Libel and Slander.

NEW TRIAL.

I. In general; as matter of right.
II. For errors of the Court.
III. For matters pertaining to jury or verdict.
A. In general.
B. Erroneous verdict.
C. Selection and qualification of, or influence upon, jurors.

D. Misconduct or separation of jurors; compromise verdict.

IV. NEW EVIDENCE; SURPRISE.

V. PRACTICE.

A. In general; time.
B. Motions; statement.
C. Evidence; affidavits generally.
D. Testimony or affidavits of jurors.
E. Remittitur.
F. Granting new trial of some issues.

I. In general; as matter of right.

(§ I—2)—REMARKS OF ATTORNEY.

Where counsel for the plaintiff improperly refers in his opening to the jury to the fact that money has been paid into Court, and counsel for the defendant objects, a new trial will be ordered, though counsel for the plaintiff apologizes for his statement and withdraws it, and counsel for the defendant does not ask to have the jury discharged.

Dickinson v. "The World," 5 D.L.R. 148, 21 W.L.R. 529.

(§ I—4)—TERMS.

Nokes v. Kent, 6 D.L.R. 877, 4 O.W.N. 252.

II. For errors of the Court.

(§ II—5)—FOR ERRORS OF COURT.

Railway—Death of person—Negligence—Evidence for jury—New trial.

Brewer v. Grand Trunk R. Co., 2 D.L.R. 919, 20 O.W.R. 939, 3 O.W.N. 572.

A new trial will be granted where, before any evidence was heard, an action was dismissed on an objection, that was not pleaded by the defendant, that the shares of stock on which the plaintiff based his action, had been assigned by him.

Daniel v. Birkbeck Loan Co., 4 D.L.R. 767, 3 O.W.N. 1250, 22 O.W.R. 147.

(§ II—7)—ADMISSION OF EVIDENCE; MATTERS READ TO JURY.

Where a statute provides, "that only three expert witnesses may be called by either side, without the leave of the Judge or other person presiding, to be applied for before the examination of any such witnesses," a refusal of the Judge to obey the provisions of the statute constitutes a mistrial and a new trial will be granted.

Rice v. Sockett, 8 D.L.R. 84, 4 O.W.N. 397, 23 O.W.R. 602.

That the conviction of one of two defendants tried jointly for burglary and theft was against the weight of evidence is no reason for granting a new trial to both under sec. 1021 of the Criminal Code; but the rule is otherwise if the defendants have been jointly convicted of conspiracy, or if a new trial will tend to the administration of justice. [R. v. Fellowes, 19 U.C.Q.B. 48, distinguished.]

Rex v. Murray and Fairbairn, 8 D.L.R. 208, 4 O.W.N. 368, 23 O.W.R. 492.

Under sec. 376 of ch. 111 of the Supreme Court Act, C.S. (N.B.) 1903, that Court will not grant a new trial of an action appealed from the County Court in which but a trifling amount is in dispute, on the ground of misdirection or improper admission or rejection of evidence, unless substantial wrong or miscarriage was thereby occasioned. [Jenkins v. Morris, L.R. 14 Ch.D. 674, specially referred to.]

Westell v. McLaughlin, 5 D.L.R. 201, 10 E.L.R. 397.

Where, in an issue as to lunacy under sec. 7 of the Lunacy Act, 9 Edw. VII. (Ont.) ch. 37, a Divisional Court has, of its own motion and against the protest of one of the parties to the issue, improperly called for and heard fresh evidence, and itself examined the alleged lunatic, and, upon the original evidence and the further facts thus ascertained, has determined the issue and reversed the decision of the trial Judge, and it appears that much of the fresh evidence so obtained may be material and important, the proper course is, not to determine the issue upon the record as it stood when the appeal came before the Divisional Court, but to direct a new trial. [Re Fraser, 24 O.L.R. 222, considered.]

Re Fraser, Fraser v. Robertson, McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 22 O.W.R. 353, 26 O.L.R. 508.

(§ II—8)—AS TO INSTRUCTIONS.

In an action for assault the Judge misdirected the jury in favour of the plaintiff on matters which might affect the question of damages, and a verdict was rendered for the plaintiff for $135. On appeal upon the ground of misdirection and excessive damages. Held, that although the damages were not excessive, yet the misdirection caused a substantial wrong or miscarriage entitling defendant to a new trial, inasmuch as the jury might have been influenced by it in assessing damages.

Edmondson v. Allen, 40 N.B.R. 299.

When the facts are such that in order to guide the jury properly there should be a direction of law given, the omission to give such direction of law is a ground for a new trial. [Prudential Assurance Co. v. Edmonds, 2 A.C. 487.]

Guimond v. Fidelity Phœnix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

Where, upon the second trial of an action with a jury, the charge of the trial Judge is such that it may have prejudiced the defendant as to the amount of damages, and larger damages have been awarded than at the former trial, a new trial may be refused, upon the plaintiff

consenting to a reduction of the damages to the amount awarded at the former trial.

Connors v. Reid, 3 D.L.R. 636, 3 O.W.N. 1137.

Where on a trial for shooting with intent to murder the jury returned a verdict of acquittal after an erroneous ruling by the trial Judge that the jury could not be directed, on such indictment, to bring in a verdict for the lesser offence of shooting with intent to maim or to do grievous bodily harm, if they found such lesser offence proved, a new trial will not necessarily be granted by the Appellate Court on reversing such erroneous ruling on an appeal by the prosecution, but the Court will exercise its discretion in refusing a new trial if it considers that the evidence does not warrant it.

Rex v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 21 W.L.R. 652, 22 Man. L.R. 353.

Upon an appeal in a criminal case, the Court of Appeal should not grant a new trial merely because a portion of the Judge's charge was objectionable if of opinion that, irrespective of the charge, the jury could not have done otherwise than convict the accused and consequently that the misdirection could not have occasioned any "substantial wrong" to the accused within the terms of the Criminal Code (Can. 1906), sec. 1019. [See also Tremeear's Criminal Code, 2nd ed., 1908, pages 806-808; and see annotation to this case.]

The King v. Lew, 1 D.L.R. 99, 19 W.L.R. 853, 19 Can. Crim. Cas. 281, 17 B.C.R. 77.

A new trial of a criminal case in which the jury returned a verdict of not guilty will be ordered at the instance of the Crown where the trial Judge, upon being asked by the jury after they had been out a while whether he had told them that it was not necessary to have before them evidence corroborative of that of the accused's accomplice, replied that he had not, and then went on to say, among other things, that the law did not require such corroborative evidence to be given though it was usual for Judges to advise the jury that they should not convict on the uncorroborated evidence of an accomplice, and where the Judge, after the jury had retired again, refused the request of the counsel for the Crown further to instruct the jury that if they saw fit to believe the evidence of the accomplice and to find a verdict against the accused upon it, they might do so, and such a verdict would be a lawful one, especially where the trial Judge also said to the jury just after his statement above set forth that "of course the jury is generally supposed to pay some attention to what the Judge says upon a legal point."

Rex v. Betchell, 5 D.L.R. 497, 19 Can. Cr. Cas. 423, 21 W.L.R. 665.

It is not misdirection for the Judge to tell the jury his opinion upon a question at issue before them, if he expressly leaves that question to them to settle. [Smith v. Dart, 14 Q.B.D. 105, 108, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

A new trial is not granted on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned. [Bray v. Ford, [1896] A.C. 44, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

III. For matters pertaining to jury or verdict.

B. Erroneous verdict.

(§ III B—15)—ERRONEOUS VERDICT.

In a personal injury action arising from a car colliding with a rig, where the jury finds (a) that by reasonable care plaintiff, had he seen that he had sufficient time to cross the tracks, could have avoided the accident, (b) that by reasonable care defendant's motorman had he applied the brakes when he first noticed plaintiff heading across the tracks could have avoided the accident, (c) that the accident was caused by negligence of both plaintiff and defendant, such findings are inconsistent and uncertain and a ground for a new trial.

Herron v. Toronto R. Co., 6 D.L.R. 215, 4 O.W.N. 12, 22 O.W.R. 933.

The jury at the trial of an action has nothing to do with costs and if they bring in a verdict clearly stated to be for damages and costs, which is accepted and acted upon by the Judge, the judgment should be set aside and a new trial ordered. [Poole v. Whitcomb (1862), 12 C.B. N.S. 770, and Kelly v. Sherlock (1866), L.R. 1 Q.B. 691, followed.] Costs are now entirely in the discretion of the trial Judge, no matter what is the amount of the verdict for the plaintiff. [Shillinglaw v. Whillier (1909), 19 M.R. 149, followed.]

Davis v. Wright, 21 Man. R. 716.

The findings of the jury were set aside and a new trial ordered where the findings were at variance with the preponderance of the evidence, and the plaintiff's conduct so inconsistent with his claim that a reasonable jury, correctly apprehending the effect of the evidence, could not have come to the conclusions at which they arrived.

Densmore v. Hill, 45 N.S.R. 312.

Where the result of jury findings and of what takes place at the trial with reference to their answers and to questions put by trial Judge (both written and oral) leaves uncertainty as to what they meant, a new trial will be granted.

Herron v. Toronto R. Co., 6 D.L.R. 215, 4 O.W.N. 12, 22 O.W.R. 933.

Where the jury, in answer to the question whether the defendant could, by the exercise of reasonable care, have avoided the accident, answer, "Yes, to a certain extent," and further state that his want of reasonable care consisted in "lack of judgment," these answers do not amount to a definite finding of contributory negligence, but the proper course is to send the case back for a new trial.

Dart v. Toronto R. Co. (No. 2), 8 D.L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

In a personal injury case arising from a street car colliding with a rig, where the jury upon their first return into Court found under one question that after defendants' motorman saw that the plaintiff was about to drive across the tracks the motorman could not by reasonable care have avoided the accident, while finding under another question that the motorman was guilty of negligence in waiting too late before applying the brakes, and while finding under a third question that the motorman was negligent in not applying the brakes when he first noticed the plaintiff heading across the tracks, and where, upon proper comment by the trial Judge on such contradictory findings, the perplexed jury struck out the answers to the two questions first mentioned, still leaving doubt as to what they meant by the answer to the third question, such findings are vague and ambiguous and a ground for a new trial.

Herron v. Toronto R. Co., 6 D.L.R. 215, 4 O.W.N. 12, 22 O.W.R. 933.

(§ III B—16)—INSUFFICIENCY OF EVIDENCE TO SUSTAIN.

Where a verdict is clearly against the weight of evidence, a new trial shall be ordered.

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559.

Where an Appellate Court is of opinion that some of the findings of a jury are against the weight of evidence, but there is conflicting evidence upon some of the issues raised, the Court will not itself determine the case, but will direct a new trial.

Reiffenstein v. Dey, 7 D.L.R. 94, 4 O.W.N. 78, 23 O.W.R. 48.

Where, in an action which has been twice tried, the jury have disagreed upon the first trial, and, upon an appeal from the verdict at the second trial, the Appellate Court is of opinion that some of the findings are so entirely against the evidence that it is apparent that the jury must have given effect to some improper consideration or have acted unreasonably, and the plaintiff, by whom the jury notice was first given, desires a trial without a jury, the Appellate Court will direct a new trial before a Judge without a jury.

Reiffenstein v. Dey, 7 D.L.R. 94, 4 O.W.N. 78, 23 O.W.R. 48.

(§ III B—18)—JUDGMENT IN UNDEFENDED ACTION.

A new trial will be granted, in the interests of justice, where the merits of a defence are shewn, and it appears that the action was undefended because of someone's mistake, misapprehension, or perhaps neglect, upon the payment of the costs of such undefended trial, and the costs of opposing the motion for the new trial, and on giving satisfactory security for the amount of any judgment that may be recovered against the defendant on a new trial. [Dickenson v. Fisher, 3 Times L.R. 459; and Holden v. Holden, 102 L.T. 398, followed.]

Ferguson v. Swedish Canadian Lumber Co., Limited, 2 D.L.R. 557, 10 E.L.R. 386.

Ordinarily a new trial will not be granted upon a judgment pronounced in an action not defended at the hearing merely on the ground of an inadvertent mistake or misunderstanding, through which the defendant did not attend and was not represented by counsel thereat.

Ferguson v. Swedish Canadian Lumber Co., Limited, 2 D.L.R. 557, 10 E.L.R. 386.

(§ III B—19)—FAILURE OF JURY TO FOLLOW INSTRUCTIONS.

Where an action for an alleged breach of the Factories Act and the B.C. Employers' Liability Act as well, was improperly submitted to the jury on the theory of a common law liability arising from an alleged breach of the former Act, upon the jury returning a verdict of $2,880 for the plaintiff, and being asked what damages they would award if they were to decide the case under the Employers' Liability Act, they answered $2,880, a new trial will be granted if the jury have failed to answer questions submitted to them on the question of voluntary assumption of risk which would be material to the question of liability under the latter Act.

Everett v. Schaake, 4 D.L.R. 147, 17 B.C.R. 271, 21 W.L.R. 525.

IV. New evidence; surprise.

(§ IV—31)—NEWLY DISCOVERED EVIDENCE.

In this action plaintiff had succeeded in the Court below, and the defendants had appealed, which appeal was dismissed, whereupon an appeal was taken to the Supreme Court of Canada. While this appeal was standing for hearing the defendants applied to the Court en banc for a new trial on the grounds (a) that one of the defendants' solicitors on the record was financially interested with the plaintiff in the action, without defendants' knowledge, and (b) discovery of new evidence. It was held, by sec. 25 of the Judicature Act, the Court en banc has power to hear application for new trial, etc., provided that the judgment or order complained of has not been made as the judgment or decision of the Court en banc, and the judgment in question having been

affirmed by the Court en banc has become the judgment of that Court, which now had no jurisdiction to make any further order. (2) That so far as this Court was concerned the matter was res judicata and the defendants' only remedy, apart from the appeal pending, was by way of a new action on the ground that the first judgment was obtained by fraud.

Willoughby v. The Saskatchewan Valley and Manitoba Land Co., Limited, 4 S.L.R. 454.

A new trial will not be granted on the ground of newly discovered evidence where it appears to the Court that due diligence was not used, otherwise the evidence would have been discovered in time for use on the former trial.

McDonald v. McKay, 8 D.L.R. 78, 11 East. L.R. 590.

A new trial asked on the ground of newly discovered evidence will be refused where the Court is of the opinion that, if such evidence were used on another trial, there is no reasonable probability that the result would be different.

McDonald v. McKay, 8 D.L.R. 78, 11 East. L.R. 590.

When new facts of an essential nature have been discovered by the defence in a criminal trial before verdict rendered, even after the Judge has charged the jury and the jury has retired to deliberate, the jury should be recalled to hear this additional evidence, and a new trial will be granted where the jury has not been allowed to hear such additional evidence.

Rex v. Manconi, 3 D.L.R. 112, 20 Can. Cr. Cas. 81.

(§ IV—32)—SURPRISE.

A new trial will not be granted on the ground of surprise in that the principal witness for the defence had departed from the statements made to the defendant's solicitor before the trial as to the nature of his testimony, if the affidavits do not disclose the difference between the two statements, nor specify in detail what the witness had represented before the trial. [Caswell v. Toronto R. Co., 24 O.L.R. 339, specially referred to.]

Yackman v. Johnston, 3 D.L.R. 191, 3 O.W.N. 624, 21 O.W.R. 86.

V. Practice.

A. In general; time.

(§ V A—36)—WAIVER OR LOSS OF RIGHTS TO NEW TRIAL.

Where there is even meagre evidence to support a finding of fact drawn by a jury in favour of the plaintiff, and that evidence is not contradicted, a new trial should not be directed if the defendants were not taken by surprise by its introduction, and could easily have met it if untrue, although the point was raised only in a general way by the pleadings.

Graham v. Grand Trunk R. Co., 1 D.L.R. 554, 3 O.W.N. 538, 20 O.W.R. 965, 25 O. L.R. 429, 13 Can. Ry. Cas. 232.

F. Granting new trial of some issues.

(§ V F—60)—GRANTING NEW TRIAL OF SOME ISSUES.

Where, in an action for several alleged slanders some of them should not have been submitted to the jury, and damages in the plaintiff's favour were not separately assessed, a new trial will be granted with reference to the remaining charges.

Holland v. Hall, 3 D.L.R. 722, 22 O.W.R. 209, 3 O.W.N. 1304.

NOMINATION.

To office, see Elections, III.

NON-RESIDENT.

Jurisdiction over, see Courts, I.

Security for costs, see Costs.

Service on generally, see Writ and Process.

Service by publication on, see Writ and Process, II.

NON-SUPPORT.

Neglect to supply wife with necessaries, see Husband and Wife, IV.

Alimony actions, see Divorce and Separation, V.

NOTES.

In general, see Bills and Notes.

NOTICE.

I. IN GENERAL.

II. IMPUTED.

A. By knowledge of agent or representative.

B. By possession or servitude.

Of appeal, see Appeal, III.

Of non-payment of note, see Bills and Notes, IV.

Of rights of third persons in note taken by assignment, see Bills and Notes, V.

Of arrival of property shipped, see Carriers, III.

Of injury to property shipped, see Carriers, III.

Of acceptance of contract, see Contracts.

Evidence to shew, see Evidence, XI.

Of fraud in conveyance, see Fraudulent Conveyances, IV.

Record as, see Records and Registry Laws, III.

Of assignment of chose in action, see Assignment, III.

Of bona fide purchaser of land, see Vendor and Purchaser, III.

I. In general.

(§ I—2)—NOTICE TO BANK OR LOAN COMPANY.

Defendant A.B. purchased land under

an agreement for sale. Being financially involved, and executions having been issued against him, he decided to raise a loan upon the land, and for that purpose procured the conveyance of the land from the vendor to his wife, defendant J.B. It did not appear that there was any consideration given by J.B. therefor. Defendants then applied for a loan, and executed a mortgage to the plaintiff. After the execution of the mortgage the sheriff seized the goods of defendant A.B., and to secure the withdrawal of the seizure defendants gave the sheriff an order on the proceeds of the loan from plaintiff company, which the sheriff accepted and withdrew from possession. This order the company paid, and the money so paid constituted the only money advanced on the mortgage. The same day the order was given the defendants attempted to revoke it by notice given to the company's solicitors, who had then reported the loan and completed their duties in connection therewith. This notice was given before the money was paid over. In an action for foreclosure, defendants alleged (1) that the company had paid the money in question after notice revoking the order, and (2) that the defendant J.B. executed the mortgage for her husband's debt and without independent advice. It was held, that even if the defendants could have revoked the order given, their notice intended to have that effect was insufficient, in that the solicitors upon whom the notice was served had completed their duties and were no longer agents of the company for the purpose of the loan. (2) That under the circumstances of the case the Court should not interfere on the ground that the wife had executed the mortgage without independent advice.

Great West Permanent Loan Co. v. Badenoch et al., 4 S.L.R. 241.

(§ I—8)—NOTICE TO MAKER OF LIEN NOTE ON RESALE OF GOODS.

Where the maker of a lien note, upon the retaking of the goods or chattels for which it was given, had actual notice of the resale thereof within the time required by statute, personal service of notice thereof is unnecessary.

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

(§ I—9)—NOTICE OF SALE BY SHERIFF.

Legal notices of the sale of immovables at sheriff's sale should be posted up at the door of the parish church recognized by the civil law for this purpose, and failure so to do is a fatal irregularity.

Savoie-Guay Co. v. DesLauriers and De-Briêre; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

II. Imputed; constructive.

A. By knowledge of agent or representative.

(§ II A—16)—WHEN KNOWLEDGE ACQUIRED.

Even when a power of sale of property pledged is so framed as to relieve a purchaser from obligation to make inquiries, yet, if the circumstances which put in question the propriety of the sale are brought to his knowledge he thereby becomes charged with notice. [Jenkins v. Jones, 2 Giff. 99, referred to.]

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

(§ II A—24)—OF OFFICER OR AGENT OF CORPORATION.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to learn the actual conditions of the streets which, by statute, it is under a duty to repair and cannot successfully set up want of knowledge as an excuse for non-repair if the knowledge might have been obtained by the exercise of reasonable precautionary measures.

City of Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194.

NOVATION.

(§ I—1)—PERSONAL OBLIGATION OF COMPANY'S AGENT FOR COMPANY'S DEBT.

When an agent, acting on behalf of a company, guarantees a contract made on behalf of such company and gives his own promissory notes to accommodate the third party with whom the contract is made, such giving of notes does not constitute novation, whereby a new debt and a new debtor would be substituted to a previous debt and a previous debtor.

French Gas Saving Co., Limited v. The Desbrats Advertising Agency, Limited, 1 D.L.R. 136.

(§ I—5)—RENEWAL NOTE.

The mere acceptance of a renewal note is but a conditional payment and is not a novation of the original note, especially so when the holder retains such original note. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative. The holder has the option to proceed either on the original note and tendering the renewal note, or on the renewal note itself.

The Bank of British North America v. Hart et al., 18 Rev. de Jur. 334.

NUISANCES.

I. WHAT ARE.

II. REMEDIES.
- A. In general; who may have.
- B. Who liable.
- C. Abatement.
- D. Defences.

III. CRIMINAL LIABILITY.

Indictment for maintaining, see Indictment.

Power of municipality as to, see Municipal Corporations, II.

I. What are.

(§ I—13)—HOSPITAL OR PEST-HOUSE.

Where it appeared that the defendant municipality established and maintained within its limits a hospital for the treatment of contagious diseases and especially small-pox patients; that the premises are unsuited for such a purpose and their establishment and maintenance are in contravention of law, and that it was in close proximity to dwelling-houses of plaintiff, access to which was interfered with, if not prevented, by barriers erected across the road and put up by the hospital, such hospital is a nuisance and its further use for the purposes indicated should be enjoined. [Crawford v. Protestant Hospital for the Insane, M.L.R. 7 Q.B. 57, distinguished; sec. 43, by-laws of the Board of Health of the Province of Quebec, referred to.]

MacIntosh v. City of Westmount, 8 D.L.R. 820.

Where, in an action for an injunction against a municipality for the further use and maintenance of a building as a small-pox hospital or for contagious diseases, it is claimed by the city that the said building is an emergency hospital, but the weight of evidence is that it was intended for and was to be used as a permanent hospital for emergency cases, the said building must be established in conformity to sec. 43 of the rules of the Board of Health of the Province of Quebec, and the facts that the said Board of Health approved of the hospital has no bearing where the rule or provision of sec. 43 of the by-laws of said Board of Health as to a space of forty feet between the pavilions of the patients and the fence or border of the ground has not been complied with, the Board of Health having no right to dispense with compliance with said sec. 43.

MacIntosh v. City of Westmount, 8 D.L.R. 820.

(§ I—22a)—UNPROTECTED WELL OR PIT.

The owner of property let to a tenant without any retention of control or right of entry by the owner or any undertaking by him to keep the premises in repair is not responsible for the loss of a horse from falling into an unprotected well on the premises while being pastured under an agreement between the tenant and the owner of the horse. [Cavalier v. Pope, [1906] A.C. 428, and Lane v. Cox, [1897] 1 Q.B. 415, applied; see also Underhill on Torts, 9th ed., 173, 190c, 224.]

Love v. Machray, 1 D.L.R. 674, 20 W.L.R. 505, 22 Man. L.R. 52.

II. Remedies.

C. Abatement.

(§ II C—43)—ANTICIPATED OR THREATENED NUISANCE.

In an action to restrain the municipality from constructing a public convenience on municipal property, brought by the owners of an adjoining lot, the evidence was that they contemplated building, and alleged that substantial and special injury would be suffered by them (apart from that suffered by the general public by such an institution), in that the odours from the convenience would be offensive, and that the building, being on an alleged public highway, would obstruct the approach to the plaintiffs' proposed building. It was held, that a public convenience such as that proposed to be constructed by the corporation is not per se a nuisance, and in any event it could not be considered so to the occupants of a building not yet erected, and that, therefore, the action was premature. An application at the trial to add the Attorney-General was refused as having been made too late, without his consent, and without its being shewn that the public interest would otherwise suffer.

British Canadian Securities, Limited v. Corporation of the City of Victoria, 16 B.C.R. 441.

(§ II C—48)—BY A PRIVATE INDIVIDUAL.

The law only justifies the abatement of a nuisance by a private individual where the right can be exercised without disturbing the public peace; and, in an action, where the plaintiff, a riparian owner, with teams and men in force, enters the lands of a neighbour (the defendant), and proceeds to cut down and remove a wing-dam thereon, on the ground that it constitutes a nuisance causing damage to the plaintiff's lands; and where the defendant, while resisting this action, was assaulted and beaten severely by the plaintiff, it appearing that, while the defendant did commit the first assult in defence of the wing-dam, the plaintiff and his associates retaliated, throwing him down and otherwise maltreating him; there is no justification for the excessive beating, and the plaintiff is liable in damages. [Blackstone, 3 Com. 5; Perry v. Fitzhowe, 8 Q.B. 757; Six Carpenters' Case, 8 Rep. 146a, referred to.]

Lorraine v. Norrie, 6 D.L.R. 122.

D. Defences.

(§ II D—51)—PRESCRIPTION.

The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with. Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded.

Waddell v. Richardson, 17 B.C.R. 19.

OATH.

(§ I—1)—AUTHORITY OF NOTARY TO TAKE.

A notary public of the State of New

York may, under art. 30 C.P., administer oaths to dispositions taken under a commission rogatoire for use in the Province of Quebec. [Shwob v. Baker, 5 Que. P.R. 441, followed.]

Lehr v. Peterson, 5 D.L.R. 182.

(§ I—3)—Power of commissioners.

Where by the terms of the Municipal Elections Act (B.C.) the declaration of qualification of voters is to be made before a "commissioner for taking affidavits in the Supreme Court," a declaration of qualification made before a commissioner appointed under the provisions of the Provincial Elections Act (B.C.) is of no legal effect; the powers of the commissioners last referred to being restricted to those conferred upon him by the Act under which he was appointed. [Boyd v. McNutt, 9 Ont. P.R. 493; Pollard v. Huntingdon, 16 C.L.J. 168, and Reynolds v. Williamson, 25 U.C.C.P. 49, referred to.]

In re Municipal Elections Act, 2 D.L.R. 349, 19 W.L.R. 830, 17 B.C.R. 31.

OBJECTIONS.

To raise questions on appeal, see Appeal, V.

In general, see Trial, I.

OBSCENITY.

(§ I—5)—Selling or exposing for sale obscene books.

The proprietor of a book store cannot be convicted, under sec. 207 of the Crim. Code, of knowingly selling an obscene book, where he did not have knowledge as to the contents of the books, a few copies of which had been, without his knowledge, purchased by a clerk and kept among stock in a cellar to which the public was not admitted.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

The owner of a book store containing thousands of books, cannot be convicted of knowingly exposing for sale an obscene book under sec. 207 of the Crim. Code, where a few copies which had been purchased by a clerk without the defendant's knowledge, were found in a cellar where stock was kept, and to which the public was not admitted.

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

In order to warrant a conviction under sec. 207 of Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 and 9 Edw. VII. ch. 9, for selling or exposing for sale an obscene book, it must be proved that the accused was aware of its obscene character and that it was sold or exposed for sale with his knowledge. [Rex v. Beaver, 9 O.L.R. 418, 9 Can. Cr. Cas. 415, referred to.]

Rex v. Britnell, 4 D.L.R. 56, 3 O.W.N. 977, 21 O.W.R. 800, 26 O.L.R. 136, 20 Can. Cr. Cas. 85.

OBSTRUCTING JUSTICE.

(No cases.)

OFFERS.

As to offers and their acceptance, see Contracts.

OFFICERS.

I. Selection; incumbency; removal.
- A. In general; eligibilty.
- B. Appointment and election.
- C. Qualifying; induction; vacancy.
- D. Term; holding over.
- E. Resignation or deprivation of office.
- F. Contest of title.

II. Rights; powers; duties; liabilities.
- A. Rights, powers and duties generally.
- B. Compensation and fees.
- C. Liabilities.

III. Officers de facto.

Arrest by, see Arrest.

Assault on, see Assault and Battery.

Of banks, see Banks, II.

As to bonds of, see Bonds, II.

Of corporation, see Companies, IV.

Embezzlement by, see Theft.

Liability for false imprisonment, see False Imprisonment.

As to health officers, see Health.

Justice of the peace, see Justice of the Peace.

Libel of, see Libel and Slander, II.

Limitation of time for bringing suit, see Limitation of Actions.

Mandamus to, see Mandamus.

Municipal liability for acts of, see Municipal Corporations, II.

As to levy under execution, see Execution; Levy.

Notary public, see Notary Public.

As to receivers, see Receivers.

Service on, for corporation, see Writ and Process.

A. In general; eligibility.

(§ I A—10) — Eligibility generally; qualifications.

Where a candidate for the mayoralty of the City of Sherbrooke, at the time of his nomination and election, was the owner of an undivided one-half of an immovable, the total value of which was $10,000, and against which undivided one-half no hypothecation or claim existed of record, such undivided ownership is a sufficient property qualification for said office under the charter of said city as "real estate" of the value of $1,000 or more, over and above any mortgage. [7 Edw. VII., ch. 66, sec. 10, referred to.]

Demers v. Hebert, 8 D.L.R. 632, 42 Que. S.C. 314.

(§ I A 3—16)—INCOMPATIBLE OFFICES GENERALLY.

Where there are two candidates for a municipal office under the Manitoba Municipal Act, R.S.M. 1902, ch. 116, the returning officer has no jurisdiction after the close of the nomination proceedings to deal with an objection that one of the nominees is disqualified, nor to declare the other candidate elected without the votes being polled on the ground of the disqualification of his opponent, although the disqualification alleged was that the candidate as the "Noxious Weed Inspector" of the same municipality was its paid officer. [St. Vital Municipal Election; Tod v. Mager (Decision No. 1), 1 D.L.R. 565, affirmed on different grounds.]

Re St. Vital Municipal Election; Tod v. Mager (No. 2), 3 D.L.R. 350, 21 W.L.R. 203.

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Re St. Vital Municipal Election; Tod v. Mager, 1 D.L.R. 565, 20 W.L.R. 537, 22 Man. L.R. 136.

B. Appointment and election.

(§ I B—27)—ELECTION.

The three essential prerequisites of the occupation of a municipal office de jure under the Municipal Act of Ontario, 1903, are: (1) The actual possession of the necessary property qualification; (2) Election to office; and (3) The completion of the statutory declaration of qualification as required by statute.

Rex ex rel. Morton v. Roberts: Rex ex rel. Morton v. Rymal, 4 D.L.R. 278, 3 O.W.N. 1089, 26 O.L.R. 263, 22 O.W.R. 50.

C. Qualifying; induction; vacancy.

(§ I C—31)—QUALIFYING; OATH.

The mere fact that a proper declaration of qualification for office required by the Municipal Act of Ontario, 1903, has not been made, does not, of itself, compel the Court to declare the seat vacant, but the party elected may, if otherwise qualified, be given leave to make the declaration of qualification so as to complete his de jure right. [Regina ex rel. Clancy v. Conway, 46 U.C.R. 85, followed.]

Rex ex rel. Morton v. Roberts: Rex ex rel. Morton v. Rymal, 4 D.L.R. 278, 3 O.W.N. 1089, 26 O.L.R. 263, 22 O.W.R. 50.

A mortgagee who is assessed for freehold property of the value named in the statute may make a valid declaration of qualification for office under the Municipal Act of Ontario, 1903.

Rex ex rel. Morton v. Roberts; Rex ex rel. Morton v. Rymal, 4 D.L.R. 278, 3 O.W.N. 1089, 26 O.L.R. 263, 22 O.W.R. 50.

Refusal or neglect to make the declaration of qualification for office, even if caused by inability to make it, amounts to refusal of the office. [Rex v. Larwood (1693), Carthew 306, specially referred to.]

Rex ex rel. Morton v. Roberts; Rex ex rel. Morton v. Rymal, 4 D.L.R. 278, 3 O.W.N. 1089, 26 O.L.R. 263, 22 O.W.R. 50.

E. Resignation or deprivation of office.

(§ I E 1—45)—RESIGNATION.

A resignation from the office of municipal councillor does not operate as a disclaimer under secs. 77 and 78 of the Municipal Ordinance, so as to vest the office in the person who received the next highest number of votes at the election.

Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264.

The filing of an alleged disclaimer of office under sec. 77 of the Municipal Ordinance (N.W.T.) 1898, (Alta.), after the person elected has resigned, is ineffective to vest the office in the person who received the next highest number of votes at the election, as provided by sec. 78 of the ordinance, a disclaimer made at a time when the person was neither an officer de facto or de jure not being within the purview of sec. 78.

Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264.

A person elected to the office of municipal councillor after a poll of votes and not by acclamation may, at any time previous to the beginning of his term of office and before his election is complained of disclaim the office under sec. 77 of the Municipal Ordinance C.O. 1898, ch. 70, without the consent of the council, and such disclaimer has the effect of a resignation.

Rex ex rel. Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264.

(§ I E 3—58)—CHARGES; NOTICE; HEARING.

A notary is a public officer (sec. 4575, R.S.Q. 1909), and, as such, he has a right to the protection which our laws accord to public officers; and, under article 88 C.P.C., a notary, as a public officer or person performing public functions or duties, cannot be prosecuted for damages resulting from anything done by him in the exercise of such functions, unless a written notice has been given him by the prosecutor at least one month before the commencement of the action; and this notice must state the grounds of the action and specify the name and office address of the attorney or representative of the prosecutor, and must be served on the defendant personally or at his domicile; and, in the absence of proof

of bad faith or fraud, the notice required by article 88 C.P.C. is absolutely necessary constituting a jurisdictional obligation of the prosecutor before he can issue a writ against the public officer in default; and the terms of article 88 C.P.C. are formal and estop the prosecutor from any action unless he has complied with their provisions, his right of action being strictly subject thereto, and no public officer can be presumed to have waived the right granted him by this article unless he has expressly and knowingly waived the same.

Authier v. Beaulieu, 18 Rev. de Jur. 393.

F. Contest of title.

(§ I F—65)—CONTEST OF TITLE.

The right of a mayor, warden, reeve, alderman, county councillor or councillors to hold a seat may be attacked by an originating notice at the instance of an elector even though the latter does not claim the seat for any other person, and the notice may be amended at any time prior to the final disposition of the motion attacking it.

Rex ex rel. Morton v. Roberts; Rex ex rel. Morton v. Rymal, 4 D.L.R. 278, 3 O. W.N. 1089, 26 O.L.R. 263, 22 O.W.R. 50.

II. Rights; powers; duties; liabilities.

A. Rights, powers and duties generally.

(§ II A—70)—RIGHTS, POWERS AND DUTIES GENERALLY.

The license commissioners for the city of Montreal are ministerial officers who exercise incidentally judicial functions as regards the confirmation of a license certificate whenever there is an opposition produced against this confirmation. (2) Therefore before they render judgment, they must submit to the essential formality of every judicial proceeding enunciated in art. 82 C.P. which forbids the adjudicating on any judicial demand unless the party against whom it is made has been heard or duly summoned.

Nurnberger v. Choquette et al. and Roberts et al., 13 Que. P.R. 270 (Sup. Ct.).

(§ II A—74)—DUTIES.

A land owner within a land registration district in Alberta is not entitled to demand from the registrar of the district an official certificate that the land in question is a homestead and as such exempt from a certain execution issued under a judgment against the applicant and registered under the Executions Ordinance, Revised Ordinances, 1911 (Alta.) ch. 27, as it is not the duty of the registrar to determine whether or not the property is a homestead and as such exempt, that being a question for a competent Court; the registrar for the purposes of his official certificates of his records must treat the execution as a charge upon the land with priority according to the date of its registration.

Love v. Bilodeau, 7 D.L.R. 175.

(§ II A—75)—POWERS AS TO AMENDMENT; RECTIFICATION OF ERRORS.

The Crown side of the Court of King's Bench will permit the clerks and officers of the police magistrate of the city of Montreal to correct errors and deficiencies in commitment warrants.

Lafleur v. Vallee, 5 D.L.R. 57.

C. Liabilities.

(§ II C—85)—LIABILITIES.

An "unlawful" act is one contrary to law, common or statutory, and a defence by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned. [Fawcett v. York and N. Mid. R. Co., 16 Q.B. 610; R. v. Clarence, 22 Q.B.D. 23, referred to.]

Markey v. Sloat, 6 D.L.R. 827, 11 East. L.R. 295.

(§ II C—88a)—BARGAINING IN REFERENCE TO ADMINISTRATION OF OFFICE.

No judicial officer should make a bargain in regard to anything connected with the administration of his judicial office.

Rex v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17.

(§ II C—89)—CUSTODY OF OFFICIAL DOCUMENTS.

A local registrar cannot permit official documents to be taken from his office except under an order of the Court.

Allin v. Ferguson, 5 D.L.R. 19, 21 W.L. R. 246.

III. Officers de facto.

(No cases.)

OPTION.

Validity of option contract generally, see Contracts, I.; Contracts, III.

To declare mortgage due for default in payment of interest, see Mortgage, VI.

Specific performance of option contract, see Specific Performance.

Ratification of option given by real estate agent, see Principal and Agent, II.

Ejectment from possession under option, see Ejectment.

ORAL CONTRACT.

In general, see Contracts, I.

Specific performance of, see Specific Performance, I.

ORAL EVIDENCE.

See Evidence, III.; Evidence, VI.

ORDER.

For publication, see Writ and Process, II.

Judicial orders, generally, see Judgment; Motions and Orders.

ORDINANCES.

Municipal ordinances and by-laws, see Municipal Corporations, II.

OUSTER.

Of officer, see Officers; Quo Warranto.
Proof of, see Ejectment.

OVERHOLDING TENANT.

See Landlord and Tenant.

PARDON.

In general, see Criminal Law, IV.

PARENT AND CHILD.

I. RELATION; RIGHTS AND OBLIGATIONS GENERALLY.
II. LEGITIMATION.
III. ADOPTION.
IV. RIGHT TO CUSTODY OF CHILD.

Maintenance of child, see Infant.
Damages to parent for killing of child, see Damages; Death.
Custody, disabilities and liabilities of infants, generally, see Infants.
Sale or mortgage of infant's real estate, see Infants.
Right of action for death of parent, see Death.
As to actions by infants, see Infants, III.

I. Relation; rights and obligations generally.

(§ I—1)—RELATION; RIGHTS AND OBLIGATIONS.

Although the Courts ought, as far as possible, to maintain the principle of paternal authority in its integrity, they can and should, on the other hand, in certain cases, exercise their control over paternal authority when the latter is not used in a judicious or just manner and especially when the welfare of the infant is being interfered with.

Bail v. Lemieux, 18 Rev. de Jur. 497.

A father cannot (for the simple gratification of seeing his son, a minor of seventeen years, follow the former's calling) insist upon the son learning the father's trade, when the minor's inclination and aptness adapt him to a totally different calling in life, especially where the son continues to live with his father and in that way continues under the supervision of the father, and where to decide otherwise would be to compromise the future welfare of the child.

Bail v. Lemieux, 18 Rev. de Jur. 497.

(§ I—8)—FATHER'S LIABILITY FOR TORTS OR NEGLIGENCE OF CHILD.

Damages against one who negligently permits his infant child to have a dangerous weapon in his possession upon a public street may be recovered by any one who, without negligence on his part, is injured by such weapon.

Moran v. Burroughs, 3 D.L.R. 392, 3 O.W.N. 1214, 22 O.W.R. 12, reversed, see 4 O.W.N. 539.

II. Legitimation.

(No cases.)

III. Adoption.

(§ III—19)—EFFECT ON STATUS OR RIGHTS.

Parentage by adoption is not recognized by the laws of Ontario. [Re Davis (1909), 18 O.L.R. 384, followed.]

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 3 O.W.N. 1208, 22 O.W.R. 72, 26 O.L.R. 367.

IV. Right to custody of child.

(§ IV—40)—RIGHT TO CUSTODY.

A widow, mother of children six and eight years old, has a right to their custody and may proceed by habeas corpus to obtain possession of them from their grandmother and uncle who have taken them to their home and maintained them for some years.

Moquin v. Turgeon, Q.R. 42 S.C. 232 (Supt. Ct.).

In the matter of habeas corpus for the custody of a child under age the interest and well-being of the child is the first consideration for the Judge. When it is a case of dispute between the parents as to the child's custody, and the latter is not capable of making an intelligent choice, the Court should choose for him. In this case the child, twenty-two months old, instead of being placed in a charitable institution was placed in care of its mother.

Nault v. Nault, 13 Que. P.R. 221 (Sup. Ct.).

Where a father of an infant daughter is respectable, of good habits, industrious, trustworthy, steadily employed, and nothing is shewn as to his character and habits such as would disentitle him to insist upon his strict legal rights in regard to his daughter, he will be entitled to her custody though he signed and sealed an agreement relinquishing her custody to her maternal grandparents until she reached her majority or married under that age and covenanting that he would not revoke the instrument. [Re Faulds, 12 O.L.R. 245; The Queen v. Gyngall, [1893] 2 Q.B. 232, per Lord Esher, at p. 239; Re O'Hara, [1900] 2 I.R. 232, specially referred to; Re Hutchinson, 26 O.L.R. 113, reversed on appeal.]

Re Hutchinson, 5 D.L.R. 791, 3 O.W.N. 1552, 22 O.W.R. 390, 26 O.L.R. 113, 601.

The Courts of the Province of Alberta are not bound by that part of a decree divorcing persons married in the United States rendered by a Court in one of the

States at the suit of the husband, giving to him the custody of a minor child of the marriage who was born in Canada and had remained in Canada during such divorce proceedings, and the child's father seeking the custody of the child upon a writ of habeas corpus is not aided by that decree. [Hope v. Hope, 4 DeG. M. & G. 328, 43 Eng. Reports 534, and Dawson v. Jay, 3 DeG. M. & G. 764, 43 Eng. Reports 300, specially referred to; Rex v. Hamilton, 17 Can. Crim. Cas. 410, distinguished.]

Re Mott, 5 D.L.R. 406, 20 W.L.R. 369.

PARLIAMENTARY LAW.

I. In general.
II. Presiding officer.
III. Voting.

I. In general.

(§ I—2)—Notice of meeting.

2. By the terms of art. 931a of the M. C., the County Council cannot take into consideration an application for an appeal, unless a public notice to make known the day and the hour of the session when the said application will be proceeded with, is given by the secretary-treasurer or by the commissioner of the municipality. This public notice should be published at least seven days before the day fixed for the session during which the examination of said application will take place. When an application for an appeal is filed in the office of the council on a date approaching one of the next regular meetings of the council, and which public notice of seven days, as above mentioned, cannot be given, the council in such a case, must order a public notice and to call a special meeting for the purpose of considering such an application, and such a special meeting is then properly held, when it is called and held within 30 days from the date the application was filed in the office of the council.

La Corporation de Ste-Foye v. La Corporation du Comte de Quebec, 18 Rev. de Jur. 99.

3. In addition to the notice published in the municipality art. 931a M.C. requires a special notice to mayors and members of the County Council to call them to such a special session. Such notice should be given by a registered letter, at least 10 days before the time fixed for holding of the session. Under the art. 224 each special notice must be drawn up or given in the language of the person to whom it is addressed, but when the special notice is addressed or given to a person who speaks both languages, French and English, to him such notice may be given in either language. In absence of a proof, which language is the right one of the councilmen or mayors not present at the special session, the only presumption which may be inferred from the fact that the names may be English names, is not sufficient to decide that such persons use English language, because such a presumption is not allowed by any part of Municipal Code, and it is an established fact, that person with an English name speaks French, and he may speak both.

La Corporation de Ste-Foye v. La Corporation du Comte de Quebec, 18 Rev. de Jur. 99.

(§ I—4)—Adjourned meeting.

4. Two sessions of the municipal council, before and after noon of the same day, do not constitute one meeting, when it does not appear as a fact that they simply adjourned for the purpose of having dinner.

La Corporation de Ste-Foye v. La Corporation du Comte de Quebec, 18 Rev. de Jur. 99.

II. Presiding officer.

(No cases.)

III. Voting.

(No cases.)

PAROL CONTRACTS.

In general, see Contracts, I.
Specific performance of, see Specific Performance, I.
Evidence of, see Evidence, VI.

PAROLE.

See Criminal Law, IV.

PARTIAL INTESTACY.

See Wills, III.

PARTICULARS.

Furnishing particulars of matters pleaded generally, see Pleadings, I.

PARTIES.

I. Plaintiff.
  A. Persons who may or must sue.
  B. Joinder.
II. Defendants.
  A. Proper and necessary parties.
  B. Joinder.
III. Bringing in; intervention; third party.
IV. Substitution.

Curing or waiving errors below, see Appeal.
To proceeding by certiorari, see Certiorari.
To criminal offence, see Criminal Law, I.
To deed, description of, see Deeds, II.
In injunction proceeding, see Injunction.
Who are affected by judgment, see Judgment, II.

In action for libel, see Libel and Slander, III.

On foreclosure, see Mortgage.

In mandamus proceeding, see Mandamus, II.

Description of, in pleading, see Pleading, II.

Mode of setting up defect of, see Pleading.

Foreign corporations as, see Companies, VII.

Action by voluntary unincorporated associations, see Associations, 2.

Action for death, see Death, I.

Who may sue to set aside fraudulent conveyance, see Fraudulent Conveyances.

Private remedy for obstruction of street, see Highways.

Action by husband or wife, see Husband and Wife, III.

Right of minor to maintain suit in his own name, see Infants.

Relator in mandamus proceeding, see Mandamus.

Who may have remedy against nuisance, see Nuisances, II.

Who may contest will, see Wills.

Consolidation of actions against different defendants, see Action or Suit, II.

Action against unincorporated voluntary association, see Associations.

Joinder of causes of action, see Action or Suit, II.

I. Plaintiff.

A. Persons who may or must sue.

(§ I A 1—9)—MUNICIPALITY.

20. The declaration, in an action to have a contract declared void or annulled, in which are set forth obligations of performance arising from a municipal board and the settlement of a boundary involving the mutual surrendering of land, that would cease to be binding or to have effect, upon judgment rendered maintaining the action, sufficiently discloses the interest of the plaintiffs to sue, required by art. 77 C.P. The fact that the conclusions do not go beyond, nor ask for anything requiring execution, does not imply lack of interest, the judgment sought being one that, of itself, is executory and redresses a wrong complained of.

Harbour Commissioners of Montreal (plaintiffs, appellants) v. Record Foundry and Machine Co. et al. (defendant, respondents), 21 Que. K.B. 241.

A public corporation created to administer and manage public property (e.g. a harbour), with powers of alienation of its movable and immovable dependencies, is competent to bring suit in its own name, to have a contract made by it declared null, or to have it annulled. Such a case is not of the kind contemplated in art. 978 C.P., as requiring the action or intervention of the Attorney-General.

Harbour Commissioners of Montreal (plaintiffs, appellants) v. Record Foundry and Machine Co. et al. (defendant, respondents), 21 Que. K.B. 241.

(§ I A—11a)—CESTUI QUE TRUST.

The rule is well settled that a member of a society or church congregation may sue on behalf of himself and all other members of the congregation to prevent a breach of trust as to which they have a legal interest to intervene.

Heugli v. Pauli, 4 D.L.R. 319, 3 O.W.N. 915, 21 O.W.R. 776, 26 O.L.R. 94.

(§ I A 1—13)—JOINT OWNERS.

An action, taken by one of two persons seized of the naked ownership of an estate against the life usufructuary to have the usufruct ended by reason of wasteful administration, is not unfounded because the co-proprietor has not been made a party, and that the action should be remitted to the Superior Court to have the co-proprietor made a party, but costs of the appeal would not be granted to the plaintiff, as he ought to have summoned the co-proprietor into the cause. [Currie v. Currie, Que. R. 3 Q.B. 552; Hubert v. Rascony, 17 R.J.R. 474, and Houde v. Marchand (1912), Que. R. 21 K.B. 184, cited.]

Guay v. Duval, 18 Rev. de Jur. 371.

Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the joint property, without adding as co-plaintiffs the other joint heirs, and where the plaintiffs in their action demand an accounting and a declaration of their right to undivided shares in the estate, a dilatory objection by the defendant against the non-joinder of the remaining joint heirs will not defeat the plaintiffs' action, when it clearly appears that the objection was taken too late, and that the remaining joint heirs will not be prejudiced by the declaration in favour of the joint heirs who are already parties in the action.

Houde v. Marchand, 8 D.L.R. 431.

(§ I A 3—40)—EFFECT OF ASSIGNMENT.

If shewn on a trial that shares of stock on which an action was based had been assigned, the case should be directed to stand over in order to permit the plaintiff to obtain the assent of the assignee to become a co-plaintiff, or, if not obtainable, to make him a defendant, where the plaintiff desires to prove that the assignment was as security only and that he still retained a beneficial interest in the shares.

Daniel v. Birkbeck Loan Co., 4 D.L.R. 767, 3 O.W.N. 1250, 22 O.W.R. 147.

This action was brought to enforce a lien against land made in 1886, in favour of an English company known as the Canada North-West Land Company. In 1893 a Canadian company with the same name was formed to take over the assets of the English company, and it was stated in evidence in a general way that the Cana-

dian company did take over such assets. The action did not shew which company was suing, merely alleging the claim upon a lien to the plaintiff company. Objection was raised that the Canadian company had sued, and could not maintain an action without alleging and proving an assignment. The company then applied for leave to amend. Held, 1. The lien, being dated before the organization of the Canadian company, must be taken to have been made in favour of the English company, and if so could not be sued upon by the former unless an assignment was alleged or proved. 2. On the circumstances of the case it would appear that the action was brought by the Canadian company. 3. That while there was evidence of a vague character pointing to the assignment of the lien to the Canadian company, such evidence was not such as could be left to a jury, the rule being that it must be determined, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is placed, and a Judge sitting without a jury is bound by the same principle. 4. There being, therefore, no sufficient evidence of assignment, the plaintiffs could not maintain this action, and as to allow an amendment would entail the setting up of an entirely new cause of action, such amendment should not be allowed.

The Canada North-West Land Company, Limited v. Irwin, 4 S.L.R. 394.

(§ I A 4—16)—By taxpayer.

Where a city corporation is about to pass an ultra vires by-law and an application for an injunction to restrain is made by a plaintiff (not in the name of the Attorney-General), such plaintiff comes within the prohibition of the well-settled rules that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself.

Keay v. City of Regina, 6 D.L.R. 327, 22 W.L.R. 185.

(§ I A 4—47)—Qui tam action; status of plaintiff.

An objection that the plaintiff has no legal status to sue cannot be raised on peremption proceedings, but only by exception to the form or on the merits. [Lamontagne v. Grosvenor Apartments, 20 Que. K.B. 221, approved.]

Mason v. Ledoux & Co., Limited, 2 D.L.R. 50.

(§ I A 4—48)—Right of Attorney-General to sue.

Only the Attorney-General has the right in the absence of any express statutory provision to sue for an order restraining a municipal corporation from passing a by-law which while ultra vires does not specially affect any citizen or class of citizens. [Hope v. Hamilton Park Commissioners, 1 O.L.R. 477; Boyce v. Paddington Borough Council, 72 L.J. Ch. 32; Caldwell v. The Pagham Harbour Reclamation Company, 45 L. J. Ch. 796, referred to.]

Keay v. City of Regina, 6 D.L.R. 327, 22 W.L.R. 185.

The Attorney-General, suing on the relation of a city and an officer thereof, if he has independent rights in the action, is not bound by the proceedings in a former action by the city against the same defendant in which similar issues were involved and the judgment was rendered against the city, upon the ground that such officer represents the Crown alone and could have sued without a relator as well, there being no difference except for the purpose of costs between an ex officio information and an information on the relation of a corporation or a private person. [Attorney-General v. Logan, [1891] 2 Q.B. 100, per Vaughan Williams, J.; Attorney-General v. Cockermouth, L.R. 18 Eq. Cas. 172, per Jessel, M.R., at p. 176, specially referred to; Fonseca v. Attorney-General, 17 Can. S.C.R. 612 (reversing, on other grounds, Attorney-General v. Fonseca, 5 Man. L.R. 173), at p. 619, distinguished.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

The Attorney-General is not a necessary party to an action for trespass to land, where the defendant sets up that the land in question, though formerly the property of the plaintiff, has been encroached upon by navigable waters and has become the property of the Crown, and justifies the alleged trespass under a lease thereof from the Crown subsequent to the plaintiff's patent.

Volcanic Oil and Gas Co. v. Chaplin, 6 D.L.R. 284, 22 O.W.R. 800, 27 O.L.R. 34, 3 O.W.N. 1597.

(§ I A 5—52a)—Receivers.

A liquidator of a company appointed under the Winding-up Act, R.S.C. 1906, ch. 144, sufficiently represents the creditors without joining one of the creditors generally, as a party in an action to contest as against an alleged chattel mortgagee of the company's goods the invalidity of the chattel mortgage as against creditors by reason of non-compliance with a statute requiring that chattel mortgages made without actual and continued change of possession shall be recorded, and declaring that otherwise they shall be void as against creditors of the chattel mortgagor. [Re Canadian Camera and Optical Co., 2 O.L.R. 677, specially referred to.]

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 22 O.W.R. 933, 3 O.W.N. 1093, 26 O.L.R. 279.

B. Joinder.

(§ I B—55)—Joinder.

Addition of plaintiff—Person interested

in commission claimed by plaintiff—Discovery—Better affidavits of documents.

Imrie v. Wilson (No. 1), 2 D.L.R. 883, 3 O.W.N. 895.

Where a plaintiff sues jointly and severally the city of Montreal and a third party for damages on account of injuries caused by them the city can compel him in such third party are a mise en cause.

Duchesne v. City of Montreal, 14 Que. P.R. 86 (Sup. Ct.).

Addition of plaintiff—Assignment — Joinder of parties and causes of action.

Clarke v. Bartram, 1 D.L.R. 907.

While the non-joinder of parties having a joint interest as co-owner with the plaintiff is, under Ont. C.R. 206 (1897), no longer a ground for the absolute dismissal of the action, the Court will direct, on the defendant's exception raised on an interlocutory motion, that the action do not come on for trial unless and until the other person interested has been joined as a party. [Lydall v. Martineau, 5 Ch. D. 780, specially referred to.]

Hoodless v. Smith, 7 D.L.R. 280, 4 O.W.N. 190.

(§ I B—57)—Of Attorney-General.

Where a proceeding is defective because the Attorney-General was not added as a party plaintiff and no consent from the Attorney General is forthcoming when the case comes on for final disposition, as upon a plaintiff's motion for judgment, a conditional amendment will not be granted subject to the plaintiff obtaining the Attorney-General's consent, but the action will be dismissed if the plaintiff has not the necessary status to maintain the action.

Keay v. City of Regina, 6 D.L.R. 327, 22 W.L.R. 185.

II. Defendants.

A. Proper and necessary parties.

(§ II A 1—65)—In general.

An action cannot be maintained in the Supreme Court of the North-West Territories for the purpose of enjoining a party from bringing an action therein or from proceeding therewith. A defendant against whom the only relief claimed is such as the Court has no power to grant, and who is not a necessary party in order that the plaintiff may obtain the relief prayed for against other defendants, will be struck out as a party defendant, and it is no longer the practice of the Courts to permit a party to be made a defendant simply for the purpose of making him liable for costs.

Bible v. Hill & Moses, 7 Terr. L.R. 389.

(§ II A 1—67b)—Numerous parties.

Ont. Con. Rule 200 as to class representation orders cannot be invoked by a plaintiff to have one member of a voluntary association appointed to represent all the other members, in an action for trespass and assault committed at the instance of that defendant on behalf of the association. [Bedford v. Ellis, [1901] A.C. 1, referred to.]

Scully v. Ontario Jockey Club, 8 D.L.R. 203, 4 O.W.N. 379, 23 O.W.R. 422.

Numerous defendants—Representation by counsel at trial—Powers of Court—Con. Rule 200—Unnecessary party—Motion to dismiss—Absence of consent.

Howie v. Cowan, 2 D.L.R. 906, 3 O.W.N. 1150.

Ont. Con. Rule 201 as to class representation orders can only be invoked where the right of the class to be represented depends upon the construction of an instrument, and those rights are sought to be ascertained.

Scully v. Ontario Jockey Club, 8 D.L.R. 203, 4 O.W.N. 379, 23 O.W.R. 422.

(§ II A 5—86)—Partners.

As a rule there can be only one defendant in an action of slander, namely, the person who uttered the words complained of, and unless the plaintiff pleads that one defendant instructed the other to utter the slander sued on, a claim against two persons jointly, although alleged to be partners, will be struck out as embarrassing. [See Odgers on Libel, 5th ed., p. 601, and see annotation to this case.]

Messervey v. Simpson, 1 D.L.R. 532, 20 W.L.R. 531, 22 Man. L.R. 421.

(§ II A 7—100)—Husband and wife.

While a claim for the custody of the children may be joined in an action by the wife against the husband for alimony, another person taking care of the children under the defendant's directions cannot be made a co-defendant for the purposes of the relief sought as to the custody of the children.

Ney v. Ney (No. 2), 1 D.L.R. 641, 3 O.W.N. 927, 21 O.W.R. 524.

(§ II A 8—105)—Cases as to real estate.

Where a mortgagee holds by a conveyance absolute in form, but which is in effect a mortgage only, he may be made a co-defendant in a creditor's action for a sale in aid of execution against the owner of the equity without any offer by the plaintiff to redeem; and the plaintiff may, upon his debtor's interest being ascertained, elect either to redeem or to sell subject to the mortgagee's claim. [Moore v. Hobson, 14 Grant 703, followed; and see Bell and Dunn on Mortgages, 225.]

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

B. Joinder.

(§ II B—115)—Joinder.

If two defendants are jointly sued for the same debt, one personally and the other as tiers de tenteur of mortgaged land, the plaintiff cannot inscribe for judgment by default against the latter who has not pleaded when his co-defendant has pleaded that the debt sued for is not yet exigible.

Therien v. Viau, 13 Que. P.R. 277 (Sup. Ct.).

Under Ontario Rules 186 and 192 (Con. Rules of 1897), an alleged agent may be joined in an action on a contract made by him, ostensibly on behalf of the principal, for the purpose of claiming against the alleged agent alternative relief in case it should be found that he made the contract on his own behalf. [Tate v. Natural Gas Co. (1898), 18 P.R. 82, followed; Andrews v Forsythe (1904), 7 O.L.R. 188, distinguished.]

Youngston v. Doty et al., 2 D.L.R. 839.

Under rule 86 of the Saskatchewan Supreme Court Rules (1911), it is proper to make an order ex parte to add as a party defendant in a foreclosure action a person who has, after order nisi for foreclosure and before final order, acquired the equity of redemption in the mortgaged premises; rule 42 as to notice of motion does not apply in such a case.

Wasson v. Harker (No. 1), 7 D.L.R. 495, 22 W.L.R. 298.

A motion to add a party defendant may be refused, when there appears to be a substantial question as to the application of the Statute of Limitations, which might be affected by the order, unless the applicant consents to a term that the Statute of Limitations shall apply for the benefit of the added defendant up to the date of the order and not merely to the date of the writ against the original defendant. [Broom v. Toronto Junction, 3 O.W.N. 1158, affirmed on appeal.]

Broom v. Toronto Junction, 3 D.L.R. 699, 3 O.W.N. 1228, 22 O.W.R. 41.

(§ II B—118)—PERSONAL INJURIES.

Where one is injured by the fall of a building, and a writ is issued against the supposed owner, and it is then discovered that the building is registered in the name of his wife, and she is added as a defendant, the plaintiff cannot be compelled, under the Supreme Court Rules of British Columbia, to elect against which defendant he will proceed.

North v. Rogers, 5 D.L.R. 377, 17 B.C.R. 87.

There is no distinction between actions of contract and actions of tort in respect of the interpretation of the rules as to joinder of parties defendant. [Bullock v. London General Omnibus Co., [1907] 1 K.B. 264, at p. 271, followed; Compania Sansinena de Carnes Congeladas v. Houlder Bros. & Co., Ltd., [1910] 2 K.B. 354, and Times Cold Storage Co. v. Lowther and Blankley, [1911] 2 K.B. 100, specially referred to.]

North v. Rogers, 5 D.L.R. 377, 17 B.C.R. 87.

III. Bringing in; intervention; third party.

(§ III—120)—BRINGING IN; INTERVENTION; THIRD PARTIES.

Where in an action by a ratepayer against a municipal corporation the submission of one of its by-laws was by a competent Court declared a nullity and its operation was held not to prevent the submission of a similar by-law in the January following if the corporation should see fit to submit it, and where the decision of the Court was by resolution of the council formally and duly acquiesced in by the council of the municipality, a motion by another ratepayer for leave to intervene and appeal will be refused. [Re Mace v. County of Frontenac, 42 U.C.Q.B. 70, distinguished.]

Stoddart v. Town of Owen Sound, 7 D.L.R. 377, 4 O.W.N. 171.

Ratepayers, or parties who are assessable in respect to the opening of a highway, may intervene in an action to set aside a procès-verbal for the opening thereof, notwithstanding the corporation of the county was a party to the action, since they had a special interest in the proceeding different from that in respect to which the municipal corporation represented them. [Burland v. Earle, [1902] A.C. 83; Brown v. Gugy, 2 Moo. P.C.N.S. 341, specially referred to.]

Breakey v. Bernard, 6 D.L.R. 312, 18 La Rev. de Jur. 318.

Adding additional third parties—Application by present third parties—Joint liability.

Fisher v. McLeod, 7 D.L.R. 804, 22 W.L.R. 178.

The third party procedure, whereby a third party notice is served by the defendant on the insurance company in which he is insured against loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his employees, so that the company may if it wishes dispute the plaintiff's claim against the defendant and also dispute its liability to indemnify the defendant, may be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party, notwithstanding that the contract between the defendant and the third party is so framed as to preclude the bringing of an action before the defendant has actually paid. [Pollington v. Cheeseman, 5 D.L.R. 887, and 6 D.L.R. 875, considered.]

Pollington v. Cheeseman, 8 D.L.R. 142, 4 O.W.N. 410, 23 O.W.R. 639.

Closing pleadings against third party—Con. Rule 3—Particulars in action on guaranty.

Niagara and Ontario Construction Co. v. Wyse and United States Fidelity and Guaranty Co., 6 D.L.R. 876, 4 O.W.N. 248.

Third parties—Motion to set aside third party notice—Employers' liability assurance—Terms of policy—Action for damages for death of employee.

Pollington v. Cheeseman (No. 2), 6 D.L.R. 875, 4 O.W.N. 248, 23 O.W.R. 242.

(§ III—123)—CREDITORS.

In an action by a widow against the heirs of her husband, who had died insolvent, to recover the amount of a donation in contemplation of death made to her in their marriage contract, a creditor of the deceased, claiming under a lease for rent and other privileged debts, has no status to contest the conclusions of the plaintiff's declaration and his intervention for that purpose will be rejected.

Racine v. Meloche, 41 Que. S.C. 392 (Ct. Rev.).

(§ III—124)—CONTRIBUTION INDEMNITY; RELIEF OVER; BRINGING IN; INTERVENTION; THIRD PARTY.

Third party notice—Motion to set aside—Ex parte order—Lapse of time—Time for service—Extension.

Hudson v. Smith's Falls Electric Power Co., 4 O.W.N. 391, 23 O.W.R. 641.

A third party notice cannot be supported as upon a contract of indemnity where the defendants are sued upon a promissory note given for the price of a stallion to the third party and seek to claim against him a breach of warranty of the stallion; any damages to which the defendants may be entitled in that regard as against the warrantor are for breach of contract and not of a contract to indemnify.

Marshall v. Kinniburgh, 8 D.L.R. 70, 22 W.L.R. 272.

A third party notice against the payee of a promissory note will not be set aside in respect of a claim by the makers sued upon a promissory note by the endorsee thereof, that the note should not be used or negotiated by the payee unless and until he had obtained the signature of certain other parties as joint makers thereof.

Marshall v. Kinniburgh, 8 D.L.R. 70, 22 W.L.R. 272.

A third party notice served pursuant to an ex parte order got after issue joined is irregular and will be set aside as it is equivalent to commencing a new action. [Parent v. Cook, 2 O.L.R. 709, 3 O.L.R. 350, followed.]

Swale v. Canadian Pacific R. Co., 1 D.L.R. 501, 3 O.W.N. 601, 20 O.W.R. 997.

Where full discovery has been had between plaintiff and defendant, and issue joined, a third party notice for indemnity would be permitted only upon terms by which the defendant seeking to bring in a third party at that stage would be ordered to pay the additional costs, and a notice served under an ex parte order made after the proceedings had reached that stage, was set aside on motion.

Swale v. Canadian Pacific R. Co., 1 D.L.R. 501, 3 O.W.N. 601, 20 O.W.R. 997.

The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff. [Rule 209, Ontario Consolidated Rules of Practice (1897), construed; Pettigrew v. Grand Trunk R. Co., 22 O.L.R. 23, referred to.]

Swale v. Canadian Pacific R. Co. (No. 2), 2 D.L.R. 84, 3 O.W.N. 664, 21 O.W.R. 225, 25 O.L.R. 492.

A carrier sued for conversion of goods by the consignor in respect of an alleged neglect of duty on the part of the auctioneer employed by the carrier to sell the goods for unpaid charges, and for alleged failure to account for all of the goods sold, may properly bring in the auctioneer as a third party and claim indemnity and relief over against him under Ont. Rule 209 (C.R. 1897). [Swale v. Canadian Pacific R. Co., 1 D.L.R. 501, 3 O.W.N. 601, 20 O.W.R. 997, reversed.]

Swale v. Canadian Pacific R. Co. (No. 2), 2 D.L.R. 84, 3 O.W.N. 664, 21 O.W.R. 225, 25 O.L.R. 492.

Claim against for relief over—No connection with main action.

Dominion Belting Co. v. Jeffrey Manufacturing Co.

A person brought into the action by a "third party notice" upon a claim of indemnity made by the principal defendant against him should obtain leave to enter a conditional appearance on defending such indemnity claim, otherwise he will be taken as waiving any right he may have to object to the local jurisdiction. [Grocers' Wholesale Co. v. Bostock, 22 O.L.R. 130, followed.]

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 3 O.W.N. 1588, 22 O.W.R. 786.

Motion to set aside third party notice—Time for moving—Employers' liability insurance—Terms of policy—Action for damages for death of employee.

Pollington v. Cheeseman, 5 D.L.R. 887, 4 O.W.N. 92, 23 O.W.R. 40.

IV. Substitution.

(No cases.)

PARTITION.

I. RIGHT TO; WHO MAY HAVE, AND IN WHAT.

II. PROCEDURE.
- A. In general; parties.
- B. Question of title.
- C. Decree.
- D. Sale.
- E. Division of proceeds.

III. DEEDS.

I. Right to; who may have, and in what.

(No cases.)

II. Procedure.

B. Question of title.

(§ II B—20)—QUESTION OF TITLE.

On a bill in equity for partition the

plaintiff must prove title in himself to an undivided part of the property, but if his title is denied, the equity jurisdiction is not ousted merely because the title in dispute is a legal and not an equitable one.

Durant v. Huestis, 1 D.L.R. 786, 10 E.L.R. 423.

III. Deeds.

(No cases.)

PARTNERSHIP.

I. NATURE; CREATION; WHAT CONSTITUTES.
II. RIGHTS AND POWERS OF PARTNERS.
III. LIABILITY OF PARTNERS; RIGHTS OF CREDITORS.
IV. PARTNERSHIP REAL ESTATE.
V. RIGHTS OF MEMBERS AS TO EACH OTHER.
VI. DISSOLUTION; EFFECT OF.
VII. ACTIONS.
VIII. LIMITED OR SPECIAL PARTNERSHIP.

I. Nature; creation; what constitutes.

(§ I—3)—CREATION; WHAT CONSTITUTES.

The relationship of master and servant only was shewn and no partnership was established between the parties, in an action for an accounting of a partnership claimed to have been entered into by the plaintiff and the defendant, where the plaintiff alleged that it was verbally agreed (1) that he should contribute a certain amount of money and the defendant a much larger sum and that each could draw a specified amount on account of his share of the profits and failed to state that any of these things were done except that he (the plaintiff) received out of the business a sum for five months equal to the amount stipulated to be drawn out of the profits under the agreement, and his own evidence shewed that he afterwards drew up an agreement in writing in the terms he desired it to be signed by him and the defendant, in which it was stated that he was to contribute, not the sum in cash mentioned in the written agreement, but only half thereof and a note for the balance to be paid out of his earnings from the business; (2) that his salary was to be a certain sum per month which was equivalent to the sum drawn by him as aforesaid; (3) that each party "was to draw a salary of ——," but whether on account or exclusive of profits was not shewn; (4) that the parties agreed "to produce satisfactory agreement drawn up in legal form upon the . . . [plaintiff] producing such cheque with note to be signed as agreed," and the testimony given by the plaintiff himself shewed that after the verbal agreement was entered into and before he drew up the formal agreement aforesaid, he refused, when he arrived at the city where the business was to be carried on, though he went to work in the business, to surrender the cash and note unless a contract in writing was drawn up.

Hallvorson v. Bowes, 5 D.L.R. 693, 21 W.L.R. 593.

Fraud—False Arrest—Sale of business—Judgment—Terms.

Webb v. Black, 2 D.L.R. 902, 3 O.W.N. 1153.

Failure to establish—Assignment of interest in business—Attack by creditors—Disclaimer by assignee—Judgment—Costs.

Jamieson Meat Co. v. Stephenson, 2 D.L.R. 911, 3 O.W.N. 1196.

An agreement, whereby the owner of land transfers an undivided interest therein, and in all the profits arising therefrom to another, who undertakes to provide funds for laying out the land into lots and for other incidental expenses preparatory to offering the lots for sale, and to devote a reasonable amount of his time to the affairs of the property, constitutes the parties partners in respect of the land.

Galbraith v. McDougall; McDougall v. Galbraith, 6 D.L.R. 232, 3 O.W.N. 1655, 22 O.W.R. 928.

The word "contracting," as used in the phrase "trading, manufacturing, contracting or mining," contained in the Partnership Act (Alta.) 1908, ch. 5, as to registration of firm and company names, is to be interpreted in its popular sense as referring to what is usually known as a contracting business (ex. gr., building or railway contracting work) and does not include the making of contracts for the sale or purchase of real estate either on one's own account or as a broker or agent.

Lambert v. Munns, 7 D.L.R. 264.

II. Rights and powers of partners.

(§ II—6)—AS TO BILLS, NOTES AND CHECKS.

A note given by one partner in the name of the firm for the payment of a private debt of his own due the payee, who took the same in good faith, cannot be enforced by the latter against the partnership unless he shews that it was in fact given with the authority of the other partners. [Kendal v. Wood, L.R. 6 Ex. 243, 248, specially referred to.]

Tebb v. Baird; Tebb v. Hobberlin Bros. & Co.; Hobberlin Bros. & Co. v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

(§ II—8)—DISPOSAL OF PARTNERSHIP FUNDS AND PROPERTY.

An assignment of the book debts due a partnership by one of the two partners composing the firm in the absence of the other is valid as to the other partner, even though the partner executing the assignment was by agreement between him and the other member of the firm without power in that regard, if the assignee was without knowledge of the lack of authority on the part of the partner who executed the assignment. [Marchant v. Morton Down & Co., [1901] 2 K.B. 829, specially referred to.]

Tebb v. Baird; Tebb v. Hobberlin Bros. & Co.; Hobberlin Bros. & Co. v. Tebb, 3 D.L.R. 161, 3 O.W.N. 952.

Where one who desires to obtain a lease of land from a partnership firm is refused by two of those connected with the firm, on the ground that he intends to use the land for a saw-mill, and subsequently obtains a written lease from another partner by concealing his real intention and representing that he wants the land for a lumber yard, he will be restrained from erecting a saw-mill upon the land, even though the written lease be unconditional.

Audet v. Jolicoeur, 5 D.L.R. 68.

(§ II—9)—As to insolvency.

The law does not provide for the appointment of a sequestrator in the case of a demand against a partnership for an assignment when such demand is opposed by one of the partners. To dispossess a party to the proceedings of his property by appointment of a sequestrator it is necessary to allege special and strong grounds therefor.

Wolfston v. Raymond, 14 Que. P.R. 87 (Sup. Ct.).

III. Liability of partners; rights of creditors.

(No cases.)

IV. Partnership real estate.

(§ IV—15)—Partnership real estate.

Where the plaintiff and the three defendants purchased land in partnership and the conveyance was made to one of the defendants who afterwards gave an option of purchase to another defendant and the latter succeeded in securing a purchaser at a price and on terms to which all expressed assent, though the plaintiff refused his formal consent unless the defendant who secured the purchaser would make an affidavit, which he refused to do, that he was not receiving a secret profit, the defendants were not guilty of fraud or of a breach of duty to the plaintiff in completing the sale without his consent, if there was in fact no secret profit, particularly in view of the provisions of the Partnership Act, R.S.B.C. ch. 175, sec. 25, making the assent of the majority of a number of partners sufficient.

Gordon v. Holland, 2 D.L.R. 327, 20 W.L.R. 887.

(§ IV—16)—What is.

If a caveator succeeds in establishing his contention that a valid partnership which was not evidenced by any writing subsisted between him and the owners of the land in question and that such land was an asset of that partnership and that he still retained his interest in the same, he would be entitled to a declaration by the Court to protect that interest by the recording of a caveat.

Re MacCullough and Graham, 5 D.L.R. 834, 21 W.L.R. 349.

The fact that the plaintiff, who claimed that the defendant was a trustee for him in respect to a one-half interest in property the latter purchased and in which the plaintiff was to have such an interest upon providing a large sum for the initial payment, advanced the defendant $500 as one-half of the sum the latter was to pay and did pay the owner of the property in order to obtain an option thereon, which was subsequently applied as a part of such initial payment, the balance being furnished by the defendant upon the plaintiff's failure to do so, does not make the defendant a trustee for the plaintiff, notwithstanding the $500 was not returned the plaintiff until fourteen days after the defendant made such initial payment.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499.

(§ IV—17)—On death of partner.

Land acquired for the purpose of carrying on a partnership business and used for that purpose is to be considered as partnership property and not as real estate owned by each partner as joint-tenants or tenants in common. [Jackson v. Jackson, 9 Ves. 591; Crawshay v. Maule, 1 Swanst. 495, and Waterer v. Waterer, L.R. 15 Eq. 402, followed.]

Farquharson v. Stewart, 1 D.L.R. 581, 10 East. L.R. 408.

Where the executors of a deceased partner who carried on a business with a surviving partner, upon being ordered by a Michigan Court of Chancery after the latter's death, to wind up the business, became the purchasers of partnership lands situated in Ontario, the sale being confirmed by such Court and the executors directed to make and execute conveyances thereof to themselves, they may convey title to such lands, and, where the beneficiaries of the estate have received the purchase money, it is unnecessary for an administrator who was appointed by the Court of Ontario of the estate of the surviving partner, to join in such conveyance, therefore he will be denied leave to file a caution under sec. 15 (1) (d) of the Devolution of Estates Act, 10 Edw. VII., ch. 56, after the proper time for filing it had expired.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

(§ IV—18)—Hypothecation or mortgage by trustee partner.

The hypothecation of a property for his own purposes by a person holding the same in trust for himself and another jointly, may be tantamount to an alienation thereof, and this under article 1092 C.C. (Que.) would give such other person the right to demand the immediate return of money he had contributed in the joint venture if such hypothecation impairs his security.

Frank v. Forman, 2 D.L.R. 8, 41 Que. S.C. 511.

V. Rights of members as to each other.

(§ V—20)—RIGHTS OF MEMBERS AS TO EACH OTHER.

One partner has no right to devise his interest in the partnership property in such a manner as to clog his partner's interests in the partnership business, by imposing conditions as to making payments of sums alleged to be due to the testator by his partner.

Farquharson v. Stewart, 1 D.L.R. 581, 10 East. L.R. 408.

(§ V—21)—ACCOUNTING; SETTLEMENT.

Where the devisee of a deceased partner in a mercantile co-partnership to whom the business was devised as a going concern to be worked by the devisee and the surviving partner share and share alike, continues to carry on the business for his own benefit, using the stock and plant of the co-partnership he must account to the surviving partner for any profits made. [Crawshay v. Collins, 15 Ves. 218; Featherstonhaugh v. Fenwick, 17 Ves. 298; Yates v. Finn, L.R. 13 Ch.D. 839, followed.]

Farquharson v. Stewart, 1 D.L.R. 581, 10 East. L.R. 408.

(§ V—22)—LIABILITY OF PARTNER MAKING ADVANCE FOR BENEFIT OF FIRM.

A partner who has paid money for the benefit of a partnership cannot hold a co-partner for more than his proportionate share thereof, on the ground of the insolvency of other partners, without shewing such insolvency. [Dering v. Winchelsea, 1 Cox 318, 1 White and Tudor Eq. Cases 539, and Lowe v. Dixon, 16 Q.B.D. 455, specially referred to.]

Lamb v. North, 3 D.L.R. 774, 22 Man. L.R. 360, 21 W.L.R. 422.

A partner who has paid money for the benefit of the partnership cannot, on the ground that some of the partners have left the Province, hold other partners liable for more than their proportionate shares thereof.

Lamb v. North, 3 D.L.R. 774, 22 Man. L.R. 360, 21 W.L.R. 422.

VI. Dissolution; effect of.

(§ VI—25)—DISSOLUTION, EFFECT OF.

The member who wishes to retire from a business partnership for termination of which no time is fixed is not required to justify his action; it is sufficient that the notice by him not to longer continue a member of the firm is given in good faith and under circumstances which do not prejudice his partners. No form of notice is required and it need not be served by a bailiff.

Lardon v. Valade, 13 Que. P.R. 438 (Sup. Ct.).

Arbitration clauses in articles—Interim receiver pending reference.

Davies v. Mack, 4 O.W.N. 357, 23 O.W. R. 407.

(§ VI—26)—WHAT CONSTITUTES A DISSOLUTION.

Two members of a partnership may not dissolve the partnership without notice to the third member, even by the one buying out the other's interest.

Thomas v. McNaughton, 2 D.L.R. 211, 21 W.L.R. 267.

(§ VI—27)—RIGHTS IN FIRM NAME.

A law firm is a civil partnership and when one of the partners retires from the firm on his appointment to an official position, his co-partner may execute on a judgment in the name of the partnership, but only for his share, unless the retiring partner's interests have been properly transferred to him.

Bernard v. Pelissier et al., 8 D.L.R. 545.

(§ VI—28)—POWERS AND COMPENSATION OF SURVIVING PARTNER.

The surviving member of a foreign partnership, although an alien, may, if the countries are at peace, sell and convey partnership lands situated in another country without any representative of a deceased partner joining in the conveyance. [Comm. Litt. 129, C.; and Bacon's Abr. Aliens, D., referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

A surviving partner is not entitled to any remuneration for his services in the liquidation of the partnership affairs.

Livingston v. Livingston, 4 D.L.R. 345, 26 O.L.R. 246, 3 O.W.N. 1066, 21 O.W.R. 901.

Where a surviving partner engaged in the liquidation of the affairs of the partnership improperly purchases part of the partnership property himself, and, before the transaction is impeached, transfers the property so purchased to one who is not before the Court, his liability to the partnership estate is limited to the real value of such property, and does not extend to profits realized by him from his subsequent dealings therewith. [Atkinson v. Casserly, 22 O.L.R. 527, referred to.]

Livingston v. Livingston, 4 D.L.R. 345, 21 O.W.R. 901, 3 O.W.N. 1066, 26 O.L.R. 246.

A surviving partner engaged in the liquidation of the affairs of the partnership cannot himself become interested either directly or indirectly in the purchase of any part of the partnership property, without the full knowledge and consent of the representatives of the deceased partner.

Livingston v. Livingston, 4 D.L.R. 345, 21 O.W.R. 901, 3 O.W.N. 1066, 26 O.L.R. 246.

(§ VI—29)—ACCOUNTING.

In an action for winding-up a partnership for a defined term, if it appears that, before the expiration of the term, the partners mutually agreed upon a dissolu-

tion, upon the terms that the defendant should take over the assets and liabilities, and should agree to employ the plaintiff as manager of the business, and that such agreement was acted upon, the plaintiff cannot succeed, even though the parties did not finally agree as to all the assets, but left the disposition of some of them to depend upon the employment agreement.

Town v. Kelly, 5 D.L.R. 14, 21 W.L.R. 610.

Dissolution agreement—Fraudulent representation.

Garvey v. Freer, 7 D.L.R. 932.

VII. Actions.

(§ VII—30)—ACTIONS.

Valuation of assets—Goodwill—Interest—Assets of former firm—Right of user—Costs.

Foster v. Mitchell, 3 D.L.R. 888, 3 O. W.N. 1509, 22 O.W.R. 571.

(§ VII—31)—MONEYS ADVANCED BY ONE PARTNER FOR BENEFIT OF PARTNERSHIP; ACTION AGAINST OTHER PARTNER.

Where the amount that one partner has expended for the benefit of the partnership is ascertained, he may maintain an action therefor against his co-partners, and recover from each their proportionate share thereof.

Lamb v. North, 3 D.L.R. 774, 22 Man. L.R. 360, 21 W.L.R. 422.

VIII. Limited or special partnership.

(No cases.)

PART PAYMENT.

Accord and satisfaction by, see Accord and Satisfaction.

As affecting limitation of actions, see Limitation of Actions.

PART PERFORMANCE.

Under Statute of Frauds, see Contracts, I.

PARTY WALL.

Party wall as boundary, see Boundary.

(§ I—1)—CREATION OF RIGHT.

The plaintiff McG. and the defendants the W. F. Co. are the owners of adjoining lots which originally comprised one lot. On each lot is a building which entirely covers its whole area. The wall about which this dispute has arisen is used as the northern wall of the plaintiff's building and the southern wall of the defendants'. It is clear, however, from the evidence that it stands entirely on the plaintiff's lot. In 1877 the buildings on these two lots were destroyed by fire, the foundations, however, being left standing, and when the buildings were rebuilt, immediately after the fire, these old foundations were used, the walls were rebuilt on them, and the then owner of the defendants' lot used the wall in question as a support for the joists of the building he constructed. The original lot was first divided in 1833 when the part now owned by the plaintiff was conveyed to one T. P. who continued to own it down to the time of his death in 1875. T. P. died intestate, leaving him surviving a widow and five daughters. In 1896 this piece of property became vested in one of these daughters by a conveyance from all of the other heirs of T. P. to her. In 1899 she and her husband conveyed it to one E. F. J., who was acting for the plaintiff and later on in the same year conveyed it to him. The eldest daughter of T. P. became of age in 1876 and the youngest in 1887. One of the daughters married before she reached her majority:—Held, that while the wall in question is entirely the property of the plaintiff and is not a party wall, the defendants have an easement for the support of the joists of their building in the wall as constructed after the fire in 1877, it having been openly and uninterruptedly used for that purpose for a period of more than twenty years; that a lost grant must be presumed to which this user would be referred. Semble, the plaintiff when he purchased the building in 1899 had at least constructive notice of this easement:—Held, also, that as the youngest daughter of T. P. became of age in 1887, over twenty-two years before this action was commenced, the grant might have been made at any time during the two years succeeding her attaining her majority; and further that coverture does not bar the presumption of the making of this grant. The defendants recently constructed an elevator in their building, and for that purpose let beams or joists into the wall in question and used it for the support of the elevator.

McGaffigan v. The Willett Fruit Co. et al., 4 N.B. Eq. 353.

The owner of land who consents, by using it, to the construction of a party wall built by the adjoining owner on the dividing line between their lots and formed a backing for their respective houses cannot, when he had notice of its construction and went with his architect to visit the spot, examined the plans and specifications and allowed the work conforming thereto to be done, claim as damages the value of an excess of land, over and above the nine inches fixed by law, taken from eleven feet in depth for the foundation of the wall. He is considered as having given his tacit consent and the ownership in common created between him and his neighbour deprives him of such right of action. He cannot invoke the reservation of his recourse for any damage incurred which he made on receiving notice, nor the injunction which

he applied for to stop the construction. He renounced the reservation by using the wall and the injunction cannot help him as it was asked for, not at the beginning of the work but long after, when it was nearly finished which was the reason of its being refused.

Dubreuil v. Labelle & Co., Q.R. 42 S.C. 353 (Sup. Ct.).

A neighbouring proprietor may acquire a common wall either by formally indicating his intention to do so, or by performing acts which constitute on his part a desire to make use of the wall. (Per Brodeur, J.)

Morgan v. Avenue Realty Co., 6 D.L.R. 388, 46 Can. S.C.R. 589.

Where a building in Quebec is so constructed that the wall of the neighbouring building is used for all the purposes of an exterior wall except support, one wall of the new building being such that, without the neighbouring wall, it would not stand the weather, or afford sufficient protection, or satisfy the building regulations, and, for further protection, the two walls are joined at the top by metal flashing, and it appears that the owner of the new building expected that, when it had settled into position, it would receive support also from the neighbouring wall, the owner of the neighbouring wall is entitled to compensation for the use of his wall as a party wall. [Avenue Realty Co. v. Morgan, 20 Que. K.B. 524, reversed on appeal; Boyer v. Marson, 15 Que. S.C. 449, discussed.]

Morgan v. Avenue Realty Co., 6 D.L.R. 388, 46 Can. S.C.R. 589.

(§ I—9)—REMOVAL.

An action by one who has built a party wall to recover from the adjoining owner a part of the cost is, in its nature, a petitory action claiming a servitude and, therefore, a judgment maintaining it, though it condemns the defendant to pay a sum less than $500, is appealable. The adjoining owner, when the party wall, built in good faith, encroaches only a few inches, has no right to an action for its demolition either directly or indirectly by means of an action en bornage. A party wall built between two lots of land affords a ground of nonsuit to the action en bornage brought by one of the owners.

Boulanger v. Pelletier, Q.R. 21, K.B. 216.

PASS.

Liability for injury to person riding on, see Carriers.

PASSAGEWAY.

As boundary, see Boundaries.

PASSENGER CARRIERS.

See Carriers.

PATENTS.

I. IN GENERAL.
II. PATENTABILITY OF INVENTIONS.
A. Utility.
B. Combinations.
C. Anticipation; prior knowledge or use.
III. APPLICATION; CLAIMS AND SPECIFICATIONS.
IV. SALE; LICENSE; ASSIGNMENT.
A. Sale.
B. Use of purchased machine.
C. License; assignment.
V. INFRINGEMENT.

For mining claim, see Mines, I.

Grant of public land by, see Public Land.

I. In general.

(§ I—4b)—INVENTION OF SERVANT.

In the absence of a special contract, the invention of a servant, even though made in the master's time and with the use of the master's material and at the expense of the master, does not become the property of the master, so as to justify him in opposing the grant of a patent for the invention to the servant, who is the proper patentee. [Re Marshall and Naylor's Patent, 17 R.P.C. 553, referred to; Worthington Pumping Engine Co. v. Moore, 20 R.P.C. 41, distinguished.]

Imperial Supply Co. v. Grand Trunk R. Co., 7 D.L.R. 504, 11 East. L.R. 340.

II. Patentability of inventions.

C. Anticipation; prior knowledge of use.

(§ II C—20)—ANTICIPATION; PRIOR KNOWLEDGE OF USE.

In order that a device be validly patentable it is not sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied; the true test being whether an ordinary mechanic could have made it without other suggestion than his knowledge of his art. [Dominion Fence v. Clinton Wire Cloth Co., 39 Can. S.C.R. 535, distinguished; Harwood v. Great Northern R. Co., 11 H.L.C. 654, followed; Wisner v. Coulthard, 22 Can. S.C.R. 178; Carter v. Hamilton, 23 Can. S.C.R. 172, and Copeland v. Paquette, 38 Can. S.C.R. 452, specially referred to.]

Rolland v. Fournier, 4 D.L.R. 756.

III. Applications; claims and specifications.

(§ III—27)—CLAIMS AND SPECIFICATIONS.

In the manufacture of a sofa-bed the addition of a woven wire mattress to the lower frame when such a device has been used for years in the upper frame is not a new and useful improvement which can be protected by patent. [Harwood v. Great

Northern R. Co., 11 H.L.C. 654, 35 L.J. Q.B. 27, applied.]

Rolland v. Fournier, 4 D.L.R. 756.

IV. Sale; license; assignment.

(§ IV—30)—SALE; LICENSE; ASSIGNMENT.

Where a servant devises an invention in the time and at the expense of his master and with the use of the master's material, and, having obtained a patent for the invention, assents to its use by the master, the proper conclusion is that he has given the master an irrevocable license to use the invention.

Imperial Supply Co. v. Grand Trunk R. Co., 7 D.L.R. 504, 11 East. L.R. 340.

(§ IV—31)—AGREEMENT FOR LICENSE.

An agreement for a license to manufacture and sell a patented invention is equivalent to a license. [Walsh v. Lonsdale, 21 Ch.D. 9, 52 L.J. Ch. 2, 46 L.T. 858, followed.]

Duryea v. Kaufman, 2 D.L.R. 468, 3 O. W.N. 651, 21 O.W.R. 141.

C. License; assignment.

(§ IV C—45)—LICENSE ASSIGNMENT.

Where a form of license to use a patented invention was signed by the employee in whose favour the patent had been issued, to license the employers, a railway company, to use the same for a nominal consideration of one dollar without royalty or further payments being thereby provided, and the railroad company objected to the inclusion of a clause in the license which purported to restrict the license so as to exclude the use of the invention by certain allied railway companies and gave notice of such objection to the proposed licensors, and the license was not executed by the company nor was anything done towards its acceptance further than the retention by the company of the copy forwarded to them, such retention without registration thereof will not be held to be an acceptance of the agreement binding upon the company, if it appears that the alleged invention was perfected in the course of the employee's work for the company and that the licensors knew that the company always demanded from employees who invented a device under such circumstances an absolute license without cost to the company for the use of the invention on their own and all allied lines.

The Imperial Supply Co. v. The Grand Trunk R. Co., 1 D.L.R. 243, 10 East. L.R. 414, 13 Ex. C.R. 507.

V. Infringement.

(§ V—50)—INFRINGEMENT.

The plaintiff L. obtained two Canadian patents for a certain log-hauling machine. The first was applied for April 17, 1901, and was granted July 16, 1901. The second was applied for May 22, 1907, and was granted November 19, 1907. L. also obtained a patent in the United States for the same device, which was applied for November 22, 1905, and granted in May, 1907. Four of the machines were manufactured in the United States in accordance with the specifications of the 1907 Canadian patent, and were sold there in the years 1905 and 1906 with the knowledge and consent of L. On the hearing all rights under the Canadian patent of 1901 were formally abandoned by L.:—Held, that the Canadian patent dated November 19, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the invention so patented was in public use and on sale with the consent of the inventor thereof for more than one year previous to the application for the said patent in Canada. R.S.C., ch. 69, sec. 7. The words "in Canada" in sec. 7 of the Patent Act have reference to the application for the patent, and not to the sale of the machine to be patented. [Smith v. Goldie, 7 Ont. App. 628 (on appeal 9 S.C.R. 46), followed.] In the Canadian patent of 1907 small rollers were substituted for roller chains, as specified in the 1901 patent, to perform a certain function in connection with the operation of the machine. These rollers were afterwards found to be impracticable, and in all the machines manufactured both by L. or his agents, and by the defendants, with the exception of the four machines mentioned above, the roller chains were used as specified in the patent of 1901. Three of the machines were manufactured in Canada by L.'s agents in 1908, and two were sold in Canada in that year. Three of the machines were also manufactured in the United States by L. in the years 1906 and 1907, and were sold by him in Canada during those years. All of these machines were fitted with the roller chains according to the specifications for the patent of 1901, and not with the small rollers as provided for in the patent of 1907:—Held, also, that the Canadian patent dated November 19, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the construction or manufacture of the invention so patented had not been commenced or carried on in Canada within two years from the date of the said patent. R.S.C., ch. 69, sec. 38.

Lombard v. The Dunbar Co., 4 N.B. Eq. 271.

PAVEMENT.

In general, see Highway; Public Improvements.

PAYMENT.

I. MEDIUM OF; VALIDITY.

II. TIME.

III. PLACE.

IV. APPLICATION.

V. DEMAND.

Accord and satisfaction by part payment, see Accord and Satisfaction.
Of depositor's cheque, see Banks, III; Cheques.
Presentation of negotiable paper for, see Bills and Notes, IV.
Of municipal bonds, see Bonds, III.
Of stock subscriptions, see Corporations, V.
Presumption and burden of proof as to, see Evidence, II.
Evidence to shew, see Evidence, XI.
Guaranty of, see Guaranty.
Of judgment, see Judgment, V.
Into Court with defence, see Pleading.
As affecting limitations of action, see Limitation of Actions.
Of mortgage, see Mortgage, V.
Novation, see Novation.
Of taxes, see Taxes, III.
Of purchase money, see Vendor and Purchaser, I.

I. Medium of; validity of.

(§ I—8)—By note.

When a debtor, in account current with his creditor, informs that he will be unable to meet a note about to mature, and the creditor obtains from a third party, indebted, or about to be indebted, to the debtor on a contract between them, a note of the same amount, and uses it to take up the maturing note, and it is paid in due course, the operation amounts to a payment made, if not by the debtor, for him and with his money, and the rule of art. 1161, Civil Code, that imputation of it should be made upon the oldest debt due, applies to it. Hence, if the indebtedness from the note taken up with the proceeds of the other is the oldest in the account, it is extinguished.

Craik et al. v. MacFarlane & Co., Ltd., 21 Que. K.B. 10.

That the respondent did not, by the mere act of crediting as cash in its books the amount of the appellants' promissory note when such note was received, subject themselves to have such entry of credit imputed as a payment, seeing the default of appellants to pay their note at maturity; the entry of such credit and recharge at maturity being considered mere bookkeeping operations. [Cf. Galula v. Pintus, 27 T.L.R. 382.] But, held (2) (Trenholme, J., dissenting upon a different view of the facts), that, in view of the legal imputation which had to be made of the sum paid in discharge of the customer's note and of the other sums credited in the account, the debt sued for, namely, the debt of the dissolved copartnership between the appellants must be held to have been paid. [Cleveland v. Exchange Bank, M.L.R. 32, B. 30; Birket v. McGuire, Case Dig., 2nd. ed., 1598; Cooper of Molsons' Bank, 26 Can. 611; Fuzier Herman, C.N., 1256, Nos. 39 to 42, ib. supp. Nos. 11, 12 and 13, cited.]

Craik et al. v. MacFarlane & Co., Ltd., 18 Rev. de Jur. 88.

(§ I—11)—By cheque.

The acceptance of a cheque at one of the branches of the bank on which it is drawn but after the board of directors had passed a resolution for suspension which was not, at the time, made known to the maker, discharges the latter and constitutes a payment by him to the payee.

Brunelli v. Ostigny, Q.R. 21 K.B. 302.

(§1—16)—To whom.

Where a loan company notifies a borrower to make his payments direct to the company, and not to any agent, and the borrower nevertheless makes a payment to the agent, which is forwarded to the company, and the company sends it back to the agent, who does not return it to the borrower, the company, having once received the money, is accountable for it, and must credit the borrower with the amount.

The Colonial Investment Co. v. Borland, 6 D.L.R. 211, 22 W.L.R. 145.

II. Time.

(No cases.)

III. Place.

(§ III—25)—Place.

When a contract is silent as to the place of payment, the money will be payable at the residence of the contractor, although the work is done in another Province. [Gullivan v. Cantelon, 16 Man. L.R. 644, followed.]

Empire Sash and Door Co. v. McGreevy; Canadian Pacific R. Co., 8 D.L.R. 27, 22 W.L.R. 372.

Under the provisions of article 1152 C.C., when the place of payment is not definitely designated by the contract or otherwise prescribed, the payment must be made at the domicile of the debtor; and the domicile which determines the place of payment is his actual domicile at the time of payment, and not some different domicile which he had at the date of the contract: and the fact that the debtor may have paid certain instalments at the domicile of the creditor is not of itself of such a nature as to modify the law nor the rights of the parties in this respect, and the Court will not hold that the defendant has by virtue of any such payment at the domicile of the creditor waived his right to pay the subsequent instalments at his own domicile; and in a case where this provision is ignored the plaintiff will lose his right to the costs of his action by not demanding payment at the domicile of the defendant before commencing the suit, and tender and deposit duly made by the defendant under this doctrine will be deemed valid and sufficient.

Coutu v. Auclair, 18 Rev. de Jur. 435.

IV. Application.

(§ IV—30)—Application.

Where an indication of payment is made in a deed of sale to which the creditor is not a party by an insolvent trader who sells part of his assets a few days prior to his formal abandonment and the third party has not accepted the indication so as to transform it into a delegation of payment, such indication does not constitute a preferential payment to the detriment of the other creditors, and no action will lie against the third party who has not accepted the same.

Turgeon v. Bourgeois, 4 D.L.R. 144.

That inasmuch as such an imputation of the sum of $500 first paid would have had the effect of making a part payment upon the contract work on the appellants' house for work not yet done, it was more to the appellants' interest that the sum of $500 first paid should be held to have been paid in entirely upon the contract work in this Ryan house notwithstanding the notice of privilege which affected the appellants' house, but that in view of the notice of privilege and of the substantial progress of the work in both houses on the 18th December, when the second payment was made, the appellants had a greater interest to have the second payment of $500 imputed on the contract for work in the appellants' own house. Accordingly, the payments were so imputed and the judgment of the Court of Review modified accordingly.

Masse v. Germain et al., 18 Rev. de Jur. 91.

An indication of payment in favour of a third party who does not intervene or appear in the deed of sale containing the indication of payment does not constitute a delegation of payment until it has been formally accepted by the creditor in whose favour it is made, and may be revoked by the parties to the deed at any time before such acceptance.

Turgeon v. Bourgeois, 4 D.L.R. 144.

Where upon the payment of a certain sum as damages for the pollution of a stream no suggestion was made that the payment was for the excess over and above a limited prescriptive right and no such claim was advanced, the claim should be rejected.

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

(§ IV—33)—Of partial payment.

Where the payment of the deposit is made with an application to an agent for the purchase of shares from the agent upon a condition that the consent of the principal, the owner of the shares, shall be obtained to the terms offered, and the principal declines the terms, the agent is not entitled to treat such deposit as the money of the principal but should place the same in medio so that it may be returned by the agent to the prospective purchaser on the offer being refused.

McPherson v. Fidelity Trust and Savings Co., Ltd., 6 D.L.R. 530, 17 B.C.R. 182.

V. Demand for payment.

(§ V—41)—Sufficiency.

The exhibition of a certificate of membership in a mutual association organized to insure the employees of a railway company against death or injury, to the secretary-treasurer of the association, and an offer by the latter to pay the amount due thereon, if, as required by a by-law of the association, a release was furnished of all claim against the railway company for causing the death of a member, and the giving by that officer of a printed receipt to that effect constitute a sufficient demand of payment.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

PENAL STATUTE.

Construction of, see Statutes.

PENALTIES.

(§ I—4)—Statutory penalties.

The $200 penalty which may be imposed against a person found guilty of the criminal offence mentioned in sec. 269 of Dominion Election Law, R.S.C., ch. 6, is not recoverable until after a Court of competent criminal jurisdiction shall have adjudged the person in question guilty of the offence which forms the basis of the action for the penalty under said section.

Renouf v. Dubuc, 18 Rev. de Jur. 519.

The penal action against a member of a business firm for failing to register a declaration of his marriage within sixty days from the date on which it was celebrated is a qui tam action which can be brought by the plaintiff as well in his own name as in that of the King.

Lamontagne v. Galbraith, 13 Que. P.R. 397 (Sup. Ct.).

A corporation cannot sue for penalties as a common informer, unless expressly authorized to do so by the statute imposing the penalties. [Guardians of the Poor of the Parish of St. Leonard's; Shoreditch v. Franklin, 3 C.P.D. 377, followed.]

Guy Major Co. v. Canadian Flaxhills, 3 D.L.R. 312, 3 O.W.N. 1058.

Article 7538 R.S.Q. gives the right to a person to take a suit in his own name only when he is authorized by law or by a municipal by-law for the recovery of a fine or a penalty. (2) A penal action against a defendant who is carrying business alone for not having filed at the prothonotary's office or in the registry office a declaration as to whether he is common or separate as to property with his wife can only be taken in the name of his Majesty. [Lamontagne v. Galbraith, 13 Que. P.R. 397, 13 Que. P.R. 44.]

Cardinal v. Geoffroy, 13 Que. P.R. 413 (Sup. Ct.).

Under the R.S.Q. 1909 the action for penalty for failure by a trader to register a declaration as to his marriage status in accordance with article 1834 C.C. can only be brought by the Crown and does not lie in favour of any person or informer, as the statutes call for a special authorization by law or by municipal by-law before an individual can sue by way of qui tam action.

Cardinal v. Geoffroy, 4 D.L.R. 226.

(§ I—5)—BREACH OF CONTRACT.

Where a deed of sale of a partnership business contains a clause stipulating a penalty in the event of the vendor carrying on business within certain limits to the prejudice of the buyer, the proof of a single act of sale by the vendor for a very small price (e.g. $3.63) does not constitute such a carrying on of business by the vendor as would entitle him to the stipulated penalty.

Ledoux v. Hill, 8 D.L.R. 894.

PENITENTIARY.

See Criminal Law, IV.

PENDENTE LITE.

See Lis Pendens.

PEREMPTION (Que.).

(Eng.) Corresponding to Dismissal and Discontinuance (Involuntary).

(§ I—1)—GENERALLY.

An opposition to judgment, when entertained, is a plea to the action and its object is to have the judgment set aside. The defendant opposing has a right to ask for dismissal of the action if no effective steps have been taken within two years from the date when his opposition was filed.

Montreal Baseball and Amusement Co. v. Grant, 13 Que. P.R. 178 (Sup. Ct.).

The defendant who has filed an opposition to judgment is, notwithstanding, in a position to demand dismissal of the action.

Haensgen v. Demers, 13 Que. P.R. 189 (Sup. Ct.).

A motion for péremption d'instance will not be granted so long as a former motion for peremption is not disposed of.

Stuart v. Martel, 13 Que. P.R. 435 (Sup. Ct.).

(§ I—3)—AS TO QUI TAM ACTION.

The action to recover a fine taken under the provisions of article 7442 R.S.Q. 1909, whether in the name of the claimant or in that of his Majesty, is not subject to péremption d'instance for discontinuance for ten years.

Lamontagne v. Galbraith, 42 Que. S.C. 88 (Sup. Ct.).

As there can be no peremption against the Crown, it will be refused in a penal action although the plaintiff sues as well in his own name as in that of the Crown, the claim being indivisible. Semble, on the hearing of a motion for peremption of a qui tam action the defendant is not entitled to ask for dismissal of the action on the ground that the plaintiff could not sue jointly with the King.

Mason v. Ledoux & Co., 13 Que. P.R. 386 (Sup. Ct.); Lamontagne v. Galbraith, 13 Que. P.R. 397 (Sup. Ct.).

Under the Quebec Revised Statutes of 1888 the plaintiff in a qui tam action is the legal representative of the Crown suing for a penalty and therefore such action cannot be perempted (nonsuited) after two years have gone by without any steps being taken to bring the case on to trial, as peremption does not lie against the Crown. [Accord, Croysdill v. Copeland-Chatterson-Crain Co., 12 Que. P.R. 311.]

Mason v. Ledoux & Co., Ltd., 2 D.L.R. 50.

PERFORMANCE.

Part performance of oral contract, see Contracts, I.

Of contract generally, see Contracts, IV.

Of condition subsequent, see Covenants and Conditions, II.

Specific performance, see Specific Performance.

PERJURY.

I. NATURE OF OFFENCE.
- A. At common law.
- B. By statute.

II. ELEMENTS OF OFFENCE.
- A. In general.
- B. Knowledge of falsity.
- C. Proceedings on which oath is administered.
- D. Authority to administer.
- E. Form and make of oath.
- F. Materiality of testimony.
- G. Intent to mislead.

III. DEFENCES.

IV. SUBORNATION OF PERJURY AND ATTEMPTS.

V. SENTENCE AND PUNISHMENT.

I. Nature of offence.

(No cases.)

II. Elements of offence.

C. Proceedings on which oath is administered.

(§ II C—60)—PROCEEDINGS ON WHICH OATH IS ADMINISTERED.

The fact that the witness, although sworn by the prothonotary was actually examined in the robing-room and not in the presence of the prothonotary or a Judge, is immaterial when neither party raised any objection to the mode of examination at the time.

The King v. Howley, 20 Can. Cr. Cas. 36.

A person who makes a statement on oath

knowing it to be false, upon examination on discovery under article 286 of the Code of Civil Procedure (Que.) is guilty of perjury.

The King v. Howley, 20 Can. Cr. Cas. 36.

Notwithstanding the method of administering an oath to a witness lies within the control of the trial Judge, upon a subsequent prosecution for perjury the sufficiency of the manner of administering the oath on the trial in which the perjury is alleged to have been committed, is to be decided by the Judge presiding at the perjury trial.

Rex v. Lee Tuck, 5 D.L.R. 629, 19 Can. Cr. Cas. 471, 21 W.L.R. 669.

E. Form and make of oath.

(§ II E—80)—FORM AND MAKE OF OATH.

A Chinaman cannot be convicted of perjury where, when presented as a witness in the case in which the false testimony was alleged to have been given, in response to a question from the clerk of the Court, the accused stated that he was a Christian and that he desired to be sworn upon the Bible, but, under the directions of the trial Judge, without further inquiry or any assent on the part of the Chinaman, the clerk administered the Chinese oath by burning paper, as under such circumstances no binding oath was administered. [The Queen's Case, 2 Br. & B. 284, referred to.]

Rex v. Lee Tuck, 5 D.L.R. 629, 19 Can. Cr. Cas. 471, 21 W.L.R. 669.

III. Defences.

(No cases.)

IV. Subornation of perjury and attempts.

(No cases.)

V. Sentence and punishment.

(No cases.)

PERMIT.

For buildings, in general, see Buildings.

PERPETUITIES.

I. IN GENERAL.

II. REMAINDERS; POWERS; ACCUMULATIONS.

III. SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION.

IV. GIFTS TO CHARITIES.

I. In general.

(No cases.)

II. Remainders; powers; accumulations.

(No cases.)

III. Suspension of the absolute power of alienation.

(§ III—20)—SUSPENSION OF ABSOLUTE POWER OF ALIENATION.

Any gift not of a charitable nature the purpose of which is to tie up property for an indefinite time is void as creating a perpetuity.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 3 O.W.N. 924, 21 O.W.R. 501.

IV. Gifts to charities.

(No cases.)

PERSONAL INJURIES.

On bridge, see Bridges.

To passengers, see Carriers.

Damages for, see Damages, III.

Evidence as to, see Evidence.

In highways, see Highways, IV.

To married woman, husband's right of action for, see Husband and Wife.

Wife's right of action for, see Husband and Wife.

Insurance against, see Insurance.

To employee generally, see Master and Servant.

Proximate cause of, see Proximate Cause.

On railroad tracks, see Railways.

On street car tracks, see Street Railways.

Instructions in action for, see Trial.

PERSONAL PROPERTY.

Mortgage on, see Chattel Mortgage.

Damages for injury to or taking or detention of, see Damages, III.

Sale of, see Sale.

PETITION OF RIGHT.

On claims against Crown, see Public Moneys; Public Lands.

(§ I—1)—CLAIM AGAINST CROWN.

Where goods submitted for inspection and possible purchase by the Government were rejected by the Government inspector, but the owner neglected to remove the goods from the Government property on which they were deliverable subject to inspection and acceptance forthwith after their rejection and, in consequence of urgent need of the space which the goods in question and other rejected goods occupied, the Government officials sold them all and divided the proceeds pro rata, the owner has no claim against the Crown on the ground of wrongful conversion, or on the ground that the price realized on such sale was inadequate, the Crown not being liable for such act of its servant, either as for negligence or tort or as for acts done by the Government officials as volunteer agents, nor was such sale by the Government officers an acceptance of the goods on the part of the Crown. [Per Fitzpatrick, C.J., Davies and Anglin, J.J., affirming the judgment of the Exchequer Court on an equal division of the Supreme Court. Boulay v. The King, 43 Can. S.C.R. 61, considered.]

Poirier v. The King, 1 D.L.R. 766.

The only cases in which a petition of right may be brought by the subject against the Crown for a money demand are when the land or goods or money of the subject have found their way into the possession of the Crown and the purpose of the petition

of right is to obtain restitution or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract for goods supplied to the Crown or to the public service. (Per Fitzpatrick, C.J.) [Feather v. The Queen, 6 B. & S. 257, and Windsor and Annapolis R. Co. v. The Queen, 11 A.C. 607, specially referred to.]

Poirier v. The King, 1 D.L.R. 766.

PHARMACY.

See Drugs and Druggists.

PHYSICAL EXAMINATION.

In general, see Discovery and Inspection.

PHYSICIANS AND SURGEONS.

I. RIGHT TO PRACTISE; OFFENCES.
- A. In general.
- B. By particular methods.

II. RIGHTS, DUTIES AND LIABILITIES.

I. Right to practice; offences.

A. In general.

(§ I A—1)—RIGHT TO PRACTISE.

A member of the College of Physicians and Surgeons of Manitoba is entitled, without undergoing any examination, to be admitted upon the register of the College of Physicians and Surgeons of the North-West Territories, under C.O. 1898, ch. 52.

In re Sinclair, 7 Terr. L.R. 178.

II. Rights, duties and liabilities.

(§ II—36)—FREQUENCY OF VISITS.

A physician, employed to treat a child's broken leg, is not necessarily guilty of negligence, if he fail to make frequent visits for the purpose of inspecting the leg, where he lives at a considerable distance, and, after treating the leg for ten days, has left it properly bandaged and secured, and warned the parents against interfering with it, and instructed them that, if anything goes wrong, he is to be called by telephone, to which they have easy access.

Rickley v. Stratton, 4 D.L.R. 595, 3 O.W.N. 1341, 22 O.W.R. 282.

(§ II—42)—LIABILITY FOR WANT OF CARE OR SKILL.

Evidence required—Absence of proof of damage.

Hampton v. MacAdam, 7 D.L.R. 880, 22 W.L.R. 31.

PICKETING.

Unlawfulness of, see Conspiracy.
Injunction against, see Injunction.

PLACE.

Place of trial, see Venue.

PLAINTIFF.

Parties plaintiff, see Parties, I.
Pleadings of, see Pleading, II.

PLATFORM.

Injury to passenger riding on, see Carriers.

Injury to servant by fall of, see Master and Servant.

PLEADING.

I. IN GENERAL.
- A. Generally; necessity; form.
- B. Verification.
- C. Definiteness; particularity.
- D. Inconsistency; repugnancy.
- E. Implication.
- F. Conclusions.
- G. Defects waived or cured; time for objections.
- H. Exhibits; profert; oyer.
- I. Particulars.
- J. Pleading laws and ordinances.
- K. Judgment on pleading.
- L. Relief under pleading.
- M. Admissions.
- N. Amendments of pleading.
- O. Supplemental pleading.
- P. Filing after default; time.
- Q. Surplusage.
- R. Withdrawal.
- S. Striking out.
- T. Dismissal.
- U. Misjoinder; multifariousness.
- V. Duplicity.

II. DECLARATION OR COMPLAINT.
- A. Jurisdictional averments.
- B. Right or capacity to sue.
- BB. Nature of cause of action set out.
- C. Description of parties.
- D. Statement of cause generally.
- E. Negation of defence.
- F. Prayer; allegations as to damages.
- G. Averments as to ownership, title or possession.
- H. On contract liability.
- I. Allegations as to liens.
- J. For negligence.
- K. For libel or slander.
- L. For torts, injuries or nuisance.
- M. For infringement.
- N. Estates of decedents; wills; trusts.
- O. As to corporate matters.
- P. Miscellaneous.

III. PLEAS AND ANSWERS.
- A. In general.
- B. What must be pleaded.
- C. What may be pleaded.
- D. Sufficiency.

IV. CROSS-BILL.

V. REPLY.

VI. SET-OFF; COUNTERCLAIM; RECOUPMENT.

VII. DEMURRER.
- A. Form.
- B. When lies.
- C. What demurrable.
- D. What questions raised by demurrer.
- E. What admitted by demurrer.
- F. Effect; practice.

Joinder of causes of action, see Action or Suit, II.

Review of discretion as to, on appeal, see Appeal, VII.

In criminal prosecution, see Criminal Law, II; Indictment.

Admissibility of evidence under, see Evidence, XIII.

I. In general.

A. Generally; necessity; form.

(§ I A—12)—By special leave.

In a proper case the plaintiff whose motion for summary judgment has been denied may be granted leave to deliver his pleading without prejudice to a pending appeal from the order denying summary judgment.

Clarkson v. McNaught (No. 1), 2 D.L.R. 52, 3 O.W.N. 638 and 670, 21 O.W.R. 629.

C. Definiteness; particularity.

(§ I C—21)—Definiteness.

Statement of claim—Motion for particulars—Nuisance—Damages.

Black v. Canadian Copper Co., 5 D.L.R. 890, 4 O.W.N. 62, 23 O.W.R. 20.

(§ I C—27)—Validity of municipal by-law.

Where article 697 Quebec Municipal Code provides that "the promulgation of every municipal by-law is considered to have been sufficiently made until the contrary is alleged," it is not necessary that this allegation should be made in an action at law but it is sufficient that the interested party be informed by the Municipal Council of the irregularity; consequently, the value of work done by a contractor under a contract based on such a by-law after notice of the irregularity has been given by the Council but before any action to set aside the contract or by-law is taken cannot be recovered.

Poutres Siegwart v. Deschambault, 5 D.L.R. 395, 41 Que. S.C. 453.

D. Inconsistency; repugnancy.

(§ I D—30)—Inconsistency; repugnancy.

In an action to recover the purchase price of a hay press which the plaintiff alleges to have sold and delivered to the defendant, the plaintiff cannot amend his declaration in such a manner as to allege further that the machine in question is at the disposal and risk of the defendant; as such an amendment would entirely change the nature of the action and would be inconsistent with its allegations.

International Harvester Co. v. Ratelle, 18 Rev. de Jur. 458.

G. Defects waived or cured; time for objections.

(§ I G—52)—Cured by opponent's pleading.

Joining issue and going to trial without an objection that a counterclaim for wages could not be interposed in an action for tort, is a waiver of the irregularity. (Per Riddell, J.) [Hyatt v. Allen, 3 O.W.N. 370, applied.]

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

I. Particulars.

(§ I I—65)—Particulars.

When, in obedience to a judgment ordering plaintiff to furnish particulars under certain paragraphs of the declaration, plaintiff has given evidence of his good faith in endeavouring to supply such particulars, the Court will not grant defendant's motion for further particulars, more especially when defendant does not allege that such further particulars are necessary for his defence. Under such circumstances the Court will grant act of defendant's motion for such further particulars, and reserve the latter's right to make any application for such delay of the enquete as may, in the discretion of the Court, be necessary in justice to defendant, should the evidence adduced by plaintiff, owing to the absence of such further particulars, take defendant by surprise.

Conroy v. Conroy, 18 Rev. de Jur. 165.

Infringement of rights under patent for invention—Postponement until after discovery.

Batho v. Zimmer Vacuum Machine Co. (No. 1), 2 D.L.R. 894, 3 O.W.N. 1009.

Infringement of patent rights—postponement till after discovery.

United Injector Co. v. James Morrison Brass Manufacturing Co., 2 D.L.R. 910, 3 O.W.N. 1195.

Claim—Particulars—Damage by flooding—Origin of waters—Specific ground of claim—Amendment.

Day v. City of Toronto, 2 D.L.R. 898, 3 O.W.N. 1083.

Statement of claim—Negligence—Personal injuries—Anticipating defence—Particulars.

Mitchell v. Heintzman, 1 D.L.R. 926.

Motion before delivery of defence—Absence of affidavit—Nuisance—Damages.

Black v. Canadian Copper Co. (No. 2), 6 D.L.R. 855, 4 O.W.N. 111, 23 O.W.R. 95.

Statement of claim—Motion for particulars after delivery of defence, but before examination for discovery—Plaintiffs resident abroad—Default in payment of interlocutory costs.

Rickart v. Britton Manufacturing Co. (No. 1), 6 D.L.R. 852, 4 O.W.N. 112, 23 O.W.R. 63.

Particulars—Acts antecedent to writ—Inability to give particulars—Municipal by-law—Con. Rule 552.

Fuller v. Bonis, 6 D.L.R. 901, 4 O.W.N. 306.

Counterclaim—Leave to rejoin—Examination for discovery.

Canadian Westinghouse Co. v. Water Commissioners for City of London, 4 O.W.N. 387, 23 O.W.R. 648.

Particulars—Action on guaranty—Sug-

gested assessment of damages on a reference.

Niagara and Ontario Construction Co. v. Wyse and United States Fidelity and Guaranty Co., 4 O.W.N. 357, 23 O.W.R. 409.

Statement of claim—Delay in moving—Con. Rule 268.

Delap v. Canadian Pacific R. Co., 4 O. W.N. 416, 23 O.W.R. 644.

Action for defamation—Slanderous words in foreign language—Special damage.

Dickman v. Gordon, 4 O.W.N. 424, 23 O. W.R. 512.

Where a statement of claim alleges fraudulent misrepresentations inducing the purchase of shares and the statement of defence sets up laches and acquiescence, and the reply alleges that the delay in bringing the action was caused by "further misrepresentations," it is not a satisfactory answer to a demand for particulars of the reply to say that such particulars are sufficiently set out in the reply, statement of claim, and particulars of the statement of claim already furnished.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

A provision in an order for particulars that they may be given after examination for discovery is not proper where the facts must be within the knowledge of the party from whom the particulars are sought. That party may, in a proper case, obtain leave after discovery to deliver further particulars, but the case ought to be presented upon the pleadings and ancillary particulars before discovery is had.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

Statement of defence and counterclaim —Postponement till after examination of defendant for discovery—Leave to examine before pleading to counterclaim.

Caldwell v. Hughes, 1 D.L.R. 898.

Particulars—Negligence—Death in railway accident—Res ipsa loquitur—Discovery.

Madill v. Grand Trunk R. Co., 3 D.L.R. 876, 3 O.W.N. 1333, 22 O.W.R. 233.

Particulars—Statement of claim—Discovery.

Grocock v. Edgar Allen & Co., Ltd., 3 D.L.R. 871, 3 O.W.N. 1315, 22 O.W.R. 219.

Claim—Infringement of rights under patent for invention—Postponement until after discovery.

Batho v. Zimmer Vacuum Machine Co. (No. 2), 2 D.L.R. 902, 3 O.W.N. 1152.

L. Relief under pleading.

(§ I L—80)—RELIEF UNDER PLEADINGS.

Where a conditional sale contract contains a stipulation that the conditional vendee shall upon his default be liable for any loss upon a re-sale, and the conditional vendor resumes possession and resells, the vendee if sued for the balance due without reference to the price realized upon the re-sale should plead the re-sale and his right to abatement in the price in order to enable the Court to take an account of the vendor's expenses upon the re-sale, otherwise the Court may award judgment for the amount claimed with a reservation to the vendee of his remedy in respect of the re-sale.

Gaar Scott v. Mitchell, 1 D.L.R. 283, 20 W.L.R. 6.

N. Amendments of pleading.

(§ I N—110)—AMENDMENTS.

In an action, upon a bond, by a municipal corporation against a manufacturing company and its surety, where the defendant company seeks to amend its pleadings to dispute its execution of the bond, proper tests are (a) whether the fact is admitted by the record, (b) whether the defect in execution is at best of a most technical character; and, governed by such tests, the application, in a proper case, will be denied.

City of Guelph v. Jules Motor Co. et al., 8 D.L.R. 635, 4 O.W.N. 401, 23 O.W.R. 823.

The determination of a question touching the merits of the action should not be made on a Chamber motion, since there is a very limited right of appeal from Chamber orders and the proper policy is to have all questions both of law and fact disposed of at the trial.

Bristol v. Kennedy, 8 D.L.R. 750, 4 O W.N. 537, 23 O.W.R. 685.

Statement of claim—Mistake—Motion to amend.

Sheardown v. Good, 4 O.W.N. 553, 23 O.W.R. 949.

When action at issue—Amendment of pleadings—Application for special jury.

Brown v. Telegram Printing Co., 8 D.L. R. 1026.

(§ I N—111)—WHAT AMENDMENTS ALLOWABLE, GENERALLY; CONSENT.

Where a plea of general denial is filed in order not to retard the hearing of the case which is to be inscribed for proof and hearing with the understanding that such plea may be replaced later at any time before the trial by a special plea, and the case is inscribed on the roll in the ordinary way, then such agreement precludes the option for a trial by jury on the special plea filed later by consent.

Canadian Northern R. Co. v. Levine, 4 D.L.R. 233.

Inconsistency with endorsement on writ of summons—Amendment—Validation of pleading—Costs.

Chapman v. McWhinney, 5 D.L.R. 881, 4 O.W.N. 35, 23 O.W.R. 3.

An application to amend a pleading should be refused if the matter proposed to be pleaded would constitute no ground

of action or defence as against the other side.

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

No admissible amendment to pleading material to the case of the party applying therefor should be refused unless the opposite party cannot be compensated by costs.

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

(§ I N—113)—Before trial.

An amendment of the statement of claim consisting of the substitution of the word "train" for "motor-car" will be allowed if the defendant is not thereby prejudiced in going to trial on the date fixed.

Mercer v. British Columbia Electric R. Co., Ltd., 7 D.L.R. 405, 22 W.L.R. 234.

Where an amendment is served under art. 514 C.P. (i.e., as of right without leave of the Court) the delays for peremption are not suspended pending the filing of the amended pleading, and if two years elapse without further proceedings being taken the suit will be dismissed on the motion of the defendant (C.P. 279).

Samson v. City of Montreal, 3 D.L.R. 424.

(§ I N—114)—On the trial.

Leave to amend a pleading will be refused if the claim or objection sought to be added does not appear to be well founded.

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

The plaintiffs, a firm of real estate brokers, in an action for the specific performance of a contract to sell lands, may be permitted at the trial thereof to amend their statement of claim so as to shew that such agreement was made in the name of a member of the firm for its benefit. [Gandy v. Gandy, 30 Ch.D. 57; and Fry on Specific Performance, 5th ed., 80, specially referred to.]

Edgar v. Caskey, 4 D.L.R. 460, 21 W. L.R. 444.

Where the plaintiff sues for specific performance of an alleged agreement for the sale of lands, and where the agreement as to price was in writing and as to terms oral, the defendant may, at the trial, be allowed to amend his statement of defence so as to plead the Statute of Frauds.

Clement v. McFarland, 8 D.L.R. 226, 4 O.W.N. 448, 23 O.W.R. 613.

An amendment may be granted, on the trial of an action for malicious prosecution, to strike out the word "feloniously" from the plaintiff's statement of claim, in respect of an allegation that the defendant charged the former with having feloniously stolen a watch, to conform with the information laid by the defendant charging the plaintiff with fraudulently and without colour of right converting it to his own use under sec. 347 of the Criminal Code, since the act so charged constituted the statutory offence of theft or stealing, whether or not it was a felony.

Wood v. Newby, 5 D.L.R. 486, 21 W. L.R. 438.

An application to amend a pleading should be refused where the application is made at the conclusion of the evidence and the truth of the allegations sought to be introduced is not borne out by the evidence.

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

In an action by a city in its own right and by the Attorney-General on the relation of the city and its building inspector against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company it was not subject to the by-laws and also denied the validity of the by-laws, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the company possessed all the powers of its predecessor, the amendment was allowed as against the city and an opportunity given the company of proving it.

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 21 W.L.R. 906.

Where the plaintiff in his statement of claim upon a sale and delivery of seed grain does not allege the exact ground of action, whether misrepresentation and deceit or breach of contract or both, but does bring out all the facts basing his action, thus sufficiently informing the defendant what the real complaint is so that the defendant cannot be prejudiced by a proper amendment, such an amendment may be made during the trial to allege a breach of warranty so that a more satisfactory ground of action may be laid under secs. 13 to 17 inclusive of the Sale of Goods Ordinance, N.W.T. Ordinances (Alta.), 1911, ch. 39, when those sections are applicable.

Carstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W. L.R. 433.

Where a petition of right to recover from the Crown compensation for land taken and for resulting damages to property by reason of the erection of ice piers on and opposite the suppliant's land, makes a claim both for the value of the land taken and for damages, an amendment at the close of the case claiming the value of the

land taken and offering to waive expropriation proceedings and convey to the Crown the land taken upon a certain sum being paid over to the suppliant as compensation for the land, is unnecessary and will be refused.

Pickels v. The King, 7 D.L.R. 798.

(§ I N—118)—AMENDMENT AFTER VERDICT, OR TRIAL; JUDGMENT;. ON MOTION TO VARY REPORT.

A request, after judgment dismissing an action, to permit an amendment so as to allege an alternative claim, not originally pleaded, was rightfully denied.

Davis v. Lowry, 3 D.L.R. 157, 20 W. L.R. 839.

Leave to amend a statement of claim from which was inadvertently omitted particulars of the plaintiff's damages, will be granted by the Supreme Court of Alberta, on an application to vary the findings of the clerk of the Court as to assessment of damages, where such omission was not discovered until the hearing of such application.

Lavallee v. Canadian Northern R. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

(§ I N—121)—AFFECTING JURISDICTION.

A plaintiff will be allowed to amend his statement of claim in an action for personal injuries by amplifying an alternative claim made therein under the Employers' Liability Act, although the statutory period within which an action under that Act must be brought has expired. [Mercer v. B.C. Electric R. Co., 7 D.L.R. 405, reversed.]

Mercer v. British Columbia Electric R. Co. (No. 2), 8 D.L.R. 144, 22 W.L.R. 691.

A plaintiff will not be allowed to amend his statement of claim in an action for personal injuries by inserting an alternative claim under the Employers' Liability Act after the statutory period, within which an action under that Act must be brought, has expired. [Weldon v. Neal, 19 Q.B.D. 394; Morris v. Carnarvon County Council, [1901] 1 K.B. 159, followed; Hosking v. Le Roi, 9 B.C.R. 551, 34 Can. S.C.R. 244, referred to.]

Mercer v. British Columbia Electric R. Co., Ltd., 7 D.L.R. 405, 22 W.L.R. 234.

Plaintiff will be allowed to amend his declaration so as to include an item necessary to complete the amount mentioned in the conclusions of the action and omitted by error from the body of such declaration. (2) It is not by an inscription in law, but by a declinatory exception that a defendant may deny the jurisdiction of the Superior Court to hear an action, on the ground that plaintiff has only set forth in the body of the declaration items aggregating to a sum under $100.

Morin, plaintiff v. Cie. Paquet, defendants, 13 Que. P.R. 195 (Sup. Ct.).

(§ I N—123)—TERMS.

A motion by plaintiff to so amend her declaration that her action should be founded, not only upon her community rights, as set forth in the action, but upon the will of her late husband instituting her his universal legatee, will be dismissed as changing the nature of the demand.

Legarè et al. v. Verret et al., 13 Que. P.R. 298 (Sup. Ct.).

(§ I N—124)—STRIKING OUT; DISALLOWING.

Where a plaintiff without leave files and serves an amended statement of claim pursuant to Alberta rule 179, the defendant if dissatisfied should move to disallow the same under Alberta rule 181.

Horne v. Jenkyn, 6 D.L.R. 54.

P. Filing after default; time.

(§ I P—130)—FILING AFTER DEFAULT.

The party seeking to file objections after the lapse of the time limited by statute should apply for an order of extension, and if he files his objections late and without leave and the opposing party moves to strike them out, the filing will be allowed to stand only upon terms of paying the costs of the motion to strike out. [Eaton v. Storer, 22 Ch.D. 91, followed.]

Re Provencher Election; Barkwill v. Molloy (No. 1), 1 D.L.R. 84, 19 W.L.R. 794, 22 Man. L.R. 6, 48 C.L.J. 111.

Extension of time for delivery—Special grounds.

Delap v. Canadian Pacific R. Co., 6 D. L.R. 868, 4 O.W.N. 213, 23 O.W.R. 177.

Where a consent to file a pleading is given after the expiry of the legal delays, but before the right to a jury trial is forfeited, such consent has an interruptive effect on these delays and the plaintiff has three days from such consent to move for a jury trial. But a consent to file a pleading after the right to a jury trial has lapsed will not make this right revive. [Matthews v. Town of Westmount, Que. 6 P.R. 52; Asselin v. Montreal Light, Heat and Power Co., Que. 7 P.R. 218; Anderson v. The Norwich Fire Insurance Co., Que. 17 K.B. 361, distinguished; St. Paul Electric Light and Power Co. v. Quesnel, Que. 12 P.R. 158, in appeal, followed.]

Canadian Northern R. Co. v. Levine, 4 D.L.R. 233.

S. Striking out.

(§ I S—145)—STRIKING OUT.

Under practice rule 167 of the Saskatchewan Rules, 1911, a pleading will be struck out as embarrassing only in plain and obvious cases. [Hubback v. Wilkinson, [1899] 1 Q.B. 86, referred to.]

Douglas v. Young, 8 D.L.R. 788, 22 W. L.R. 733.

After a defendant, in his statement of defence, has demurred to certain paragraphs of the statement of claim as dis-

closing no facts upon which the plaintiff would be entitled to recover, a motion to strike out the same paragraphs as embarrassing and prejudicial to the fair trial of the action on the same grounds should not be entertained while such demurrer is pending.

Smith v. Murray, 21 Man. R. 753, 14 W.L.R. 402.

Statement of defence—Infringement of patent for invention—Attack on patent process—Offers of settlement—Venue.

Alsop Process Co. v. Cullen (No. 2), 6 D.L.R. 859, 4 O.W.N. 135, 23 O.W.R. 106.

Statement of claim—Action to restrain nuisance—Joinder of plaintiffs—Property rights and interests—Embarrassment—Prejudice—Joinder of causes of action—Election—Attorney-General.

Smyth v. Harris (No. 2), 6 D.L.R. 865, 4 O.W.N. 168, 23 O.W.R. 144.

Motion to strike out portions—Irrelevancy—Embarrassment—Motion for particulars before pleading—Practice—Affidavit—"Arrangement" for transfer of shares—Particulars of time, place, persons, etc.

Wall v. Dominion Canners Co., 6 D.L.R. 868, 4 O.W.N. 214, 23 O.W.R. 183.

(§ I S—146)—STRIKING ENTIRE PLEADING.

A statement of claim will not be struck out under Con. Rule 261 (C.R. (Ont.) 1897), on the ground that the plaintiff was not qualified to maintain the action unless the lack of qualification appears from the pleading itself.

Greer v. Greer, 4 D.L.R. 169, 3 O.W.N. 584, 21 O.W.R. 139.

Striking out reply—Delay in filing judicial discretion of referee—Amendment of statement of claim—Costs.

Monarch Lumber Co. v. Hewitt, 7 D.L.R. 785.

(§ I S—149)—STRIKING PART OF PLEADINGS.

The superficially frivolous appearance of grounds of action in a plaintiff's declaration does not constitute ground to have them struck out on demurrer, if the matter of such allegations amount to legal grounds of action when read together with the other averments of the declaration.

Edge v. Security Life Insurance Co., 8 D.L.R. 492.

Defence—Patent for invention—Royalties—Agreement—Validity of patent.

Moore Filter Co. v. O'Brien, 2 D.L.R. 900, 3 O.W.N. 1084.

The tendency of the practice at present is against any interference with the pleadings of either party, except in the very plainest cases; the application of Ont. Con. Rule 298 (Rules of 1897) is usually confined to cases where statements are made which could not be considered at the trial, and which would tend to prejudice a fair trial. [Flynn v. Industrial Exhibition Association of Toronto, 6 O. L.R. 635, referred to.]

Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 331, 3 O.W.N. 1078 and 1182, 22 O.W.R. 1.

In an action for damages for a refusal to license the plaintiff, a professional jockey, who had paid the required fee therefor, in order to enable him to "exercise his profession" as driver of race horses upon the race track of the defendant, a racing club owning a public franchise, that operated for gain a race-course to which the public was invited upon the payment of an admission fee, a portion of the statement of claim will, on motion, be stricken out, where its allegations in substance were that "so public is the function it (the club) exercises, that it has a monopoly of race-horse betting on its tracks, that would be criminal but for the saving grace of legislation, whereby all members of the public, at its race meetings, are forced to bet through the defendant club, which acts as stake-holder, and exacts therefor over five per cent. on over a million dollars a year of bettors' money passing through its hands, and from which its chief income is derived," since such allegations are merely statements of evidence pertaining to the plaintiff's claim, which, under Con. Rule 268, are not properly a part of a statement of claim. [Blake v. Albion, 35 L.T. 269, 45 L.J.C.P. 663, C.P.D. 94, referred to.]

Trubel v. Ontario Jockey Club and Fraser, 4 D.L.R. 86, 3 O.W.N. 1453.

In an action for damages for the refusal to license the plaintiff, a professional jockey, after he had paid the necessary fee therefor, so that he might "exercise his profession" as a driver of race horses, not only upon the race track of the defendant, but as well upon the tracks of the various members of an unincorporated association of racing clubs, the franchises of which required them to treat all members of the public fairly and equally, an allegation of the statement of claim, alleging in substance, that other members of such association owned and controlled other tracks where betting was done by means of bookmakers in the employ of such members, will not be stricken out, since it is an allegation either historical and explanatory of the nature aand composition of the association, or referable to the damages the plaintiff sustained by being prevented from driving upon the tracks of the association, as well as upon that of the defendant.

Trubel v. Ontario Jockey Club and Fraser, 4 D.L.R. 86, 3 O.W.N. 1453.

Striking out defence—Con. Rule 298—Non-payment of interlocutory costs—Remedy.

Rickart v. Britton Manufacturing Co. (No. 2), 5 D.L.R. 892, 4 O.W.N. 110, 23 O.W.R. 84.

In an action for slander, upon a motion to strike out, as embarrassing, certain para-

graphs of the statement of defence, and also the particulars of such paragraphs which set out as true a series of alleged facts of public interest and concern, upon which the defendant pleaded fair comment in good faith and without malice, if the defendant's pleading shew that he is prepared to rely, at the trial, on the plea of fair comment and sets out the series of alleged facts as a basis upon which to submit to a jury, the question as to whether in their opinion the comments so based were fair and reasonable, the defendant will not be required to change his pleading. [Crow's Nest Pass Coal Co. v. Bell, 4 O.L.R. 660; Digby v. Financial News, [1907] 1 K.B. 502; Hunt v. Star Newspaper, [1908] 2 K.B. 309; Peter Walkers v. Hodgson, [1909] 1 K.B. 239, 251, referred to.]

Brown v. Orde (No. 2), 6 D.L.R. 297, 4 O.W.N. 18 and 36, 22 O.W.R. 1002.

Defence—Action for specific performance of contract—Setting up facts justifying termination of contract—Embarrassment—Irrelevancy.

Fuller v. Maynard, 2 D.L.R. 897, 3 O.W.N. 1082.

(§ I S—149a)—IRRELEVANT STATEMENTS.

On an application under rule 167 (Sask.) to strike out part of a statement of defence as unnecessary and as tending to prejudice, embarrass and delay the fair trial of the action, the fact that the objectionable plea contains considerable unnecessary matter of evidence is of itself not sufficient ground for granting the motion, the only question being whether the plaintiff has been embarrassed or prejudiced in any way by the evidence being pleaded.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739.

In a statement of defence of an action for malicious prosecution and false imprisonment, where one of the defences is that the defendant acted on the advice of counsel, it is sufficient merely to state that fact without pleading in detail what the defendant was advised by his counsel.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739.

Statement of defence—Irrelevance—Further examination refused—Con. Rules 616, 259, 261.

Roscoe v. McConnell, 4 O.W.N. 423, 23 O.W.R. 515.

Irrelevant statements in defence—Dower action—9 Edw. VII. ch. 39, sec. 24—Mortgaged land.

McNally v. Anderson, 4 O.W.N. 386, 23 O.W.R. 547.

U. Misjoinder; multifariousness.

(§ I U—155)—MISJOINDER; MULTIFARIOUSNESS.

A plaintiff who asks that a defendant be declared to be bound by the obligations assumed by his auteur towards plaintiff, cannot by subsequent conclusions ask, in the alternative, that the deed between the two defendants be declared to be fraudulent, simulated, null and void.

Heath v. The Escanaba Manufacturing Co. et al. and Foster, 14 Que. P.R. 48.

II. Declaration of complaint.

A. Jurisdictional averments.

(§ II A—173)—FACT OF JURISDICTION.

A prohibition to a Division Court (Ont.) upon the ground of absence of territorial jurisdiction in respect of a case alleged to have entered in the wrong district or division of the Province, will not be granted on motion of defendant where the question of jurisdiction is raised for the first time after a default judgment has been entered against defendant and where there is no excuse shewn for defendant's delay and it does not appear that any injustice will be done by allowing the judgment to stand. [London v. Cox, L.R. 2 H.L. 238, specially referred to; Broad v. Perkins, 21 Q.B.D. 533, followed.]

Re Canadian Oil Companies and McConnell, 8 D.L.R. 759, 4 O.W.N. 542.

(§ II A—174)—ASSETS WITHIN JURISDICTION; AVERMENT OF.

A foreign plaintiff need not set up in his statement of claim that he has assets within the jurisdiction of the Court sufficient to answer for costs.

McEwan and Dougherty v. Marks, 4 D.L.R. 369, 21 W.L.R. 34.

B. Right or capacity to sue.

(§ II B—176)—FOREIGN CORPORATION.

Under rule 219 of the Saskatchewan Supreme Court Rules, 1911, giving any party the right to raise by his pleading any point of law and providing for its disposition by the Judge before, at or after the trial, the defendant, though he failed to raise the question in his pleading, is entitled to a decision as to whether the plaintiff could succeed in the action if the statement of claim merely alleged that the plaintiff was an incorporated company carrying on business in another Province, but failed to allege that it had registered under the Saskatchewan Foreign Companies Act or other facts to establish its status to sue in Saskatchewan. [Stokes v. Grant, 4 C.P.D. 25, applied; and see Odgers on Pleading, 7th ed., pp. 169, 175.]

Ontario Wind Engine and Pump Co., Ltd. v. Eldred, 2 D.L.R. 270, 20 W.L.R. 697.

(§ II D—185)—STATEMENT OF CAUSE GENERALLY.

Relevancy of allegations—Costs in the cause.

Fearnside v. Morris, 2 O.W.N. 676, 18 O.W.R. 271.

An action is rightfully dismissed where the plaintiff, if entitled to recover at all,

could do so only on an alternative claim which was not pleaded.

Davis v. Lowry, 3 D.L.R. 157, 20 W.L.R. 839.

G. Averments as to ownership, title or possession.

(§ II G—210)—AVERMENT AS TO OWNERSHIP, TITLE OR POSSESSION.

The defence that a chattel was purchased bonâ fide for value, is sufficiently raised by an allegation that it was understood between the defendant's vendor and the person from whom the latter bought the chattel, who retained the title thereto, that the former was at liberty to sell and dispose of it.

Delaney v. Downey, 4 D.L.R. 474, 21 W.L.R. 577.

The plaintiff, in a possessory action, has to allege that he was in possession a year and a day before the controversy of which he complains. Upon omission of such an allegation the action will be sent back for inscription of the right.

Henry v. Hodge, 18 Rev. de Jur. 47.

H. On contract liability.

(§ II H—218)—ON COVENANT.

As the onus rests upon the defendant in an action for specific performance of a contract to sell lands, to shew that, in cancelling the agreement, the procedure agreed upon in the contract was followed, it is immaterial that objection to the sufficiency of the notice of cancellation was not taken by the plaintiff in the pleadings.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C.R. 16.

(§ II H—219)—BILLS AND NOTES.

In an action on a note against an endorser, no legal ground of action or "lien de droit" is disclosed, if the declaration omits to allege, that notice of the protest was given to defendant as endorser. A declaration is not demurrable if it be therein alleged that defendant has acknowledged to owe and promised to pay the amount of the note sued upon, which means a promise and acknowledgment subsequent to the maturity and failure to give notice of the dishonour of the note. Plaintiff cannot make proof of the protest of the note and of notice thereof to defendant, if the declaration omits to allege such notice. If plaintiff fails to file his exhibits with the return of the writ or with his answer, he cannot afterwards file them without any leave of the Court or Judge, and without any notice to the defendant. Notice of protest is insufficiently given to an endorser, when such notice is sent by depositing the same directed to the endorser's name, Montreal, in the post office, at Montreal, and prepaying postage, when defendant has under his signature on the note designated his place for the purposes of such note.

Rosenberg v. Johnson, 18 Rev. de Jur. 32.

(§ II H—223)—SALE OF GOODS.

In an action for the price of goods sold exceeding the value of $50, where there has been no acceptance or receipt of the goods and nothing given in earnest, the vendor who relies upon a written contract must allege it in his action or by subsequent amendment, and otherwise he cannot produce it or make evidence of it at the trial.

Lemay v. Lefebvre, 4 D.L.R. 833, 41 Que. S.C. 541.

J. For negligence.

(§ II J—231)—SUFFICIENCY OF ALLEGATION.

An allegation in the plaintiff's statement of claim for injuries received by being struck by an automobile, that such vehicle was being driven by the son of the defendant, is not a sufficient allegation of agency to render the defendant answerable, and the statement cannot, at the trial after all the evidence is in and the argument in progress, be amended to shew such an agency.

The B. & R. Company, Limited v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

(§ II J—236)—AS AFFECTING NATURE OF ACTION.

Where, from the nature of the wrong complained of, there is more than one form of remedy, the plaintiff may elect either, and hence redress for misdelivery of goods by a carrier may be claimed either in contract or in tort.

Williams v. Govt. Man. Board, 11 E.L. R. 10.

K. For libel or slander.

(§ II K—245)—FOR LIBEL AND SLANDER.

If in bringing action for damages caused by slander in the evidence given by defendant in an action plaintiff finds it impossible to set out in his declaration all the words and terms used he may file a copy of defendant's testimony in such action as part of his declaration. A motion for further particulars in such a case was dismissed.

Carrington v. Russell, 13 Que. P.R. 252 (Sup. Ct.).

(§ II K—249)—INNUENDO IN COMPLAINT FOR SLANDER.

The statement of claim in an action for slander, is insufficient where the defamatory words alleged were not, in themselves, actionable, and were without point or meaning, being portions only of three separate conversations had with three different persons, without any allegation of circumstances shewing that the words pleaded were used in a defamatory sense. [Harris v. Clayton, 21 N.B.R. 237; Harris v. Warre, 4 C.P.D. 125, and Vye v. Newman, 11 N.B.R. 388, specially referred to.]

Sonier v. Breau, 3 D.L.R. 184, 10 E.L. R. 391.

L. For torts, injuries, or nuisance.

(§ II L—251)—CONSPIRACY.

The mere use of the words "in collusion" in a pleading claiming damages against a defendant for having "in collusion with" his co-defendant defamed the plaintiff is insufficient to support a claim for damages for conspiracy.

Alexander v. Simpson, 1 D.L.R. 534, 20 W.L.R. 641, 22 Man. L.R. 424.

Action by wife against husband and others for—Statement of claim—Depriving wife of consortium of husband—Motion to strike out part of pleading containing substance of claim—Con. Rule 261.

Ney v. Ney, 2 D.L.R. 884, 21 O.W.R. 523, 3 O.W.N. 896.

(§ II L—252)—FOR DEATH.

Statement of claim—Negligence.

Lum Yet v. Hugill, 1 D.L.R. 897.

(§ II L—257)—MALICIOUS PROSECUTION.

Where the statement of claim in an action for damages for malicious prosecution and false imprisonment contains the usual allegations and the statement of defence denies all the material allegations, a further paragraph to the effect that "if the defendant laid or prosecuted said charge or procured the issue of said warrant, or caused the plaintiff to be arrested or imprisoned, the defendant did it on the advice of counsel," followed by a statement in detail of how the charge was laid before a magistrate who issued the warrant of his own accord and without defendant's request, will be stricken out on motion under rule 167 (Sask. Practice Rules, 1911), as tending to prejudice, embarrass and delay the fair trial of the action.

Jones v. Gore, 8 D.L.R. 868, 22 W.L.R. 739.

(§ II L—258)—TO REAL PROPERTY.

In an action for damages caused by the falling of the wall of a building erected upon the adjoining premises, by a contractor for the owner of such adjoining premises, the owner or occupant of the property upon which the wall fell should not rest the claim entirely upon the negligence in the construction of the building, but should plead substantively the omission of the adjoining owner to see to the doing of that which was necessary to prevent the mischief. [Bower v. Peate, 1 Q.B.D. 321, 326; Mersey Docks Co. Trustees v. Gibbs, L.R. 1 H.L. 93, 114; Pickard v. Smith, 10 C.B.N.S. 480, applied.]

Cockshutt Plow Co., Limited v. MacDonald, 8 D.L.R. 112.

M. For infringement.

(§ II M—265)—FOR INFRINGEMENT.

If the plaintiff in an action for infringement of patent, in which a defence of invalidity is pleaded, desires to shew at the trial that the defendant is estopped from disputing the validity of the patent, he must specifically plead the estoppel.

The Imperial Supply Co. v. The Grand Trunk R. Co., 1 D.L.R. 243, 10 East. L.R. 414, 13 Ex. C. & R. 507.

O. As to corporate matters.

(§ II O—275)—AS TO CORPORATE MATTERS.

Statement of claim—Action by creditors of company to set aside transfers of property—Want of authority of officers of company.

King Milling Co. v. Northern Islands Pulpwood Co., 1 D.L.R. 913.

P. Miscellaneous.

(§ II P—283)—CREDITORS' BILL.

Plaintiff brought an action to set aside as fraudulent and void as against creditors a bill of sale, and judgment was given in the action in his favour. He then claimed to have an account taken of goods levied upon by defendant under several warrants of distress issued by him against the makers of the bill of sale who were his tenants. It was held, that if plaintiff wished to attack the proceedings under the warrants of distress as part of the scheme to defeat creditors he should have done so in his pleadings, and also, that plaintiff could not raise in this way the question as to irregularity in connection with the distress proceedings, a special action being the only remedy in that case, and that remedy not being open to a person in plaintiff's position. Also, that the distress proceedings having been sufficiently pleaded were an answer to plaintiff's claim. Defendant's costs on the appeal set off against plaintiff's costs in the action.

Pitts v. Campbell et al., 45 N.S.R. 458.

(§ II P—288)—JUDGMENT.

If the grounds of the plaintiff's claim are not given either in the writ or declaration the objection thereto by the defendant should be taken by exception to the form and not by inscription en droit. The plaintiff who sues to recover the amount of a judgment is not required to give full particulars thereof as it is set up and filed as part of the declaration.

Cardin v. Parent, 14 Que. P.R. 61 (Sup. Ct.).

(§ II P—290)—FRAUD.

In an action for the rescission of an agreement for the sale of lands, and the return of moneys retained by the defendant, allegations of fraud are sufficiently made without actual mention of the word "fraud" in the statement of claim, where the allegations, if sustained, shew that the defendants were guilty of the perpetration of a fraud on the plaintiff. [Marshall v. Staden, 7 Hare 728, 19 L.J. Ch. 57, 68 English Rep. (reprint) 177, followed.]

Pringle v. Dwyer, 6 D.L.R. 446, 22 W.L.R. 158.

III. Pleas and answers.

A. In general.

(§ III A—303)—Denials.

It is not necessary for the defendant, in an action for malicious prosecution and false imprisonment, to affirmatively plead reasonable and probable cause, the proper form of defence being merely to deny the plaintiff's allegations.

Jones v. Gore, 8 D.L.R. 868,, 22 W.L.R. 739.

A party litigant must assert all his rights and every title that he may have justifying his claim; it is not open to him to try the matter piecemeal.

Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 331, 3 O. W.N. 1078 and 1182, 22 O.W.R. 1.

(§ III A—304b)—Abatement.

A dilatory plea to stay the principal action will not be granted when the defendant, a joint maker of a promissory note, does not give any other valid reason for that purpose, except that the note should be paid by the other maker, when in fact the note is to be paid by him.

Droin v. Ambrose, 14 Que. P.R. 58 (Sup. Ct.).

B. What must be pleaded.

(§ III B—308a)—Assumption of risk.

The maxim volenti non fit injuria has no application nor is it material whether or not it was availed of as a plea, where in the action for negligence, the jury found that it had not been contributed by the plaintiff.

Grand Trunk R. Co. v. Brulott, 46 Can. S.C.R. 629, affirming Brulott v. G.T.R. Co., 24 O.W.R. 154, 19 O.W.R. 514.

(§ III B—310)—Failure to plead.

An attempt to shew an agreement to return the money sought to be recovered cannot succeed where it is neither pleaded nor made a ground of appeal.

Maritime Gypsum Co., Limited v. Redden, 8 D.L.R. 155, 11 East. L.R. 586.

(§ III B—312a)—Fraud.

A plaintiff suing for cancellation of an instrument given as security on the purchase of a business as a going concern upon the ground of failure of consideration, will not be permitted, after repudiating the agreement and declining to accept delivery or transfer of the assets of the business, which his vendor was always prepared to hand over in terms of the agreement, to shew that the defendant took an unconscionable advantage of him in making the contract, where he has not pleaded that the contract was voidable as an unconscionable bargain or on the ground of fraud or otherwise.

Aylesworth v. Lee, 3 D.L.R. 286, 21 W. L.R. 48.

(§ III B—315)—In patent cases.

In a patent action pleadings and particulars have an important bearing on the questions at issue, and a plaintiff is entitled under the rules of the Exchequer Court of Canada to a full knowledge before the trial of the issues he is called upon to meet.

Imperial Supply Co. v. Grand Trunk R. Co., 7 D.L.R. 504, 11 East. L.R. 340.

(§ III B—318)—Statute of Limitations.

A motion for a nonsuit which the defendant had abandoned is not the proper practice to bar the limitation.

Workman v. Vineberg, 13 Que. P.R. 225 (Sup. Ct.).

(§ III B—319a)—Notice or want of notice.

In an action on a building contract, where it is claimed that under the contract notice should have been given to the owners by the contractor of the latter's application to the architect for a final certificate, such lack of notice must be pleaded or it cannot be raised at the trial.

Brown v. Bannatyne School District (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

C. What may be pleaded.

(§ III C—320)—What may be pleaded.

Where parts of defendant's pleading though couched in obscure terms nevertheless contain some facts which indicate a valid defence to some of plaintiff's allegations, a motion to strike out these parts as embarrassing will be denied.

Bristol v. Kennedy, 8 D.L.R. 750, 4 O. W.N. 537, 23 O.W.R. 685.

When a defendant sued by several plaintiffs in the same action has different ways of pleading against each of them, he can produce separate pleadings against each of the plaintiffs, leaving to the Judge to pass upon the question of costs. [Legatt v. McIntyre, 2 Que. P.R. 399.]

The Dominion Light, Heat and Power Co. v. The Colonial Engineering Co., 13 Que. P.R. 184 (Sup. Ct.).

D. Sufficiency.

(§ III D—325)—Sufficiency.

Where parts of a defendant's pleading sufficiently disclose a reasonable ground of defence against the plaintiff or a reasonable cause of counterclaim, it will not be struck out as embarrassing or as tending to prejudice the plaintiff under rule 167 of the Saskatchewan Rules of Practice, 1911.

Douglas v. Young, 8 D.L.R. 788, 22 W. L.R. 733.

Where, in an action to recover on a promissory note executed by the defendant and another, the defence is that the note in question was given as collateral to a mortgage made by the other person

in favour of the plaintiff, which the defendant executed as co-covenanter and surety, that there was a prior mortgage on the same land, which mortgage was foreclosed, thus rendering the subsequent mortgage worthless as security, a further allegation that by reason of the plaintiff's neglect to give notice to the defendant of the foreclosure and to keep alive and preserve the security of the second mortgage for the benefit of the defendant as surety, the said mortgage became worthless as a security to the defendant as such surety and that, therefore, the defendant is relieved from further liability in respect to the said mortgage and of any promissory notes given as collateral thereto, should not be struck out as embarrassing since it sufficiently discloses a reasonable ground of defence.

Douglas v. Young, 8 D.L.R. 788, 22 W. L.R. 733.

(§ III D—326)—As to corporations.

Where an allottee, upon a public subscription for shares of a company organized under the Ontario Companies Act desires to shew irregularities in the organization of the company in seeking to avoid the allotment in an action for calls made after the lapse of a long time during which notice of his refusal to accept had been given the company, but no legal proceedings had been taken by him to declare the allotment void, he must specifically set up in his pleadings the grounds on which he relies, so that the opposing party may have a reasonable opportunity of meeting the case he proposes to advance. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed on appeal; Re National Motor, etc., Co., [1908] 2 Ch. 228, cited in Court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645.

(§ III D—328a)—Payment; tender.

Sufficiency of plea of—Paying into Court amount of plaintiff's claim with reservation of rights—Striking out as embarrassing.

Canadian Pacific R. Co. v. Trusts and Guarantee Co., Limited, 7 D.L.R. 796.

Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into Court a sum of money which the plaintiff accepted and obtained payment out upon an ex parte order:—Held, that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper. Held, further, that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs.

Wainwright v. Farmer and Lindsay, 16 B.C.R. 468.

(§ III D—333)—Title to land.

It is not necessary in setting up a title under a judicial sale to plead the preliminary proceedings leading up to the order or decree directing the sale if such order or decree was made by a superior Court as in such case the proceedings are presumed to be regular, but the order or decree itself should be pleaded with particularity and also the proceedings subsequent thereto taken to vest the title in the party claiming thereunder. [See Odgers on Pleading, 1912, 7 ed., page 136.]

Irwin v. Jung, 1 D.L.R. 153, 19 W.L.R. 901, 17 B.C.R. 69.

(§ III D—333a)—Joint ownership.

A plaintiff joint owner, whose rights are contested by a person who is in possession of the joint property, may properly plead that the courts shall declare him entitled to an undivided share in such property, and such plaintiff (while not compelled to continue in the joint ownership) is not obliged to demand distribution, he can have an interest in the estate without proceeding to a distribution, and indeed may prefer to remain in joint ownership. [Armitage v. Evans, 4 Q.L.R. 300; Cannon v. O'Neil, 1 L.C.R. 160; Pothier tit. Petition of Heirship, 9 Bugnet, p. 234, applied.]

Houde v. Marchand, 8 D.L.R. 431.

Where the plaintiffs, as some of the joint heirs of an estate, proceed against the defendant, as a person wrongfully in possession of the joint property, in an action to compel the defendant to render an accounting without in the same action demanding distribution, and where the property in question is essentially divisible in its nature, the action is well taken in this respect, and the plaintiffs may be apportioned their respective shares in the whole estate, without being forced to a distribution.

Houde v. Marchand, 8 D.L.R. 431.

IV. Cross bill.

(No cases.)

V. Reply.

(§ V—349)—Sufficiency.

A reply by defendant to plaintiff's replication in the following terms, "All and each of the allegations in the plaintiff's replication which are not in accord with those in the defendant's pleas are false, and not well founded," is equivalent to a general denial and regular.

Lagacé v. Boyer, 13 Que. P.R. 265 (Sup. Ct.).

(§ V—353)—Departure.

When the plaintiff's statement of claim is based entirely upon the provisions of the Assignments Act, it is a departure in pleading to set up in the reply a case based upon the Bills of Sale and Chattel Mortgage Act and such case should not

be recognized. [Odgers on Pleading, 6th ed., 249, 250.]

Empire Sash and Door Co. v. Maranda et al., 21 Man. R. 605.

VI. Set-off; counterclaim; recoupment.

(§ VI—355)—COUNTERCLAIM; SET-OFF; RECOUPMENT.

Motion by defendant to dismiss plaintiff's motion to strike out counterclaim as irrelevant and embarrassing—Plaintiff had not obeyed subpœna issued on appointment for his examination—Service of subpœna cannot be disregarded—If party served is paid necessary conduct money—Plaintiff to attend for examination at his own expense—Motion against counterclaim to stand in meantime—Costs in cause.

Eval v. Bank of Hamilton, 3 O.W.N. 366, 20 O.W.R. 531.

A person first made a party to an action by a counterclaim must file his defence thereto within the time limited bv rule 204 (rule 298) or judgment may be recovered against him under rule 298B; but, while the plaintiff, desiring to deliver a defence to a counterclaim, must deliver it within eight days (rule 298), he is not obliged to deliver a formal defence to put such counterclaim in issue the matters in like manner as upon a general denial.

Thompson v. Yockney, 8 D.L.R. 776, 22 W.L.R. 863.

VII. Demurrer.

(§ VII—360)—DEMURRER.

In Ontario, by rule 259, Consolidated Rules of Practice, 1897, demurrers are forbidden in civil actions, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial, unless a special order is made that it be earlier dealt with.

Bristol v. Kennedy, 8 D.L.R. 750, 4 O. W.N. 537, 23 O.W.R. 685.

(§ VII D—380)—WHAT QUESTIONS RAISED BY DEMURRER.

Embarrassment in a defendant's pleading is where the pleader brings forward, by way of defence, matters which he is not entitled to make use of, while a pleading, bad in law, is one which does not shew a defence at all. [Glass v. Grant, 12 P.R. (Ont.) 480; Stratford v. Gordon, 14 P.R. (Ont.) 407, referred to.]

Bristol v. Kennedy, 8 D.L.R. 750, 4 O. W.N. 537, 23 O.W.R. 685.

A motion to strike out a pleading on the ground that the same tends to prejudice, embarrass and delay the fair trial of an action is not equivalent to a demurrer, filed under the former Ontario practice, since prior to the passing of rule 259 (Consol. Rules, 1897) abolishing demurrers in Ontario there also existed a rule authorizing a motion against pleadings as embarrassing.

Bristol v. Kennedy, 8 D.L.R. 750, 23 O. W.R. 685, 4 O.W.N. 537.

PLEDGE.

I. NATURE AND VALIDITY; EXTINGUISHMENT; RELEASE.

II. RIGHTS OF PARTIES AND THIRD PERSONS.

A. In general.

B. Sale.

I. Nature and validity; extinguishment; release.

(§ I—6)—EXTINGUISHMENT.

The pledgor cannot claim the restitution of the thing given in pledge until the debt is wholly paid except in cases of misuse by the pledgee of the thing pledged.

Klock v. The Molsons Bank (No. 1), 2 D.L.R. 445, 41 Que. S.C. 370.

(§ I—8)—RECOVERY OF POSSESSION.

One who holds personalty as security may retake it from the owner who had obtained possession from the bailee by falsely representing that he had paid the debt for which it was held as security. [Wallace v. Woodgate, I.C. and P. 575, and Babcock v. Lawson, 5 Q.B.D. 286, specially referred to.]

Pocock v. Novitz, 4 D.L.R. 105, 21 W. L.R. 418.

II. Rights of parties and third persons.

A. In general.

(§ II A—11)—PROTECTION OF PROPERTY.

It is the duty of the pledgee of shares of stock in selling them upon default to take reasonable means to prevent a sacrifice thereof, and to act as a provident owner would have done. [Latch v. Furlong (1866), 12 Gr. 303, applied.]

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

B. Sale.

(§ II B—20)—SALE.

A sale of shares of stock held as security is irregular and will be set aside, where the order of priority of their sale as provided in the agreement by which they were pledged, was not observed, and the purchaser had notice thereof.

Bartram v. Grice, 4 D.L.R. 682, 3 O. W.N. 1296, 22 O.W.R. 191.

A power of sale in an agreement whereby shares of stock were pledged as security, which required upon default in payment, that tenders should be advertised for three times in designated newspapers, with intervals of a week between each insertion, was not properly exercised, and a sale will be set aside, where a full week, excluding the day of publication, did not elapse between each publication.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

(§ II B—21)—PURCHASE BY PLEDGEE.

A sale of pledged shares of stock cannot be upheld where the circumstances shew that the purchaser, who paid an inadequate price, knew practically nothing about the company that issued them, or about its affairs or financial circumstances, and that he consulted with the pledgee in relation to the sale, and, was, to some extent, in his employ, as the conclusion therefrom was that the purchase was made at the suggestion of and for the benefit of the pledgee.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

While inadequacy of price is not ordinarily a sufficient reason for setting aside a sale, yet it will have that effect when, taken in connection with other circumstances, it leads to the assumption that the purchase was made for the benefit of the pledgee.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

POLICE.

Arrest by, see Arrest; False Imprisonment, II.

In general, see Officers.

(§ I—5)—NEGLIGENCE IN TAKING CARE OF DRUNKEN MAN.

It is an act of imprudence and neglect to lead a practically helpless drunken man down a dangerous stairway under the charge of but one constable; and where under such conditions the prisoner misses his foothold, falls and breaks his neck the constable's employer is liable; and the fact that the constables knew of the infirmity of their prisoner obliged them to use all the more care. [Beven on Negligence, 3rd ed., 159, approved; see also Clayards v. Dethick, 12 Q.B. 439, 445, 116 Eng. Rep. 932; Lax v. Darlington, 5 Ex.D. 28, 35; McMahon v. Fields, 7 Q.B.D. 591, 594; Thomas v. Quartermaine, 17 Q.B.D. 414, 417, 18 Q.B.D. 685.]

Dube v. City of Montreal, 7 D.L.R. 87.

POLICE MAGISTRATE.

Powers of a justice of the peace, see Justice of the Peace.

Summary conviction matters, see Summary Convictions.

Preliminary enquiries by, in criminal matters, see Criminal Law, II.; Indictment and Information.

Summary trial of certain offences, see Criminal Law, II.; Indictment and Information.

POOL SELLING.

See also Gaming, II.

POOR AND POOR LAWS.

(§ I—1)—SUPPORT.

Where a pauper was chargeable to the defendant town, and the town authorities after being required to make provision for his support omitted to do so:—Held, that plaintiff, not being liable for the support of the pauper, was entitled under the provisions of R.S.N.S., ch. 50, sec. 28, to recover against the town a reasonable sum for his support and maintenance. In the absence of statutory authority provision cannot be made for the support of a pauper outside the limits of the district liable for his support.

McDougall v. The Town of Sydney Mines, 45 N.S.R. 348.

Under the Poor Relief Act (Nova Scotia) where a pauper was supported on a farm belonging to claimant, and the latter in making her claim for assistance against the board of overseers of the poor for the district notified only one of the three members of the board such notice is sufficient notice to the overseers particularly where the overseers so notified had, as a result of the notice, visited the pauper and taken her deposition before a justice of the peace in reference to the claim.

Sillers v. The Overseers of the Poor, 6 D.L.R. 109.

In an action by a municipality against the grandfather of three children to recover the sum paid by the plaintiff for their support and maintenance in an industrial school, where it is alleged they were sent there at the request of the mayor, and that defendant is well able to repay, and is the only person who can do so from among those who are liable, that the father is himself confined in an institution for the insane, and the mother is in extreme poverty, and it does not appear the sum charged is unreasonable, the defendant is liable under the laws of Quebec even where defendant received no notice of the proceedings to confine the children, he having been aware of their condition and not having taken any steps to provide for them, although able to do so. [Arts. 4031, 4032, 4033, sub-sec. 4 of art. 4035, and art. 4037, R.S.Q. 1909, referred to.]

City of Montreal v. Milot, 8 D.L.R. 817.

(§ I—2)—SETTLEMENT.

Proceedings on the part of a municipality to confine homeless children in an industrial school under art. 4037, R.S.Q. 1909, can be taken even where no notice has been given to those who may be liable to reimburse the city for the cost of maintenance.

City of Montreal v. Milot, 8 D.L.R. 817.

POSSESSION.

Adverse possession, see Adverse Possession.

Sufficiency of, to maintain ejectment, see Ejectment.

POSSESSORY ACTION.

(§ I—1)—Exclusive possession.

The possession required to support a possessory action for repossession (en réintégrande) must be uninterrupted, unequivocal and exclusive.

Tremblay v. Parish of St. Alexis, 3 D. L.R. 553.

(§ II—10)—Private road.

One who possesses, in common with another, a strip of land which serves them for a private road may maintain a possessory action against his co-possessor who has placed on the road a pent-house which impedes the passage.

Odesse v. Mathieu, 42 Que. S.C. 481 (Sup. Ct.).

POUNDS.

I. In general.

II. Pound breach.

I. In general.

(No cases.)

II. Pound breach.

(§ II—20)—Pound breach.

The Imperial statute 6 and 7 Vict., ch. 30, making it a criminal offence to rescue from a poundkeeper cattle which are in his lawful custody, is a part of the criminal law in force in Manitoba by virtue of sec. 12 of the Criminal Code of Canada, 1906, declaring that the criminal law of England as of 15 July, 1870, shall be the criminal law of Manitoba in so far as such English law is applicable and in so far as it has not been repealed, modified or affected by English or Canadian legislation.

Rex v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 W.L.R. 199.

POWERS.

I. In general.

II. Execution.

Sale by mortgage under power of sale, see Mortgage, VI.

I. In general.

(No cases.)

II. Execution.

(§ II—7)—Mode of.

Under a power of appointment contained in a marriage settlement or deed in trust authorizing the trustee to make the appointment "by any deed or instrument in writing duly executed or by any last will and testament to be by her duly executed," the power cannot be validly exercised by a document intended to operate as a will and only prevented from operating as such by defective execution, there being only one witness, and which for that reason would be invalid as an appointment under the Wills Act, R.S.N.S. 1900, ch. 139, sec. 8.

Delaney v. Delaney, 5 D.L.R. 543.

PRACTICE.

In appeals, see Appeal.

As to arrest, see Arrest.

Attachment of debt, see Garnishment.

As to costs, see Costs.

Examination for discovery, see Discovery.

As to criminal proceedings, see Criminal Law.

Injunction, see Injunction.

Insolvency, see Insolvency.

Interpleader, see Interpleader.

As to judgment, see Judgment; Execution.

Jury and jury notice, see Jury; Trial.

As to pleadings, see Pleadings.

Production of documents, see Discovery.

Security for costs, see Costs.

Service of process, see Writs of Process.

Stay of proceedings, see Abatement.

Third party notice, see Parties.

At trials, see Evidence; Trials.

Venue, see Venue.

Winding-up, see Company, VI.

As to writ of summons, see Writs and Process.

PREFERENCES.

To creditor of insolvent corporation, see Company.

As affecting conveyance, see Fraudulent Conveyances.

By insolvent, generally, see Insolvency.

PRELIMINARY ENQUIRY.

See Criminal Law, II. A.

PRELIMINARY INJUNCTION.

See Injunction.

PRESCRIPTION.

Title by, see Adverse Possession.

Prescriptive rights in water, see Waters, II.

PRESENTATION.

Of note, for payment, see Bills and Notes.

Of cheques, see Cheques, II.

PRESUMPTION.

Sufficiency of evidence to justify presumption, see Evidence.

As to intention of testator, see Wills.

For presumption and burden of proof generally, see Evidence, II.

PRINCIPAL AND AGENT.

I. THE RELATION; REVOCATION.
II. AGENT'S AUTHORITY; RIGHTS AND LIABILITIES OF PRINCIPAL.
A. In general.
B. Agent's purchase or sale on credit.
C. Agent's fraud or wrong.
D. Ratification.
III. RIGHTS AND LIABILITIES OF AGENT.

Agent of corporation, see Company, IV.
As to factors, see Factors.
As to agents of insurance company, see Insurance, I.
Matters as to partnership, see Partnership.

I. The relation; revocation.

(§ I—1)—THE RELATION.

The relationship of principal and agent is not established between an insurance company and a person not in its employ who upon being requested to procure insurance on certain property by the owner sent the application to a general agent in another place who placed a portion of the insurance applied for with the said company and therefore the company could not be charged with any information acquired by such person as to the nature of the risk or value of the property insured.

Guimond v. Fidelity Phœnix Fire Insurance Co., 2 D.L.R. 654, 10 E.L.R. 562.

(§ I—2)—REVOCATION.

Where all that a real estate broker, who had an exclusive right to sell property, did towards making a sale was to advertise it in a newspaper before the owner effected a sale thereof, the agency was revoked, and the agent could recover on a quantum meruit only for the services actually performed, and not the compensation agreed upon in case he should make a sale. [Aldous v. Swanson, 20 Man. L.R. 101, referred to.]

Cadwell v. Stephenson, 3 D.L.R. 759, 21 W.L.R. 199.

(§ I—3)—NOTICE OF REVOCATION.

Notice by the company to its agent cancelling his agency is no notice to the public that he is no longer their agent and until such public notice is given, he will be held the regular agent of the company as far as third parties are concerned. (Que. C.C. 1730.)

Anglo-American Insurance Co. v. LeBaron, 2 D.L.R. 877.

II. Agent's authority; rights and liabilities of principal.

A. In general.

(§ II A—6a)—WARRANTY OF GOODS SOLD.

Where a contract for the sale of an engine declared that every term of the agreement was therein expressed, and that its terms and conditions could not be varied, altered or changed, except in writing signed by the vendor, the promise of an agent of the latter, upon the engine not fulfilling its warranty, upon persuading the vendee not to return the engine, that he would rectify it, which was never satisfactorily done, cannot be set up as a defence to an action to recover the purchase price where the vendee afterwards continued to use the engine for nearly a year.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 19 W.L.R. 934.

(§ II A—7)—POWER OF ATTORNEY.

Whenever the very act of the agent is authorized by the terms of the power, i.e., whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, and the persons so dealing are not bound to inquire into facts aliunde. [Bryant v. La Banque du Peuple, [1893] A.C. 170, applied; Westfield Bank v. Cornen, 37 N.Y. 322, specially referred to.]

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

Notwithstanding it was stipulated in a power of attorney, under which an agent had authority to make a sale of land belonging to his principal, that any sale should be for "and in the name of" principal a contract entered into by the agent in his own name is enforceable by the purchaser against the principal.

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

(§ II A—8)—SALE OF LAND.

The agency of one who in his own name entered into an agreement for the sale of land he was duly authorized to sell, may be shewn, in order to bind his principal, in an action against the latter for specific performance of the agreement. [Morgan v. Johnson, 3 O.W.N. 297, 20 O.W.R. 509, affirmed on appeal.]

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

An agent is not clothed with authority to make a binding agreement for the sale of land, by letters from his principal, in effect stating his price and terms of payment, and that he would refer all inquiries concerning the land to the agent, and directing that the necessary papers, upon a purchaser being found, be sent him for execution, and that he would come at any time if wanted, where subsequently and before any sale was made by the agent, the principal wrote the agent not to do anything until his arrival.

Margolis v. Birnie, 5 D.L.R. 534, 21 W.L.R. 462.

One who enters into possession of land under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement where the agent had authority only to secure a

purchaser and not to enter into a contract for the sale of the property.

Havner v. Weyl, 5 D.L.R. 141, 21 W.L.R. 800.

That an owner of land in agreeing to sell the same dealt with the purchaser's agent and not directly with the purchaser himself, gives the owner no right to withdraw from the contract until the purchaser signifies his approval of his agent's act, in the absence of a stipulation to that effect in the contract.

Brown v. Street, 3 D.L.R. 291, 21 W.L.R. 46.

One who enters into possession of land under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement where the agent had authority only to secure a purchaser and not to enter into a contract for the sale of the property. [Havner v. Weyl, 5 D.L.R. 141, affirmed.]

Havner v. Weyl (No. 2), 7 D.L.R. 682, 22 W.L.R. 455.

Where an agent is authorized to sell land upon the terms of payment of one-third of the price in cash on signing the agreement, an agreement for sale made by him stipulating for a payment of a lesser sum on signing the agreement and for payment of the balance required to make up the one-third cash when the title and documents are accepted is not binding upon his principal. [Maybury v. O'Brien, 25 O.L.R. 229, 3 O.W.N. 393, reversed on appeal.]

Maybury v. O'Brien, 6 D.L.R. 268, 22 O.W.R. 677, 3 O.W.N. 1546, 26 O.L.R. 628.

Sale of land—Specific performance—Authority of agent—Alteration in material term—Authority must be clear, express, and unequivocal.

Levitt v. Webster, 4 O.W.N. 554, 23 O. W.R. 633.

(§ II A—12)—RIGHTS OF UNDISCLOSED PRINCIPAL.

On a sale of seed flax, where the sale-note contains the name of the buyer's agent instead of the buyer's own name, but the seller when he made the sale knew who the principal was and that the sale was really being made to him and not to his agent, in an action by the principal for breach of contract, the contract will be read as made with the known principal.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Where two companies are represented in financial matters by a third, all with common directors, and the financial company uses money which it has in hand to the credit of one company, being the proceeds of a sale of the bonds thereof, for the purpose of redeeming certain maturing bonds of the other company pending recoupment by the sale of a further issue of that company's bonds, and the transaction upon the minutes of the financial company bears the appearance merely of a payment by it on behalf of the company whose bonds are redeemed, and subsequently, upon the failure of the expected source of recoupment the minute is changed so as to shew that the financial company acted only as agent for the company whose money was used, and entries are made in the books of the respective companies, with the approval of the common directors, shewing that the bonds have been purchased by and were the property of that company, the proper conclusion is that the intention was to give permanence to the original temporary transaction, and that the bonds became the property of the company whose money was used in the purchase thereof, and not of the financial company. [Northern Sulphite Mills v. Craig, 3 O.W.N. 214, affirmed on appeal.]

Northern Sulphite Mills, Ltd. v. Craig, 4 D.L.R. 82, 3 O.W.N. 1388, 22 O.W.R. 563.

(§ II A—13)—AUTHORITY TO ADVERTISE.

A financial agent engaged by a company to sell its shares and merchandise (e.g., gas burners) on commission has the power to advertise the sale of the same and solicitations to subscribe for shares in the company.

French Gas Saving Co., Ltd. v. The Desbarats Advertising Agency, Ltd., 1 D.L.R. 136.

B. Agent's purchase or sale on credit.

(§ II B—15)—AGENT'S PURCHASE OR SALE ON CREDIT.

In an action for goods sold and delivered plaintiff's evidence shewed that the goods in question were sold to men employed on board a steamer of which defendant was chief steward, and that defendant's undertaking, if any, was to pay for the goods if the parties to whom they were sold remained on the vessel after she cleared from St. John, N.B., or to return the goods:—Held, affirming the judgment of the County Court Judge, assuming this to be the agreement, that defendant could only be held liable in damages for breach of his contract as bailee of the goods and not in the action as brought for goods sold and delivered. Per Drysdale, J., the case was not one for amendment. Russell, J., dissented as to the effect of the evidence.

Levine v. Sebastian, 45 N.S.R. 190, 9 E.L.R. 311.

(§ II B—17)—UNDISCLOSED AGENCY.

Where a promise of sale of immovable property is accepted in these words, "This promise is accepted for our client," and the name of the client is not disclosed at the time, there is a valid sale and the person accepting the promise becomes personally responsible as the purchaser unless he discloses his client's name and the latter accepts the property.

Dagenais v. The Modern Realty and In-

vestment Co., Ltd., 5 D.L.R. 315, 41 Que. S.C. 428.

Where the plaintiffs, who agreed to purchase land from one who did not disclose his agency for the defendant, made a cash deposit thereon, and afterwards sent the agent an agreement of purchase for execution, with directions that, when executed, the agreement, together with a draft for the first payment be sent to a designated bank, but the defendant, who was not informed by the agent of such direction, sent the executed agreement, together with a draft, to a different bank, which returned it to the defendant without making any attempt to collect or notifying the plaintiffs thereof, a delay of a month on the part of the plaintiffs before notifying the agent of the non-receipt of the agreement, when they stated that if they could not get the land they would be pleased to have the deposit returned, is not so unreasonable as to amount to an abandonment or waiver of the right to compel the defendant to specifically perform such agreement.

Edgar v. Caskey, 4 D.L.R. 460, 21 W.L.R. 444.

C. Agent's fraud or wrong.

(§ II C—20)—AGENT'S FRAUD OR WRONG.

A principal is responsible for the fraud of his agent within the scope of the agent's authority, whether the agent be acting for his own benefit or not. [Lloyd v. Grace & Co., 28 Times L.R. 547, referred to.]

Re Gloy Adhesives, Ltd., 7 D.L.R. 454, 4 O.W.N. 350, 23 O.W.R. 348.

A secret arrangement between the respective agents of the vendor and of the purchaser of property that a price larger than that which the vendor is willing to accept shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be countenanced by the Court, and the purchaser, having paid the full price demanded without knowledge of the secret arrangement, is entitled to recover such surplus.

Peacock v. Crane, 3 D.L.R. 645, 3 O.W.N. 1184, 21 O.W.R. 990.

In an action upon a mortgage of land, the question was as to the liability of one of the defendants, a married woman, upon the covenant for payment contained in the mortgage deed, which purported to be executed by her. The land had been conveyed to her by an agent of the plaintiffs, a mortgage company, the mortgagees, but she did not know of the conveyance to her, and, if the signature to the mortgage deed was hers, she was fraudulently induced by the agent to make it, believing the mortgage deed to be, as represented by the agent, another and entirely different document, relating to a transfer of shares; in the same way she executed an authority to the agent to receive the mortgage moneys; he did receive the moneys and did not pay them over to her; and he made payments to the plaintiffs upon the mortgage:—Held, that the knowledge of the agent was constructively the knowledge of the plaintiffs, and they must be taken to have known all about the transaction; although both the plaintiffs and the defendant were innocent of any wrongdoing, the plaintiffs enabled their own agent to occasion the loss, and they must suffer it; if a company is negligent in the appointment of agents and appoint a rascal, they must be responsible for his rascality in dealing with the company's affairs; their negligence is the proximate and effective cause of the fraud. [Hunter v. Walters, L.R. 7 Ch. 75; King v. Smith, [1900] 2 Ch. 425, and Howatson v. Webb, [1907] 1 Ch. 537, [1908] 1 Ch. 1, distinguished; Bagot v. Chapman, [1907] 2 Ch. 222, followed]:—Held, therefore, that the plaintiffs were not entitled to recover upon the covenant, but the defendant married woman must transfer to the plaintiffs her registered title to the mortgaged property.

Dominion Permanent Loan Co. v. Morgan, 16 W.L.R. 7 (B.C.).

A principal is bound to refund to the party with whom his agent contracted on his behalf any profit in the transaction represented by the money he has received through the fraud of his agent, whether the principal authorized the fraud or not. [Kettlewell v. Refuge Assurance Co., [1908] 1 K.B. 545, [1909] A.C. 243, applied.]

Canadian Financiers, Ltd. (plaintiffs) v. Hong Wo (defendants), 1 D.L.R. 38, 19 W.L.R. 843, 17 B.C.R. 8.

D. Ratification.

(§ II D—25)—RATIFICATION.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at two different times, and the bank's representative ratified the act of such person in the second seizure and detaining of horses and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing such horses.

Alfred Thien v. The Bank of British North America, 4 D.L.R. 388, 21 W.L.R. 192.

An agent's unauthorized agreement for the sale of land can be ratified by his principal only by his unequivocal and definite assent to the transaction.

Margolis v. Birnie, 5 D.L.R. 734, 21 W.L.R. 462.

On the failure of the contractor to complete the erection of a school for the plaintiff school district, the defendant, as secretary-treasurer, and another trustee, without the authorization of formal trustee meetings, expended certain moneys of the corporation in completing the building which was afterwards taken over by the corpora-

tion and used as a school-house. There were only three trustees and the third was not in the Province that season:—Held, that there had been such an adoption by the plaintiff corporation of the acts of the defendant and the other trustee, that the defendant was entitled to credit in his accounts as treasurer for the moneys so paid out. [French v. Backhouse (1771), 5 Burr. 2728; Sentance v. Hawley (1863), 13 C.B.N.S. 458, and Bristow v. Whitmore (1861) 31 L.J. Ch. 467, followed.] Held, also, that, as the school building was built upon land which was not the property of the school district, the rule that an employer does not, as against a contractor, accept the work done in the erection of a building merely by re-occupying his own land, did not apply.

School District of Vassar v. Spicer, 21 Man. L.R. 777, 18 W.L.R. 147.

(§ II D—26)—WHAT CONSTITUTES.

Where one who represents himself as an agent to purchase standing timber on an island enters into an agreement therefor and notifies his principals thereof and draws a draft on them in favour of the vendor marked "on account of the purchase," and his principals pay the draft, and enter the payment in their books as being "on account of the purchase" of the island, and write to the agent that they are pleased that he has secured the island and trust it will turn out a good one for timber, and subsequently send the agent to inspect the island and estimate the timber thereon, and the agent in his defence describes the transaction as a purchase, and it appears that the principals had for some time desired to purchase the island, the principals must be taken to have ratified the transaction as a purchase and cannot thereafter be heard to say that they had taken an option only. [Thomson v. Playfair, 2 D.L.R. 37, affirmed on other grounds.]

Thomson v. Playfair (No. 2), 6 D.L.R. 263, 3 O.W.N. 1539, 26 O.L.R. 624, 22 O.W.R. 866.

Where several owners of land gave one of their number a power of attorney which authorized him to sell it and to approve on behalf of the other owners, of an offer of purchase, his tacit approval of a sale effected by a third party employed by such co-owner to sell the land must be deemed to be also their approval and ratification of the sale.

Rogers v. Hewer, 1 D.L.R. 747, 19 W.L.R. 868.

Where an agent sold pulp wood from the land of his principal, though he was authorized in writing only to mine and explore the property, a letter from the principal stating that the matter of "selling the pulp wood would be taken up when" the agent returned to his principal's head office was insufficient to add to the agent's authority.

British North America Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

Ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a cheque given the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the cheque. [Hunter v. Parker, 7 M. & W. 322; Brewer v. Sparrow, 7 B. & C. 310; "The Bonita," 30 L.J. Adm. 145, referred to.]

Margolis v. Birnie, 5 D.L.R. 534, 21 W.L.R. 462.

III. Rights and liabilities of agent.

(§ III—30)—RIGHTS AND LIABILITIES OF AGENT.

There is no cause of action for breach of implied warranty of authority of an alleged agent where there is no misrepresentation of the fact of authority, ex. gr., where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal. [Jones v. Hope (1880), 3 Times L.R. 247 (a), followed; Polhill v. Walter (1832), 3 B. & Ad. 114, distinguished.]

Thomson v. Playfair (Decision No. 1), 2 D.L.R. 37, 3 O.W.N. 506, 21 O.W.R. 867, 25 O.L.R. 365.

(§ III—31)—FIDUCIARY CAPACITY; CONFLICT OF INTEREST.

Goods sold under written agreement—"To act as agents on commission"—Assignment of agent for benefit of creditors—Ownership of flour on hand—Outstanding accounts due agent for sale of goods belonging to principal—Agent trustee for seller—Assignee also trustee.

Western Canada Flour Mills, Ltd. v. Middleboro, 19 O.W.R. 722, 2 O.W.N. 1379.

Where an option of purchase has been obtained by real estate agents to themselves from the owner under circumstances which render the same voidable for non-disclosure by the agents of facts brought to their knowledge while they were acting in a fiduciary capacity for the owner, a conveyance made to the agents in conformity with such option may be set aside together with the option agreement which is impeached; and the conveyance will not operate by way of estoppel or confirmation unless it clearly appears that the owner had, in the meantime, obtained from some source the information and advice which his agents had improperly withheld, and notwithstanding the same, had elected to affirm the transaction. [For other cases, see 2 Can. Ten Year Digest 2995 et seq.]

Laycock (plaintiff) v. Lee & Fraser (de-

fendants), 1 D.L.R. 91, 19 W.L.R. 841, 17 B.C.R. 73.

(§ III—32)—On contracts.

An agent appointed by parol cannot bind his principal by deed.

British North America Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

Under an instrument authorizing an agent to mine and explore the property of his principal and "to act for and take such action or actions as he may consider necessary in the interest of" his principal, such agent was appointed and employed to "mine and explore" only and the general words in the concluding part of the document are limited to that employment and gives the agent no power to sell trees and timber from the principal's property.

British North America Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

(§ III—33)—Liability for negligence.

In an action on a fire insurance policy the defendant insurer may recover from its agent, made a third party, as damages for the latter's neglect of duty as the insurer's agent to give the insurer sufficient information of the hazardous character of the risk, resulting in too small a premium being charged, the difference between the accustomed premium which would have been charged on a proper discovery of the material facts known to the agent and the lower premium which was in fact charged upon his negligent classification of the risk.

Stoness v. Anglo-American Insurance Co., 3 D.L.R. 63, 3 O.W.N. 886, 21 O.W.R. 405.

The agency of the defendant to his son, whose negligent driving of an automobile resulted in an injury to the plaintiff, is not established by the facts that the son had the opportunity of using the vehicle whenever he liked, and that on the day when the accident occurred it was the intention of the defendant that his son should later in the day take the defendant's family riding, where it appeared that the son had obtained the car from the garage where it was kept by the defendant, and was taking a few of his own friends for a ride when the accident occurred since, at the time of the accident, the automobile was being used solely for the purposes of the defendant's son.

The B. & R. Co., Ltd. v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274.

An agent who had no authority to bind an insurance company until it had approved an application for insurance, is not liable for failure to effect insurance upon property before it was destroyed by fire, where he agreed with the applicant only to submit his application to the company for approval, which he did without negligence, and it did not appear that he unconditionally agreed to place and effect such insurance. [Baxter v. Jones (1903), 6 O.L.R. 360, and Rudd Paper Box Co. v. Rice (1911), 2 O.W.N. 1417, affirmed; Rudd Paper Box Co. v. Rice, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979 (C.A.), and by the Supreme Court of Canada, 4 June, 1912, sub nom. Rice v. Rudd Paper Box Co., distinguished.]

Binkley v. Stewart Co., 4 D.L.R. 150, 3 O.W.N. 1427, 22 O.W.R. 330.

Where a principal orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, the principal himself is bound to see to the doing of that which is necessary to prevent the mischief, and he cannot relieve himself of his own responsibility by employing some one else (whether servant or independent contractor) to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. [Bower v. Peate, 1 Q.B.D. 321, 326; Mersey Docks Co. Trustees v. Gibbs, L.R. 1 H.L. 93, 114; Pickard v. Smith, 10 C.B.N.S. 480, applied.]

Cockshutt Plow Co., Ltd. v. MacDonald, 8 D.L.R. 112.

A person employed to secure additional insurance on certain property, a correct specification of what was required being given him, who receives the policy from the underwriters and forwards it to his clients without reading it is liable for the damages sustained by the latter by reason of their being compelled, upon the loss of their property by fire, to compromise their claim against the insurers because of an erroneous specification in the policy so obtained of the prior insurance carried by them.

Rudd Paper Box Co. v. Rice, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979.

(§ III—36)—Compensation.

Where the defendant agreed to pay the plaintiff a commission for all sales of stock the latter's sub-agent should make, the plaintiff may recover from the defendant profits he would have realized on sales made by such sub-agent under an agreement between the latter and the defendant, made without the agreement between the plaintiff and the defendant being terminated, and with knowledge on the latter's part that the sub-agency still existed, to the effect that the sub-agent was to make sales independent of the plaintiff for the same commission the defendant had agreed to pay to the plaintiff.

Aronovitch v. Loper, 3 D.L.R. 389, 22 Man. L.R. 325, 21 W.L.R. 263.

An agent whose sub-agent was, to the knowledge of the former's principal, to sell shares of stock belonging to the latter, cannot recover from such principal commissions for stock personally purchased from the principal direct by such sub-agent on his own account.

Aronovitch v. Loper, 3 D.L.R. 389, 22 Man. L.R. 325, 21 W.L.R. 263.

Where the plaintiff was employed by two of the three defendants to attend to the purchasing of an interest in lands for their benefit under an agreement that he should receive for his services one-fifth of the net profit realized from the transaction, to which agreement the third defendant was not a party and to whom notice of making such agreement by the other two defendants was not brought home, the plaintiff upon rendering such services is entitled to recover from the two defendants who entered into such agreement with him, one-fifth of the net profits realized by the three defendants.

McLaws v. Smith, 5 D.L.R. 449, 21 W.L.R. 780.

In the circumstances set out in the statement following:—Held, on appeal, affirming the decision of Murphy, J., at the trial (Irving, J.A., dissenting), that plaintiff had earned only $800 of the commission claimed.

Beveridge v. Awaya Ikeda & Co., Ltd., 16 B.C.R. 474.

An agent is not entitled to any remuneration in respect of a transaction in which he has been guilty of any misconduct or breach of faith towards his principal.

Canadian Financiers, Ltd. (plaintiffs) v. Hong Wo (defendants), 1 D.L.R. 38, 19 W.L.R. 843, 17 B.C.R. 8.

(§ III—41)—DELEGATION BY AGENT.

The fact that the donee of a power of attorney for the sale of land which left to his discretion the price and terms of payment authorized a third person to find purchasers for him at a stated price and on stated terms, did not constitute a delegation to such third person of the discretion lodged in the donee.

Rogers v. Hewer, 1 D.L.R. 747, 19 W.L.R. 868.

The general rule involved in the maxim delegatus non potest delegare merely prevents an agent from establishing the relationship of principal and agent between his own principal and a third person without the authority of his principal as regards the service which the agent has personally undertaken to perform, but the rule is relaxed where the instructions necessarily may have to be carried out by another, in which case the original agent may appoint a subagent or "substitute" and thus constitute in the interests and for the protection of the principal a direct privity between the principal and such "substitute" (or subagent). [De Bussche v. Alt, 8 Ch. D. 286, at p. 310; Powell v. Jones, [1905] 1 K.B. 11, followed.]

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

PRINCIPAL AND SURETY.

I. SURETYSHIP; LIABILITIES OF SURETY.
A. In general.
B. Release or discharge.
II. RIGHTS AND REMEDIES OF SURETY.

Parol evidence of suretyship, see Evidence.

Right of married woman to become surety, see Husband and Wife, I.

As to bonds, generally, see Bonds.

As to guaranty, see Guaranty.

Endorser of bill or note, see Bills and Notes.

I. Surety; liabilities of surety.

A. In general.

(§ I A—1) — SURETYSHIP; LIABILITY OF SURETY.

Where a municipality under a special contract conditionally agrees to sell and convey certain lands to a manufacturing company; and where among other conditions of the grant the company stipulated to maintain in the manufacturing establishment so purchased from the city a plant up to a certain standard in capacity and value; and where this stipulation was guaranteed by the bond of a surety company and the manufacturing company; the fact, that, pending action on such bond for its breach, the municipality proceeds, on the default of certain other covenants of the grantee, to resume possession of the lands in question, does not necessarily affect the liability of the obligors on the bond, where the breaches of the different covenants give rise under the express terms of the contract to different and appropriate remedies; such covenants being severable, and the one independent of the other.

City of Guelph v. Jules Motor Co. et al., 8 D.L.R. 635, 4 O.W.N. 401, 23 O.W.R. 823.

(§ I A—3)—PERFORMANCE OF CONDITION PRECEDENT.

As to the provisions of a construction contract to the effect that an architect, who was thereby empowered, under certain circumstances, to take the work from the contractor's hands and complete it, should ascertain the cost of so doing, which award should be binding upon and be paid by the contractor, does not bind a surety upon a bond given by the latter, indemnifying the plaintiff against loss or damage arising from the contractor's failure to fulfil his contract, the trial Judge, in an action against such surety, rightfully ordered the plaintiff to furnish the defendant with particulars of loss, together with full details as to how it arose, where the only damages claimed referred to in the plaintiff's statement was the amount found by the architect to be due from the contractor to the plaintiff.

Power River Paper Co., Ltd. v. Wells Construction Co. and American Surety Co., 2 D.L.R. 340, 17 B.C.R. 37.

(§ I A—8)—APPLICATION OF PAYMENTS.

Where an agent has become bonded after he was in the company's debt and subse-

quent payments are applied in payment of specific premiums due prior to and not covered by the bond, and this to the knowledge of the debtor, the bondsmen or sureties cannot complain of such imputation of payment and be relieved from liability under the bond on the ground that if the imputation had been made against premiums covered by the bond they would be clear. [Morgan v. Western, 3 Que. K.B. 51, explained.]

London and Lancashire Fire Insurance Co. v. Hart, 8 D.L.R. 332; Northern Insurance Co. v. Hart, 8 D.L.R. 805.

B. Release or discharge.

(§ I B—11)—By change of contract.

In an action upon a bond, where the surety resists upon the plea that the contract guaranteed by the bond had been varied to the prejudice of the surety by a subsequent agreement between the principal and the obligee, the Court will consider whether the alleged variance was a matter contemplated and provided for in the guaranteed contract itself, and well known to the surety from the outset.

City of Guelph v. Jules Motor Co. et al., 8 D.L.R. 635, 4 O.W.N. 401, 23 O.W.R. 823.

II. Rights and remedies of surety.

(§ II—15)—Rights and remedies of sureties.

Where co-sureties on a contractors' bond entered into a written agreement between themselves prior to the abandonment of the work by the contractors under which they jointly completed the work, the draw-back of 20 per cent. returned by the owner as the work proceeds from the value of all the work from the commencement of the contract is, when finally paid, to be considered as salvage attributable to the joint efforts of the sureties, and where the amount owing for the work on completion is received by one of the sureties, who was both the assignee of the contractors' rights under the contract, and the agent of his co-sureties for completing the contract, he is liable to account to his co-sureties for the draw-back of twenty per cent.

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

Where co-sureties upon a contractors' bond for the due performance of work, prior to the abandonment of the work by the contractors, in order to protect themselves, appoint one of their number to represent all with authority to do all things necessary for the carrying on of the work, and on their completion of the work a loss results, the co-sureties are liable to the managing surety for contribution for advances made under the new obligation created by the agreement so made between themselves.

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

(§ II—16)—Between sureties.

One of several co-sureties on a contractors' bond, who has made advances to the contractors for materials and labour which enabled the contractors to continue the work, and who has obtained an assignment of all moneys due or to become due under the contract, has no greater or higher rights than the contractors had, and he cannot, apart from contract, claim contribution from his co-sureties for such advances even though these, by enabling the contractors to proceed with the work, lessened the liability of the sureties. [Ludd v. Chamber of Commerce, 60 Pac. R. 713, followed.]

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

PRIORITY.

Between assignees, see Assignment.

In case of insolvency of corporation, see Companay, VI.

Between mortgage and other claims, see Mortgage, II.

PRIVATE ROADS.

Easement in private way, see Easements.

Crossing over railroad, see Railroads.

PRIVATE WAY.

Implied covenant as to, see Covenants and Conditions, II.

Easement in, see Easements.

PRIVILEGE.

Of witness, see Criminal Law; Witnesses, II.

In libel case, see Evidence; Libel and Slander, II.

Right of public service corporation to exercise, see Public Service Corporations.

Of exemption from arrest, see Writ and Process, II.

In real property, see Fraudulent Conveyance.

Plea of privilege, see Pleading; Libel and Slander.

Privileged claim in insolvency, see Insolvency.

Privileged claim on company winding up, see Company, VI.

Privileged claim on assignment for creditors, see Assignment for Creditors.

Builders' lien or privilege, see Mechanics' Liens.

PRIZE FIGHTING.

(§ I- 2)—Definition.

To constitute a "prize fight" under Criminal Code secs. 31 and 106 (Criminal Code of Canada, 1906), the encounter must be between two persons acting together, with the intention of fighting, whether with or without gloves, till one or the other gives in from exhaustion or from injuries received.

The King v. Fitzgerald, 19 Can. Cr. Cas. 145.

In the statutory definition of a prize fight (Criminal Code, 1906, sec. 31) as an "encounter or fight" with fists or hands between two persons who have met for such purpose by previous arranagement, the words "encounter" and "fight" are synonymous.

The King v. Fitzgerald, 19 Can. Cr. Cas. 145.

(§ I—3)—Boxing match.

A sparring or boxing match for a given number of rounds, which would not ordinarily exhaust either participant, is not a "prize fight," although the boxers were paid fixed sums, not depending upon the result, for giving the exhibition.

The King v. Fitzgerald, 19 Can. Cr. Cas. 145.

PROBABLE CAUSE.

Want of, for prosecution, see Malicious Prosecution, II.

As question for jury, see Trial.

PROBATE.

Jurisdiction as to probate matters, see Courts, II.

Of wills generally, see Wills, I.

Duties of executors, see Executors.

PROCEEDINGS SUPPLEMENTARY.

See Execution, II.

PROCESS.

Abuse of, see Abuse of Process.

See also Writ and Process.

PRO CONFESSO.

Judgment pro confesso, see Judgment, I.

PRODUCTION OF DOCUMENTS.

See Discovery and Inspection.

PROFITS.

Damages for loss of, see Damages, III.

Accounting for in case of infringement of trade-mark, see Damages, III.

Right to share in, as proof of partnership, see Partnership.

Question for jury as to right to recover, see Trial.

PROHIBITION.

I. Power to issue.
II. Adequacy of other remedies.
III. Persons to, or against whom, writ may be granted.
IV. Proceedings that may be forbidden.
V. Procedure.

I. Power to issue.

(§ I—1)—Power to issue.

An unsuccessful motion before the Division Court Judge under sec. 160 of the Division Courts Act to discharge garnishment proceedings does not defeat the right to prohibition for want of jurisdiction.

Re McCreary v. Brennan, 3 D.L.R. 318, 3 O.W.N. 1052.

A Judge in Chambers has no jurisdiction to entertain a motion for a prohibition to a County Court Judge. [Watson v. Lillico, 6 M.R. 59, followed.]

Re Landsborough, 18 W.L.R. 601, 21 Man. L.R. 708.

II. Adequacy of other remedies.

(No cases.)

III. Persons to, or against whom, writ may be granted.

(§ III—10)—Persons to, or against whom, writ may be granted.

The Council of the Bar when investigating a charge against an advocate accused of having committed an act derogatory to the dignity of the profession exercises judicial functions; and as such constitutes an "inferior court" amenable to certiorari and prohibition. [Honan v. Bar of Montreal, 30 Can. S.C.R. 1, followed; O'Farrell v. Brassard, 1 L.N. (Que.) 28, distinguished.]

Gosselin v. Bar of Montreal (No. 1), 2 D.L.R. 19.

IV. Proceedings that may be forbidden.

(§ IV—15a)—Garnishment proceedings in Division Court.

Prohibition lies against garnishment proceedings in a Division Court before judgment in an action for breach of warranty of quantity upon a sale of goods such being a "claim for damages" within the exception of sec. 146 of the Division Courts Act (Ont.), and there being, therefore, no jurisdiction in the Division Court to issue garnishment proceedings before judgment in respect thereof.

Re McCreary v. Brennan, 3 D.L.R. 318, 3 O.W.N. 1052.

(§ IV—20)—Special tribunals.

Where a board of investigation has been appointed by the Minister of Labour on a Judge's order directing an investigation into an alleged combine in virtue of the Combines Investigation Act (Can.), prohibition will not lie to prevent the board from carrying on its enquiry on the ground that the applicants for such investigation were not persons competent under the Act to make such application; the procedure leading up to the order directing an investigation being sharply distinguished from the procedure of the investigation proper and not forming part thereof.

United Shoe Machinery Co. v. Laurendeau, 2 D.L.R. 77.

V. Procedure.

(§ V—27)—Objection to jurisdiction.

Where there is doubt in fact or law whether an inferior Court is exceeding its

jurisdiction, or is acting without jurisdiction, the superior Court should exercise its discretion to refuse prohibition. [Worthington v. Jeffries, L.R. 10 C.P. 379, referred to.]

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.L.R. 381.

(§ V—32)—ILLEGAL AND IRREGULAR EXERCISE OF JURISDICTION.

Upon a motion for prohibition, where, in a matter in which it has jurisdiction, an inferior Court has made an order which is incorrect, but which it can easily set right, the proper course is not to grant prohibition, but to enlarge the motion so as to give the inferior Court an opportunity to correct the mistake, and, if it be corrected, to dismiss the motion.

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.L.R. 381.

Prohibition is not ex debito justitiæ; it is an extreme measure, and is not granted in case of a mere illegality or irregularity not going to the jurisdiction, or where the judicial officer having jurisdiction exercises it in an irregular manner. [See In re Birch, 15 C.B. 743; Re Cummings and County of Carleton, 25 O.R. 607, 26 O.R. 1; Regina v Mayor of London, 69 L.T.R. 721; Regina v. Justices of Kent, 24 Q.B.D. 181.]

Rex v. Hamlink, 5 D.L.R. 733, 3 O.W.N. 1256, 22 O.W.R. 107, 26 O.L.R. 381.

PROMISSORY NOTES.

See Bills and Notes.

PROMOTERS.

Of companies, see Companies, IV.

PROOFS OF LOSS.

In general, see Insurance.

PROPERTY.

Expropriation of, see Eminent Domain.

PROSTITUTION.

Houses of, generally, see Disorderly House.

PROTEST.

Of note, see Bills and Notes, IV.
Of cheque, see Bills and Notes.

PROVOCATION.

Sufficient to reduce murder to manslaughter, see Homicide.

PROXIMATE CAUSE.

I. IN GENERAL.
II. OF DEATH, INJURY OR LOSS BY THE ELEMENTS.
A. Of loss by fire or wind.
B. Of damage by lightning.
C. Of death or injury by electricity.
D. Of loss by explosion.
E. Of drowning.
F. Of injury by water.
III. OF LOSS OR INJURY BY CARRIER OR RAILROAD COMPANY.
IV. OF INJURY ON DEFECTIVE HIGHWAY OR BRIDGE.
A. In street.
B. On sidewalk.
C. On bridge.
V. OF INJURY TO SERVANT.
VI. OF INJURY BY FALLING OBJECTS OR BUILDING.
VII. OF INJURY INFLICTED BY ANIMAL.
VIII. OF DAMAGE BY CRIME.
IX. OF INJURY BY VIOLATION OF ORDINANCE.
X. OF DAMAGE BY FRIGHT.
XI. OF DEATH BY DRUGS OR SUICIDE.

Sufficiency of evidence of, see Evidence.
Sufficiency of pleading to shew, see Pleading.
Question for jury as to, see Trial.
Correctness of instruction as to, see Trial.
Of death of insured, see Insurance.
Of accident during fog, see Collision.

I. In general.

(§ I—8)—PHYSICAL INJURY.

A cause of an efficient cause of injury is not itself an efficient cause or causa causans. [Hawthorne v. Canadian Casualty Co., 14 O.L.R. 166, and in appeal, Canadian Casualty Co. v. Hawthorne, 39 Can. S.C.R. 558, considered; Boulter v. Canadian Casualty Co., 14 O.L.R. 166, and in appeal, Canadian Casualty Co. v. Boulter, 39 Can. S.C.R. 558, considered.]

Wadsworth v. Canadian Railway Accident Insurance Co., 3 D.L.R. 668, 21 O.W.R. 601, 3 O.W.N. 828, 26 O.L.R. 55.

Where one person is negligent, and, by the negligence or wilful act of another, his negligent act causes injury to a third person, if the first negligent act be not in its nature such that the second might be looked for as a natural and probable consequence, then the first negligent person is not responsible, but, if it be so, then he is liable. [See Beven on Negligence, 3rd ed., 76.]

Johnson v. City of Montreal and The Merchants' Telephone Co., 7 D.L.R. 233, 42 Que. S.C. 450.

II. Of death, injury or loss by the elements.

A. Of loss by fire or wind.

(§ II A—15)—OF LOSS BY FIRE OR WIND.

Where an epileptic fit leaves a man unconscious and while in that condition he is so severely burned that death results,

the proximate cause of death is the fire and not the epileptic fit.

Wadsworth v. Canadian Railway Accident Insurance Co., 3 D.L.R. 668, 21 O.W.R. 601, 3 O.W.N. 828, 26 O.L.R. 55.

Breach of a contract to furnish water for the extinguishing of fires cannot be said to be the cause of a loss by fire, as it may have been caused by any one or more of a number of causes; and if the loss, as a fact, is not the direct result of a breach by the water company of its contract to furnish water for extinguishing fires, it is not liable for the loss resulting from the fire. [Farnham on Water and Water Rights 848, referred to.]

Belanger v. Town of St. Louis, 8 D.L.R. 601.

(§ II A—17)—Spread of fire across intervening lands.

Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the Judge in his instructions to the jury fully covers that point.

King Lumber Co. v. Canadian Pacific R. Co., 7 D.L.R. 733, 22 W.L.R. 553.

III. Of loss or injury by carrier or railroad company.

(No cases.)

IV. Of injury on defective highway or bridge.

(No cases.)

V. Of injury to servant.

(§ V—104)—Delivery or cartage.

The master's negligence in furnishing for the use of his servants a horse which he knew had the vice of running away is the proximate cause of an injury received by a servant from the horse running away while he was, at his master's request, assisting a fellow-servant in the delivery of the master's goods.

Veitch v. Linkert, 3 D.L.R. 39, 3 O.W.N. 874.

VI. Of injury by falling objects or building.

(§ VI—105)—Of injury by falling objects or building.

In order to absolve a sub-warrantor who manufactured a steel structure to support a water tank erected upon the roof of a building, from liability for damages occasioned by the fall thereof, on the ground that the walls were defective, the defective condition must be shewn, and it must appear that that was the immediate and proximate cause of its fall.

Wilson v. The H. G. Hogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

VII. Of injury inflicted by animal.

(No cases.)

VIII. Of damage by crime.

(No cases.)

IX. Of injury by violation of ordinance.

(No cases.)

X. Of damage by fright.

(No cases.)

XI. Of death by drugs or suicide.

(No cases.)

PUBLICATION.

Of libel, what constitutes, see Libel and Slander, II.

Service of process by, see Writ and Process, II.

PUBLIC CHARITIES.

See Charities.

PUBLIC CONTRACTS.

Municipal contracts generally, see Municipal Corporations, II.

Contract for public improvement, see Public Improvements, II.

In general, see Contracts, VII.

PUBLIC HEALTH.

See Health.

PUBLIC IMPROVEMENTS.

I. In general; authority for.
II. Contracts.
III. Assessments.
A. In general.
B. Nature of improvement.
C. Property subject to; exemption.
D. Procedure.
E. Rules of apportionment.
F. Enforcement.
IV. Damages.

Matters peculiar to drains and sewers, see Drains and Sewers.

Improvements peculiar to highways, see Highways, III.

I. In general; authority for.

(No cases.)

II. Contracts.

(§ II—10)—Contracts.

A person ordered by the Public Utilities Commission to execute certain work is entitled to be paid therefor only if he has complied with the terms of the order ordering such work done after his account,

properly proved, has been approved by the Lieutenant-Governor in council on the recommendation of the commission; and there is no right to payment for work done under orders of the commission (a) if such work has exceeded the scope of the order given, (b) if the value thereof has not been established by legal proof, (c) if the account has not been submitted to the Lieutenant-Governor in council.

La Compagnie Electrique de Grandmère v. Public Utilities Commission, 6 D. L.R. 92.

III. Assessments.

B. Nature of improvement.

(§ III B—20)—NATURE OF IMPROVEMENT.

In the case of a general work benefiting the whole of a number of bodies or divisions of marsh, such as a dam, aboiteau, etc., there is nothing to prevent the selection by the proprietors of the whole area of a commissioner for the purpose of constructing or repairing such work, and the cost may be assessed directly upon the proprietors within the whole area, notwithstanding the authority for other purposes of the commissioners of the various bodies contained within such area. Where for a long period of years one of the proprietors of land lying within one or more of the bodies or divisions contained within such area, and his predecessors in title, have assented to this method of carrying on the work, and the work has been regarded as necessary for the protection of this particular area, such proprietor will not be permitted to contest his liability to pay the amount assessed upon him on the ground that other outside areas are also benefited and that they should have been included. The word "reclaim" as used in the Act (Acts of 1893, ch. 80) extends to marsh lands that have been already dyked as well as to lands which have not yet been dyked. The Act repealing the County of Cumberland Sewers Act provided in respect to "any pending matter or thing" that "proceedings may be continued either under the Marsh Act (R.S. 1900, ch. 66) or under the Act hereby repealed":—Held, that the word "proceedings" where used was to be given the same meaning as in the Interpretation Act, R.S. 1900, ch. 1, sec. 15. The County of Cumberland Sewers Act of 1893, ch. 80, sec. 5, provided for the appointment by the commissioner "from among the proprietors of such lands" of one or more overseers. Held merely directory and that the commissioner would be justified in appointing as an overseer a person who was not a proprietor. A rate will not be set aside on account of a clerical error as to the amount, which can be corrected by the Court on certiorari or otherwise. [Baker v. McFarlane, 8 N.S.R. 94, referred to; In re Bishop's Dyke, 20 N.S.R. 263, distinguished.]

Corbett v. Pipes, 45 N.S.R. 243, 9 E.L.R. 127, 532.

IV. Damages.

(No cases.)

PUBLIC LANDS.

I. CANADA (Federal).
- A. In general.
- B. Disposal through land department; entry; sale.
- C. Patents.

II. OF THE PROVINCE.

Mines on, see Mines, I.

I. Canada.

A. In general.

(§ I A—1)—IN GENERAL.

To give title or possessory rights as against the Crown the proof should be clear and unequivocal. The occupation and use of land on the sea shore, where the acts of occupation (apart from the erection of small structures not of a permanent character) are shown to have been of a casual, temporary and irregular character, in the absence of enclosure or anything to indicate the extent of possession, are not sufficient to give title as against the Crown.

Carr v. Ferguson, 45 N.S.R. 132; 9 E. L.R. 218.

C. Patents.

(§ I C—15)—PATENTS.

Although a commissioner of lands must give a pre-emption record holder thirty days' notice of the hearing of an application to cancel his pre-emption record, yet, if the pre-emptor appear and attend on the hearing at an earlier date, he cannot object afterwards that he has not received proper notice:—Held, further, on the facts, that the commissioner was right in cancelling the record for non-compliance with the Land Act as to occupation of the land.

Heselwood v. Jones, 16 B.C.R. 485.

II. Of the Province.

(§ II—21)—GRANT OR PATENT.

Where a grant from the Crown containing no special clause in respect of the water power or the building of a mill, and expressly reserving to the Crown, "the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid," the grantee's rights are limited by the terms of the patent and cannot be enlarged by the official correspondence and documents of the Crown Lands Department relating to the issuing of the patent. [Wyatt v. At-

torney-General of Quebec, [1911] A.C. 489, followed.]

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

Where there is not enough land in a township to make out the lots as surveyed, the grantee from the Crown who first takes possession of a lot is entitled to all of the lands called for in his allotment, and a subsequent grant, the boundaries of which overlap those of the prior grant, must yield to the latter

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

A grant by the Crown of designated numbered lots in a township excludes the inference that such lots were included in a prior grant of a township to such grant and several others, where, in the earlier grant, the land was to be subsequently allotted or laid out to each grantee by a commission to be appointed by the Crown, and such lots were not allotted by them to such grantee.

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

A "township grant" from the Crown to many grantees is valid although it does not specify the locality of the area to which each grantee is to be entitled, reliance being placed therefor on the Provincial allotment proceedings for the location and registering of the allotments. [DesBarres v. Shey, 8 N.S.R. 327, affirmed by the Privy Council, 29 L.T.N.S. 592, specially referred to; see also Swinehammer v. Hart, 5 D.L.R. 106.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

In a case of overlapping by a subsequent grant of part of the same land passed by an earlier grant, the constructive possession of the area is in the person who has the senior or better title. [McInnes v. Stewart, 45 N.S.R. 435; Hunnicut v. Peyton, 102 U.S. 333, referred to.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

Where one acquires land from a person who obtained it from the Crown by a township grant made to several grantees although it did not specify the location or the area of the land to which each grantee was entitled, the locations being afterwards allotted them by commissioners appointed by the Crown for that purpose, no subsequent allotment will be permitted to disturb the prior allotment so made or the locations of land of which possession had been taken and held. [DesBarres v. Shey, 8 N.S.R. 327, affirmed by Privy Council, 29 L.T.N.S. 589; Boutilier v. Knock, 6 N.S.R. 77, specially referred to; see also Swinehammer v. Hart, 5 D.L.R. 106.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

(§ II—23)—Forfeiture; cancellation.

Judgment should be withheld until the Attorney-General of the Province is given an opportunity to intervene so as to claim on behalf of the Crown the cancellation of a land patent as wrongfully obtained from the lands department in an appeal by the defendant from the judgment of the trial Judge in favour of the plaintiff in an action for a declaration that the latter was the owner in fee of a certain island and for an injunction restraining the defendants from entering thereon, where the evidence shewed that the plaintiff's predecessor in title to the island, who made application to the Minister of Lands, for an island in a lake, stated that he wanted the largest island therein, but being misled by a departmental map, he had erroneously described it in his former application as being intersected by a certain line as indicated on such map, that a patent was issued to him for a different island, described as containing two and one-half acres; that he took and held possession of the largest island not intersected by such line and which contained about seven acres; and that the defendant, learning some time later that there was question as to the title claimed by the plaintiff as successor in title to the alleged patentee, made application for a patent for the larger island, which was issued to him after a hearing by the Minister of Lands to which the plaintiff was a party, where the trial Judge has found as a fact in the decision being appealed from that the statements made by the defendant to the lands department were made falsely and fraudulently, and that the decision of the lands department in defendant's favour had consequently been obtained by the defendant's fraud.

Zock v. Clayton, 6 D.L.R. 205, 3 O.W.N. 1611, 22 O.W.R. 813.

PUBLIC OFFICERS.

See Officers.

PUBLIC POLICY.

As affecting contracts, see Contracts, III.

(§ I—5)—Communication between solicitor and client.

The privilege attached to communications between solicitor and client is given in favour of the client and not of the solicitor, and is a matter of public order both under French law and English law.

Montreal Street Railway v. Feigleman, 7 D.L.R. 6.

PUBLIC SCHOOLS.

See Schools.

PUBLIC-SERVICE CORPORATIONS.

Right to exercise eminent domain, see Eminent Domain.

See also Carriers; Railroads; Street Railways; Telegraphs; Telephones; Waters, III.

PUBLIC WATER SUPPLY.

See Waters, III.

PUBLIC WORKS.

Contracts for, see Municipal Corporations, II.; Public Improvements, II.

PUNISHMENT.

For contempt, see Contempt, V.
For crime, see Criminal Law, IV.

PUPILS.

See Schools.

PURCHASE MONEY.

Payment of for lands, see Vendor and Purchaser, I.
For goods, see Sale, III.
Generally, see Contract.

QUALIFICATIONS.

Of voters, see Elections, I.
For office, generally, see Officers, I.

QUALITY.

Implied warranty as to, see Sale, II.

QUANTITY.

Rights of purchaser in case of shortage, see Sale.
Of land sold, see Vendor and Purchaser, I.

QUANTUM.

See Damages.

QUANTUM MERUIT.

Right of real estate broker to recover on, see Brokers.
Recovery on, generally, see Contracts, IV.

QUARANTINE.

Against contagious disease generally, see Health.

QUASHING.

For want of Jurisdiction, see Appeal, II.
Of indictment, see Indictment, etc., III.

QUESTION FOR JURY.

See Trial, II.

QUIETING TITLE.

See Cloud on Title.

QUO WARRANTO.

I. NATURE OF PROCEEDING.
II. WHEN PROPER REMEDY.
A. In general.
B. To corporations.
C. As to office.
III. WHO ENTITLED TO MAINTAIN; LEAVE.
IV. PROCEDURE RELIEF.

I. Nature of proceeding.

(No cases.)

II. When proper remedy.

C. As to office.

(§ II C—30)—AS TO OFFICE.

After the close of a municipal nomination under the Manitoba Municipal Act, R.S.M. 1902, ch. 116, and after having granted a poll to take the votes for the respective candidates, the returning officer is functus officio as to the nomination and has no jurisdiction on a succeeding day to withdraw the order for a polling of the votes or to declare one of the candidates elected on the ground of disqualification of his opponent as being already an office-holder of the same municipality; there has been no "election," either at the nomination or at the polls, which could be questioned by an election petition under the Manitoba Municipal Act and the proper method of contesting the right to the office which the candidate so declared elected had assumed to fill, is by quo warranto. [Re St. Vital Municipal Election; Tod v. Mager (Decision No. 1), 1 D.L.R. 565, 20 W.L.R. 537, affirmed, as to the right to proceed by quo warranto but on a different ground.]

Re St. Vital Municipal Election; Tod v. Mager (No. 2), 3 D.L.R. 350, 21 W.L.R. 203.

To constitute a contract between a municipal corporation and a councillor there must be a mutual obligation. Such does not exist in the case where a mayor, for pay, supervises the construction of works ordered by the corporation but executed and paid for by the Colonization Department of the Province. Assuming that the mayor is disqualified in such case a writ of quo warranto issued against him will be quashed if at the time it is issued the contract had ceased to exist.

Carignan v. Neault, 14 Que. P.R. 14 (Sup. Ct.).

An allegation on information and belief in an affidavit filed by the relator in proceedings to contest an election, that the municipal councillor whose election is questioned is not a British subject either by birth or naturalization is not admissible under Con. Rule 518 requiring affidavits to be confined to a statement of facts within the deponent's knowledge, the quo warranto motion not being an interlocutory one so as to warrant the admission of affidavits on information and belief. [Robinson v. Morris, 15 O.L.R. 649, specially referred to.]

Rex ex rel. Froehlich v. Woeller, 3 D.L.R. 281, 3 O.W.N. 838, 21 O.W.R. 672.

Under sub-section (c) of section 217 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, providing that a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was not duly elected by a majority of lawful votes and under section 218 of the same Act providing that an election shall not be questioned on any of the grounds mentioned in section 217 except by petition, quo warranto will not lie to question a municipal election on that ground. (Per Howell, C.J.M., and Perdue, J.A.)

Re St. Vital Municipal Election; Tod v. Mager (No. 2), 3 D.L.R. 350, 21 W.L.R. 203.

When after two candidates for a municipal office are nominated, objection on the ground of disqualification is made to one of the candidates and the returning officer improperly gives effect to this objection and declares the other candidate elected without the votes being taken, the right to the office is properly tried upon an information in the nature of quo warranto.

Re Vital Municipal Election; Tod v. Mager. 1 D.L.R. 565, 20 W.L.R. 537, 22 Man. L.R. 136.

III. Who entitled to maintain; leave.

(§ III—37)—LEAVE.

A motion for leave to file an information in the nature of a quo warranto against a stipendiary magistrate on the ground that he had not taken the oath of allegiance will be dismissed if the oath of allegiance has been since taken by him, although he had acted as a magistrate in the meantime; and the motion is properly refused without considering whether or not the oath is essential.

The King v. MacKay, 1 D.L.R. 481, 19 Can. Cr. Cas. 229, 45 N.S.R. 501.

IV. Procedure relief.

(§ IV—41)—ALLEGATIONS; PLEADING.

Under Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 220, providing that in proceedings to contest the election of certain municipal officers, upon the relator shewing by affidavit reasonable ground for supposing that the election was not legal, etc., the Judge shall authorize the relator upon entering into a sufficient recognizance to serve a notice of motion to determine the matter and under section 222 of the same Act requiring the relator before serving the notice to file all the material upon which he intends to rely, an application upon the hearing of the motion to file such recognizance is too late.

Rex ex rel. Frochlich v. Woeller, 3 D.L.R. 281, 3 O.W.N. 838, 21 O.W.R. 672.

Under Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 220, providing that proceedings to contest the election of certain municipal officers may be instituted if, within six weeks after the election or one month after acceptance of office by the person elected, the relator shews reasonable ground for suspicion that the election was not legal, etc., the application of the relator comes too late if made more than six weeks after the election and more than a month after the acceptance of the office. [R. ex rel. Telfer v. Allan, 1 P.R. (Ont.) 214, applied.]

Rex ex rel. Froehlich v. Woeller, 3 D.L.R. 281, 3 O.W.N. 838, 21 O.W.R. 672.

Procedure—Preliminary objections—Failure to entitle notice of motion—Reference to wrong statute—Non-payment of taxes as ground for avoiding election.

Rex v. George, 7 D.L.R. 879.

RACES.

Statute prohibiting bookmaking and pool selling, see Gaming.

RAILROADS.

See Railways.

RAILWAY COMMISSION.

Powers as to railways and common carriers, see Carriers.

Powers as to telephone companies, see Telephones.

RAILWAYS.

I. FRANCHISE AND RIGHTS; LEASES; RAILROAD AID.

II. CONSTRUCTION AND OPERATIONS.
- A. In general; change of gauge or route.
- B. Crossings.
- C. Fences.
- D. Operation.

III. ACCIDENTS AT CROSSINGS.

IV. CONTRIBUTORY NEGLIGENCE.

V. DIVERSION OR OBSTRUCTION OF WATER.

VI. INSOLVENCY AND SALE OF RAILWAY.

Matters in common with other corporations, see Companies.

Condemning property for, see Eminent Domain.

Damages in condemnation cases, see Damages, III.

Liability for acts of servants, see Master and Servant.

As carriers, see Carriers.

Governmental control of, as common carriers, see Carriers, III.

Street railways, see Street Railways.

I. Franchise and rights; leases; railroad aid.

(§ I—2)—FRANCHISES.

The sale or conveyance of lands for right of way permitted under the Railway Act from institutes to railway companies, is binding upon the substitutes, notwithstanding violation of the rules respecting payment of the consideration money. Hence, when

the company has paid the consideration money to the institute, instead of paying him the annual rent thereon, the substitute has no recourse against the railway company other than a right to recover his share of the consideration money, as determined at the time of the sale. He cannot claim, at the opening of the substitution, his share of the accrued value of the land sold.

Latour v. Grand Trunk R. Co., 40 Que. S.C. 514, 13 Can. Ry. Cas. 404.

(§ I—8)—CONSOLIDATION.

Application under section 361 of the Railway Act for a recommendation by the board to the Governor-in-Council for the sanction of amalgamation agreements between Dominion and provincial railway companies. The Montreal Park and Island and Montreal Terminal Ry. Cos. were incorporated by the Parliament of Canada and the Montreal Street Ry. Co., by a statute of the Province of Quebec. Agreements were made between the three companies apparently pursuant to the authority given in two special Acts of the Dominion incorporating the first two railway companies for the sale of these railways with their facilities and assets to the provincial railway. (1) That under sections 361 and 362 (which must be read together) the board has no jurisdiction to deal with the amalgamations of railway companies incorporated under Dominion and provincial statutes. (2) That the proper mode of procedure would be to apply as provided by the special Acts for sanction of the agreements to the Governor-in-Council.

In re Amalgamation Agreements, 13 Can. Ry. Cas. 150.

II. Construction and operations.

A. In general; change of gauge or route.

(§ II A—10)—IN GENERAL.

Application for approval of its location, "Prince Rupert westerly, mile 0 to mile 3.23." The applicant proceeded to construct the roadbed but found that it could not obtain some $400,000 under its contracts with the Government unless it was able to shew that the three and one quarter miles of railway had been constructed under the provisions of the Railway Act. The applicant contended that this being merely the yard of the company, no route map or location plan was required. (1) That the company not having complied with the provisions of sections 157, 158, and 159 of the Railway Act, the application must be refused. (2) That the board had no jurisdiction under 9 and 10 Edw. VII. ch. 50, sec. 2, empowering the board to approve of works constructed without approval before December 31st, 1909, since the roadbed in question had been constructed subsequent to that date.

In re Prince Rupert Location, Grand Trunk Pacific R. Co., 13 Can. Ry. Cas. 153.

Applications for an order directing the respondent to erect and maintain stations at Kitsumkalum and Stewart's Landing. The respondent proposed to locate stations at Littleton and Copper River and if these applications were granted there would be four stations within less than eleven miles in a sparsely settled locality. The location of a station at Kitsumkalum would involve a yard on a grade with a bridge over a river at one end and a highway crossing in the neck of the yard, while a station at Stewart's Landing would be about three miles northerly from Littleton and about two miles southerly from Copper River. It was held, that the application must be refused, and the locations proposed by the respondent approved.

Eby et al. v. Grand Trunk Pacific R. Co., 13 Can. Ry. Cas. 22.

Under sec. 159 of the Railway Act of 1906 the Board of Railway Commissioners ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants shall "make full compensation to all persons interested for all damage sustained by reason" thereof. It was held, that the order must be rescinded. Under sec. 237 (3) the power to award damages was in respect of construction, and sec. 47 did not on its true construction extend that power to meet the case of location; and as the condition failed there was no approval. [Grand Trunk Pacific and Canadian Pacific R. Cos. v. City of Fort William, Fort William Land Investment Co. et al., 43 Can. S.C.R. 412, 11 Can. Ry. Cas. 271, reversed.]

Grand Trunk Pacific R. Co. v. Fort William Landowners and Fort William Land Investment Co. et al., 13 Can. Ry. Cas. 187, [1912] A.C. 224.

(§ II A—14)—ALTERATION OF ROUTE.

The appellant company having constructed a spur track or siding into the respondent's yard for the convenience of traffic, in November, 1904, cut it off, and on February 19, 1906, the Board of Railway Commissioners, under secs. 214 and 253 of the Dominion Railway Act of 1903, directed its restoration, which was carried out on September 28, 1906. In an action for damages for breach by the appellants of their statutory obligations between October 31, 1904, and September 28, 1906:—It was held, that under sec. 42 of the Act of 1903, the order of the board, affirmed as it was by the Supreme Court on appeal, was conclusive as to the question of fact, that the facilities previously enjoyed by the respondents were of a kind to which they were entitled. It was held, also, that the special provisions of the Act as to one year's limitation (see sec. 242 substantially re-enacted by sec. 306 of the Railway Act of 1906), relate to damages

sustained by the construction or operation of the railway and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway. Canadian Northern R. Co. v. Robinson, 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304, affirmed.

Canadian Northern R. Co. v. Robinson, 13 Can. Ry. Cas. 412, [1911] A.C. 739.

B. Crossings.

(§ II B—15)—Crossings.

Application under section 176 of the Railway Act for leave to expropriate a portion of a triangular piece of land for the purpose of constructing a spur across it from the applicant's branch line on Lauriston street, in the city of Saskatoon. The said land had been acquired by the respondent from the former owner, one A. Bowerman, the respondent had been authorised by order of the board to construct certain spurs across the land in question when the applicant's spur was constructed with the exception of the section crossing the portion of the land aforesaid. The order authorising construction of the branch line and the said spur of the applicant was made before the respondent had acquired the said land. It was held (1) that the applicant should be authorised to take so much of the said land as would be necessary for the construction of its spur. (2) That if a dispute should arise as to the area necessary to be so taken, the matter should be determined by an engineer of the board. (3) The expense of making the necessary railway crossings on the land should be borne jointly by the applicant and respondent. [Canadian Northern R. Co. v. Canadian Pacific R. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; Grand Trunk Pacific R. Co. v. Canadian Pacific R. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, distinguished.]

Qu'Appelle, Long Lake and Saskatchewan Ry. and S.S. Co. v. Canadian Pacific Ry. Co., 13 Can. Ry. Cas. 131.

The applicant, the town of St. Pierre, alleged that the respondent intended to close a certain street where it crossed its tracks and asked that the respondent should bear part of the cost of protecting the crossing. The street in question had been originally a farm crossing but was now used as a general public highway crossing. The board's officers, after inspection, reported that the crossing should be made a regular highway crossing and be fully protected by gates and watchmen. The board ordered that the applicant should reimburse the respondent for the cost of construction, maintenance and protection of the crossing, but was entitled to receive from the Railway Grade Crossing Fund, 20 per cent. of the cost of the work.

Town of St. Pierre v. Grand Trunk R.W. Co., 10 E.L.R. 381.

(§ II B—17)—Crossing of steam road by street railway.

Application that the municipally owned electric railway of the applicant upon a highway be granted leave to cross the line of the respondent by a subway instead of a level crossing. It was held (1) that it was shewn that a plan shewing the location of the street was registered prior to the location plan of the respondent. (2) That the street now being within the boundaries of the applicant municipality carried with it the attribute of seniority acquired by the prior registration of the plan according to the provisions of Ordinance, North-West Territories, ch. 4, sec. 75 (1901), Public Works Act. (3) That the respondent should shew cause why an order should not be made for a subway, the cost to be apportioned equally between the applicant and the respondent subject to a contribution of 20 per cent. up to $5,000 to the cost of the work from the Railway Grade Crossing Fund.

City of Edmonton v. Edmonton, Yukon and Pacific Ry. Co., 13 Can. Ry. Cas. 128.

(§ II B—17a)—Crossing of steam road by electric interurban road.

An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieutenant-Governor-in-Council for approval, under sec. 122 of ch. 8, of the Alberta Statutes of 1907, as to steam railways under Federal control, since such application falls within sec. 227 of the Railway Act, R.S.C. (1906), ch. 37.

Edmonton Street R. Co. v. Grand Trunk Pacific R. Co., 4 D.L.R. 472, 21 W.L.R. 808.

Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to acquire the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

Edmonton Street R. Co. v. Grand Trunk Pacific R. Co., 4 D.L.R. 472, 21 W.L.R. 808.

(§ II B—18)—Highway crossing.

Leave was granted by the Board to a municipality to carry a highway over the right of way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right of way, with right of support by piers without payment of compensation to the railway companies.

The Village of Bridgeburg v. Grand

Trunk and Michigan Central R. Co.'s, 8 D.L.R. 951.

Section 75 of the North-West Territories Public Works Ordinance, 1901, is not limited in its application to land in an unincorporated village or town, but applies to all lands not within the limits of an incorporated city or town. The registration in the proper land titles office of a plan of subdivision shewing a street establishes the street as a highway from the date of registration. And, where a plan shewing a street was registered before the approval of the location plan of a railway, crossing a highway, not shewn on the railway plan, but shewn by a plan registered as above, the question of seniority was decided in favour of the highway; and the railway company were called upon to shew cause why they should not bear half the cost of a subway at the crossing, the highway having been included in the limits of a city.

City of Edmonton v. Edmonton, Yukon and Pacific R. Co., 21 W.L.R. 630.

A complaint by the town of St. Pierre that the respondent intended to close Simplex street where it crossed its tracks and asking that the respondent should bear part of the cost of protecting the crossing. Simplex street had been originally a farm crossing but was now used as a general public highway crossing. The board's officers reported that the crossing should be made a regular highway crossing and be fully protected by gates and watchmen. It was held, that the applicant must reimburse the respondent for the cost of construction, maintenance and protection of the crossing, receiving from the Railway Grade Crossing Fund, 20 per cent. of the cost of the protection works.

Town of St. Pierre v. Grand Trunk R. Co., 13 Can. Ry. Cas. 1.

Application to determine the character of the protection at a crossing of a highway by a railway and to apportion the cost thereof. The railway of the first respondent crosses a public highway leading to an amusement park, known as Grimsby Beach with a double track and the other respondent operates an electric railway on the east side of the highway ending a short distance south of the tracks of the first respondent. It was held (1) that one watchman should be employed from May 1 to October 1, for the first year to see if that would afford sufficient protection. (2) That the township should bear 15 per cent. and the first respondent the remaining 85 per cent. of the cost and that the second respondent should bear no portion of the cost of protection. Mr. Commissioner McLean, that the second respondent contributed to the danger and should pay half of 85 per cent. of the cost of protection.

Grimsby Beach Amusement Co. v. Grand Trunk and Hamilton, Grimsby and Beamsville Electric R. Cos., 13 Can. Ry. Cas. 138, 22 O.W.R. 258.

Crossing over highway—Order of Board of Railway Commissioners—Failure to comply with conditions imposed, where highway diverted—Rescission of order—New order for construction of overhead bridge.

Re Grand Trunk Pacific R. Co. and Fort Saskatchewan Trail, 7 D.L.R. 891, 21 W.L.R. 364.

Highway crossings—Application for construction of subway—Excessive expenditure—Proposed diversion of highway—Submission of plans.

Re Savoy and Canadian Northern R. Co., 7 D.L.R. 886, 21 W.L.R. 377.

(§ II B—21)—Private or farm crossing.

Applicant was owner of 72 acres, which was a sub-division of a larger farm, which had been provided with a farm crossing. The Dominion Railway Board ordered Grand Trunk R. Co. to construct a farm crossing for the applicant upon the dividing line between his land and that of his neighbour.

Riddell v. Grand Trunk R. Co., 13 Can. Ry. Cas. 216, 22 O.W.R. 331.

Application under secs. 252, 253 of the Railway Act, directing the respondent to construct a farm crossing for the proper enjoyment by the applicant of his land on the north side of the railway. The applicant's farm of 72 acres was a sub-division of a larger farm provided with a crossing, but was worked as a separate farm only, upon its being acquired by the applicant, thus requiring a crossing to join the two portions of the farm. The practice of the board has not been uniform, but not infrequently the entire cost of making a farm crossing has been imposed upon the railway company, especially in the Province of Quebec and Eastern Ontario, the facts and circumstances, especially the size of the farms being considered in each case. It was held, that the respondent should be directed by agreement to construct at its own expense a farm crossing for the applicant upon the dividing line between him and his neighbour.

Riddell v. Grand Trunk R. Co., 13 Can. Ry. Cas. 216, 22 O.W.R. 331.

The judgment of Clute, J., 24 O.L.R. 206, was affirmed, on the ground that the plaintiff's right to an undergrade crossing had been established as an easement by continuous user for twenty years.

Leslie v. Pere Marquette R. Co., 13 Can. Ry. Cas. 228, 25 O.L.R. 326.

The farm crossings which railway companies are obliged to provide for the convenience of the owners of the lands the railway runs through constitute a legal servitude and such owners are not obliged to establish a title thereto. When a company has once provided such crossings as it considers necessary it cannot close up any of

them on the ground that those left are sufficient. The Board of Railway Commissioners for Canada have no jurisdiction to declare an existing crossing unnecessary and authorize it to be closed up.

Saindon v. Temisconata R. Co., 41 Que. S.C. 337 (Ct. Rev.).

C. Fences.

(§ II C—25)—FENCES.

Duty to fence right-of-way — Order of Board of Railway Commissioners—Limitations of order as to particular localities.

Re Municipality of Nutana and Canadian Northern R. Co., 7 D.L.R. 888, 21 W.L.R. 380.

Railway companies which do not maintain their fences and gates in the condition required by law are guilty of negligence and liable for the loss of animals which get on the right of way and are killed there.

Bouchard v. Quebec Railway, Light and Power Co., 41 Que. S.C. 385 (Sup. Ct.).

A railway company which fails to maintain such fences and gates as required by the Provincial or Federal Railway Acts commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right of way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track. [Canadian Pacific R. Co. v. Carruthers, 39 Can. S.C.R. 251, and Rogers v. G.T.P.R. Co., 2 D.L.R. 683, specially referred to.]

Rowe v. Quebec Central Railway, 3 D.L.R. 175, 41 Que. S.C. 517.

D. Operation.

(§ II D 1—31)—SUNDAY LAWS.

Section 193 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, respecting operation on Sunday is, by virtue of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, binding upon an electric railway situate wholly within the Province of Ontario, which was incorporated by the Parliament of Canada in 1910, and declared to be a work for the general advantage of Canada.

Kerley v. London and Lake Erie Transportation Co., 6 D.L.R. 189, 3 O.W.N. 1498, 22 O.W.R. 646, 26 O.L.R. 588.

(§ II D 1—32)—DUTY TO OPEN VESTIBULE DOORS AT STATIONS.

It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station.

McDougall v. Grand Trunk R. Co., 8 D.L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

(§ II D 2—36)—TRESPASSERS.

A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury.

Cunningham v. Michigan Central R. Co., 4 D.L.R. 221, 3 O.W.N. 1395, 22 O.W.R. 481.

A brakeman of a railway company other than the defendant cannot recover for injuries sustained while, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute.

Cunningham v. Michigan Central R. Co., 4 D.L.R. 221, 3 O.W.N. 1395, 22 O.W.R. 481.

(§ II D 2—37)—LICENSEES AND PERMISSIVE USERS OF RIGHT OF WAY.

Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries.

Thompson v. Grand Trunk R. Co., 5 D.L.R. 145, 3 O.W.N. 1392, 22 O.W.R. 524.

A railway company will be liable in damages for injuries suffered by a person, who whilst attempting to cross the tracks to reach an adjoining roadway or whilst walking along the tracks with this end in view is struck by a train moving backwards (or engine backing up) when no one has been placed at the forward end of the train to warn persons at the crossings or along the tracks.

Grand Trunk R. Co. v. McSween, 2 D.L.R. 874.

(§ II D 2—38)—LOOKOUT; SIGNALS.

A number of railway cars which are connected and are forced backward by the concussion made in coupling will constitute a "train" before getting under way in a forward direction, and where there is a statutory obligation to station a brakeman on the last car of a train moving reversely, the railway must station the brakeman on the car last coupled, although the reverse motion is used only in the operation of taking on that car. [Hollinger v. C.P.R., 20 Ont. App. R. 244, 250, approved.]

Helson v. Morrisey, Fernie and Michel

Railway Co., 1 D.L.R. 33, 19 W.L.R. 835, 17 B.C.R. 65.

(§ II D 4—60)—SPEED.

In an action against a railway company for negligence, it appeared that a locomotive of the defendants was running at a dangerous rate of speed for the locality, and struck and killed a person who was driving a team and wagon over the track at a street crossing. There was a tool house near the crossing, which to some extent obstructed the view, and there was also another train shunting near by. The jury found that death was caused by the defendants' negligence in failing to reduce the speed of their train as provided by the Railway Act, and that the deceased had committed no acts of contributory negligence. No questions were submitted to the jury as to whether the defendants were guilty of any other acts of negligence. It was held, that as the noise of the shunting train might have reasonably engaged the attention of the deceased, and as his view near the crossing was obstructed by the tool house, the jury was justified in finding that there was no contributory negligence; but that following G.T.R. v. McKay, 34 S.C.R. 81, the verdict in the plaintiff's favour should be set aside, and (Wetmore, J., dissentiente) a new trial ordered.

Andreas v. Canadian Pacific Ry. Co., 7 Terr. L.R. 327.

(§ II D 6—70)—INJURIES TO ANIMALS BY TRAINS.

The plaintiff sued for damages for the loss of a horse killed upon the defendants' track by one of their cars. The horse was admittedly a trespasser. It was held (Britton, J., dissenting), that the defendants were not liable for the only negligence found by the jury, viz., that the motorman should have seen the horse on the track in time to enable him to stop the car. Grand Trunk R.W. Co. v. Barnett, [1911] A.C. 361, followed. Judgment of the County Court of the County of Essex reversed.

Bondy v. Sandwich Windsor and Amherstburg, R. Co., 24 O.L.R. 409, 13 Can. Ry. Cas. 57.

Action for the value of two horses alleged to have been killed by one of the company's trains through its neglect to fence its right of way at the place in question. The horses escaped from the pasture field by reason of the defective fence (slash fence) with which it was enclosed; strayed on to the unfenced right of way of the railway company and were killed by a passing train. It was held (1) that, under sub-section 4 of section 237 (now 294) of the Railway Act, 1903, the defendant escaped liability through the wilful act or omission of the owner of the animals in question by having a defective fence. (2) That, therefore, the exception in sub-section 4 of section 254, relieving a railway company from fencing did not need to be decided. Bourassa v. Canadian Pacific R. Co., 30 Que. S.C. 385, 7 Can. Ry. Cas. 41, followed.

Renaud v. Canadian Pacific R. Co., 13 Can. Ry. Cas. 358.

A railway company operating under and subject to the Railway Act of Canada is liable for killing horses at large upon the railway line, unless the railway company establishes under R.S.C. 1906, ch. 37, sec. 294 (4), that the animals got at large through the negligence or wilful act of the owner or his agent or the custodian of such animals or his agent, or unless the circumstances as to the manner in which the horses came to be at large are within the special exceptions from liability stated in secs. 294 and 295 of the Railway Act.

Rogers v. Grand Trunk Pac. R. Co., 2 D.L.R. 683, 21 W.L.R. 222, 22 Man. L.R. 349.

(§ II D 7—75)—FIRES.

It is the duty of a railway, under ch. 91 of R.S.N.S., 1900, to clear from off the sides of its roadway, where it passes through woods, all combustible material, such as grass, ferns, bushes, or other material, by careful burning at a safe time, or otherwise, whenever they become combustible.

Schwartz v. The Halifax and South Western R. Co., 4 D.L.R. 691.

Where, from the testimony, the inference is strong that sparks from a locomotive started a fire at a point off a railway company's right-of-way, where, to the knowledge of the company's servants, the fire smouldered for nearly a month, and then, fanned by a high wind, it spread, jumped across a river and destroyed standing timber belonging to the plaintiff, the company is properly held liable therefor under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37.

Farquharson v. Canadian Pacific R. Co., 3 D.L.R. 258, 20 W.L.R. 914.

Under ch. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf. [Rainville v. The Grand Trunk R. Co. 25 Ont. App. 242, affirmed, sub nom. The Grand Trunk R. Co. v. Rainville, 29 Can. S.C.R. 201, specially referred to.]

Schwartz v. The Halifax and South Western R. Co., 4 D.L.R. 691.

The fact that shortly after the passing of a locomotive a fire is seen near the railway track, where none existed before, is prima facie evidence that the fire originated from sparks from the locomotive. The provisions of the Prairie Fires Ordinance requiring locomotives to be equipped with certain appliances and in casting on a defendant the onus of proof in a criminal charge

relating thereto, are binding on a railway company deriving its powers from the Parliament of Canada, but operating lines of railway in the North-West Territories.

Rex v. Canadian Pacific Railway Co., 7 Terr. L.R. 286.

III. Accidents at crossings.

(§ III B—50)—LOOKOUT; SIGNALS.

An action to recover damages for the death of a farmer named Crouch on the ground that it was due to the negligence of the appellant company. The accident happened about seven o'clock in the evening of a winter's day said to be somewhat dark while a wagon in which the respondent was simply a passenger was being driven across the tracks of the appellants at the intersection of the highway. Three acts of negligence were found by the jury, to which they attributed the accident:—(1) Absence of warning sign-board required by the Railway Act at highway crossings. (2) Excessive grade in highway approaching crossing. (3) Failure to give statutory signals, and negativing contributory negligence. It was held, affirming the judgments of the trial Judge, the Divisional Court and the Court of Appeal for Ontario, in favour of the respondent for damages with costs. Girouard and Idington, JJ., that the absence of the sign-board was the cause of the accident. Duff, J., that the failure to give the statutory signals caused the accident. Davies and Anglin, JJ., dissenting, that because no one saw the accident the proximate cause thereof was a guess or conjecture.

Pere Marquette R. Co. v. Crouch, 13 Can. Ry. Cas. 247, 22 O.W.R. 333.

An action for damages for death of one Griffith, caused by being run down by the defendants' train, while deceased was crossing a public highway. The evidence shewed that the train gave no warning either by whistle or bell. Another train was passing upon the other track in the opposite direction at the same time, which gave the necessary signals. No one saw the accident. The jury found that the accident was caused by the violation of the statutory duty to whistle and ring the bell, and negatived contributory negligence. Middleton, J., entered judgment for plaintiff for $2,000 and costs as awarded by the jury. Moss, C.J.O., granted leave to appeal direct to the Court of Appeal. The Court of Appeal dismissed the defendants' appeal with costs. Meredith, J.A., dissenting, being in favour of granting a new trial.

Griffith v. Grand Trunk R. Co., 13 Can. Ry. Cas. 287; 48 C.L.J. 104, 21 O.W.R. 305.

(§ III C—55)—FLAGMEN; GATES.

Dominion Railway Board ordered that a watchman should be employed from 1st May to 1st October for the first year, to see if he would afford proper protection to the public crossing a railway at a public highway. Township to pay 15 per cent. of the cost and the Grand Trunk R. Co. 85 per cent.; H. G. & B. Elec. R. Co. to pay nothing.

Grimsby Beach Amusement Co. v. Grand Trunk and Hamilton, Grimsby and Beamsville Electric R. Cos., 13 Can. Ry. Cas. 138, 22 O.W.R. 258.

IV. Contributory negligence.

(§ IV A 2—91)—FAILURE TO STOP, LOOK OR LISTEN.

It is a matter of common sense that a person about to pass over a railway crossing upon a level should look to see whether or not a train is approaching. The driver of a train approaching the crossing is entitled to rely upon such person using due care and stopping before reaching the track. He is not bound to anticipate negligence on the part of the person approaching the track and guard against it beforehand. He is only bound, where he has notice of the negligence, to take the ordinary means of evading its consequences. Where deceased, driving a carriage, attempted to cross the track of the defendant company without looking to see whether a train was approaching, or the direction from which the train was coming, the finding of the jury to the effect that deceased should have stopped a short distance from the track and made sure that there was no danger from trains, indicates that the efficient proximate cause of the accident was her not stopping, and that such cause was in force at the time of the accident.

Morrison v. The Dominion Iron and Steel Co., Ltd., 45 N.S.R. 466.

(§ IV A 3—100)—INJURIES TO MINORS.

Liability to minors—"Stealing ride" on cow-catcher—Evidence—Nonsuit.

Wallace v. Canadian Pacific R. Co., 6 D.L.R. 864, 4 O.W.N. 133, 23 O.W.R. 99.

V. Diversion or obstruction of water.

(No cases.)

VI. Insolvency and sale of railway.

(No cases.)

RATIFICATION.

Of broker's contract for sale of land, see Brokers.

Contract by infant, see Infants.

By master of act of servant, see Master and Servant.

Of agent's contract, see Principal and Agent, II.

REAL ESTATE AGENTS.

See Brokers, II.

REAL PROPERTY.

As to adverse possession of, see Adverse Possession.

Boundaries of land conveyed, see Boundaries, II.

As to quieting title to, see Cloud on Title.
Option to purchase, see Contracts, I.
Oral contracts, as to, generally, see Contracts, I.
Part performance of oral contract relating to, see Contracts, I.
Construction of contract for transfer of, see Contracts, II.
Assignment of land contract, see Contracts.
As to covenants and conditions, see Covenants and Conditions.
As to curtesy, see Curtesy.
Measure of damages on contract relating to, see Damages, III.
Damages for fraud in sale of, see Damages.
Dedication of, see Dedication.
What passes by deed, see Deeds, II.
As to dower, see Dower.
Easement in , see Easements.
Ejectment to obtain possession of, see Ejectment.
Estoppel as to, see Estoppel, III.
As to fixtures, see Fixtures.
Gift of, see Gifts.
Matters as to homestead, see Homestead.
Rights of husband and wife in, see Husband and Wife, II.
Of infant, see Infants, II.
Injunction against transfer or disposition of, see Injunction, I.
Lien of judgment upon, see Judgment.
Matters as to landlord and tenant, see Landlord and Tenant.
Lateral support for, see Lateral Support.
Life estate in, see Life Tenants.
Laches as bar to action respecting, see Limitation of Actions, I.
When Statute of Limitation begins to run in action respecting, see Limitation of Actions, II.
When suit respecting is barred by limitations, see Limitation of Actions, II.
Conveyance pending suit, see Lis Pendens.
As to merger of estate, see Merger.
Mortgage on, see Mortgage.
Possession of, as notice of rights of possessor, see Notice, II.
Party in suit by one claiming adversely, see Parties.
Partition of, see Partition.
Right of partner in real property owned by partnership, see Partnership.
Averments as to ownership of title, see Pleading, II.
Powers as to, see Powers.
As to public lands, see Public Lands.
As to records of title, see Records and Recording Laws, III.
Title to, or control of, by religious societies, see Religious Societies, I.
Specific performance of contracts as to, see Specific Performance, I.
Taxation of, see Taxes.
As to timber on, see Timber.
Trust in, see Trusts.
Defects in title to, see Vendor and Purchaser, I.
Devise of, see Wills, III.
Estates or interests created by will, see Wills, III.
Conversion into personalty, see Wills, III.
Charge upon, by will, see Wills, III.

RECEIVERS.

I. APPOINTMENT; REMOVAL.
A. In general; jurisdiction.
B. In what cases.
II. POWERS, LIABILITIES, PROPERTY, AND CONTROL.
III. CLAIMS AGAINST; PRIORITIES; RECEIVERS' CERTIFICATES.
IV. ACTIONS AND REMEDIES.
V. EXPENSES OF RECEIVERSHIP; COMPENSATION.
VI. FOREIGN AND ANCILLARY RECEIVERS.
VII. SALES BY RECEIVER; RIGHTS OF PURCHASER.

I. Appointment; removal.

A. In general; jurisdiction.

(§ I A—1)—APPOINTMENT; REMOVAL; JURISDICTION.

A breach of trust is a sufficient ground for the interference of the Court by the appointment of a receiver.

Grand Council Provincial Workmen's Association v. McPherson et al., 8 D.L.R. 672.

B. In what cases.

(§ I B—14)—EQUITABLE EXECUTION.

A judgment creditor may be appointed receiver without remuneration and without security, of the legacy left to his judgment debtor, and an injunction order may be granted to restrain the debtor from dealing with the legacy to the prejudice of the judgment creditor.

Gilroy v. Conn, 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

II. Powers, liabilities, property and control.

(No cases.)

III. Claims against; priorities; receiver's certificates.

(§ III—25)—CLAIMS AGAINST; PRIORITIES; RECEIVER'S CERTIFICATE.

Claims for personal injuries and for damage to property against a railroad company prior to the appointment of a receiver by the Exchequer Court of Canada and claims for construction or repair work, Court costs, counsel fees and advertising during the six months' period prior to the receivership must be submitted to the Exchequer Court upon their merits, so that creditors may be allowed to shew cause before any authorization is given the receiver to compromise such claims.

Re American Brake-Shoe and Foundry

Co. and Pere Marquette R. Co., 8 D.L.R. 873, 14 Can. Ex. 105.

IV. Actions and remedies.

(§ IV—33)—RIGHT OF ACTION BY RECEIVER.

A judgment creditor appointed receiver of his judgment debtor's legacy, and wishing to contest the executor's claim that the legacy is to be set off against advances which the testator had made to the debtor may be granted leave to contest such claim of the executors in the name of the judgment debtor on indemnifying him against costs.

Gilroy v. Conn, 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

V. Expenses of receivership; compensation.

(No cases.)

VI. Foreign and ancillary receivers.

(No cases.)

VII. Sales by receiver; rights of purchaser.

(No cases.)

RECEIVING STOLEN PROPERTY.

(§ I—5) — SUBSTITUTION BY OWNER ON LEARNING FROM SERVANT OF INTENT TO STEAL.

The defendant cannot be convicted for receiving stolen property, knowing it to have been stolen, where a master, upon being informed by his servant that the defendant had asked the servant to steal and deliver to him a barrel of whisky belonging to his master, substituted a barrel of water therefor, which, at the direction of the master, the servant delivered to the defendant, as there was no theft thereof on the part of the servant.

The King v. Montgomery, 19 Can. Cr. Cas. 233.

RECITAL.

In deed, see Estoppel.
In will, see Wills, I.

RECOGNIZANCE.

On appeal, see Appeal, III.; Appeal, X.
See also Bail and Recognizance.

RECORDS AND REGISTRY LAWS.

I. IN GENERAL.
II. JUDICIAL RECORDS.
III. RECORDS OF TITLE OR OWNERSHIP.
- A. In general; what may be recorded.
- B. Requisites and sufficiency or record.
- C. Necessity of recording; effect of failure; reliance upon records.
- D. As notice; effect of recording.

Record on books of corporation of transfer of stock, see Company.
Estoppel by record, see Estoppel, II.
Records as evidence generally, see Evidence, IV.
Time of filing mechanics' lien, see Mechanics' Liens.
Of criminal case, see Criminal Law, V.
Record of judgment, see Judgment, I.
Of chattel mortgage, see Chattel Mortgages.
Recording conditional sale, see Sale.

I. In general.

(No cases.)

II. Judicial records.

As to judgments, see Judgment.

(§ II—6)—RECORD OF CONVICTION.

The filing by a stipendiary magistrate of a warrant and conviction with a city clerk instead of the clerk of the peace, to be kept among the records of the general or quarter sessions of the peace, as required by sec. 793 of the Criminal Code, where there is no such Court in the Province or officer thereof with whom they may be filed, does not terminate the right of the magistrate to amend the conviction or substitute a new and correct one therefor at any time before the defective one has been quashed.

The King v. Sarah Smith. 19 Can. Cr. Cas. 253.

III. Records of title or ownership.

A. In general; what may be recorded.

(§ III A—10)—RECORDS OF TITLE.

The company applied to the registrar to register a document called an "agreement to secure and charge," which contained first a covenant to execute a mortgage upon described land for a sum stated, payable at different dates, and then encumbered the land with the said sum, the form of words used exactly complying with the statutory form of encumbrance as provided in the Land Titles Act. The registrar refused to register the document, claiming that it did not comply with the Land Titles Act. The Master of Titles having sustained the registrar's objection, the company appealed:—It was held (1) That under the Land Titles Act a document, the purpose of which is to charge land with a debt or loan, is a mortgage, and to be effective must be in the form provided by the Act. (2) That the document in question, not complying with the statutory form of mortgage, could not be registered as a mortgage. (3) That the definition of "encumbrance" given in the interpretation clauses of the Land Titles Act does not apply to the statutory encumbrance provided in sec. 98 of the Act, but the encumbrance there provided for is an instrument intended to create a charge upon land other than by way of debt or loan. (4) That the instrument in question, purporting to charge the land with a debt or loan, was not an encumbrance, and, while in the form of an encumbrance, could not be registered

as such. (5) That the document was also objectionable and incapable of being registered in that, containing as it did a covenant to give a mortgage, it was not in form J or to like effect, as provided by the Act, the provisions of the Act being mandatory, and the use of the words "or to like effect" permitting only the inclusion of covenants, terms or remedies not affecting the substance of the form, and the inclusion of the covenant referred to, giving greater rights than those of a simple encumbrance, made the whole incapable of registration.

M. Rumely Co. v. The Registrar of Saskatoon Land Registration District, 4 S.L.R. 466.

Where a registrar of land titles in Alberta has registered as of a certain date an instrument received by him prior to such date, and gives as his reason the complicated description of the lands mentioned in the instrument and the time involved in examining the same, the Court will order the date of registration to be changed to the date of the receipt of the instrument, notwithstanding that, since the date of receipt but before the date of registration a caveat has been registered in respect of a transaction prior in date to the instrument in question, the only question for decision in such case is whether the instrument was registered as of its proper date, and the Court will not inquire whether the instrument should, in fact, have been registered at all, or how the equities stand between the parties.

Bank of Hamilton v. McAllister, 7 D.L.R. 460.

B. Requisites and sufficiency of record.

(§ III B—15)—REQUISITES AND SUFFICIENCY OF RECORD.

The mere deposit of an instrument with the registrar does not amount to a registration under the Manitoba Registry Act, R.S.M. ch. 150, sec. 50; the certificate of the registrar is required to be endorsed on the instrument to make the registration complete; the registrar must endorse the actual date of the registration and the endorsement of an erroneous date of registration will not give priority over an instrument which has been previously registered. [Harris v. Rankin, 4 Man. R. 115, distinguished.]

Siemens v. Dirks, 1 D.L.R. 757, 20 W.L.R. 768.

C. Necessity of recording; effect of failure; reliance upon records.

(§ III C—20) — NECESSITY OF RECORDING; EFFECT OF FAILURE.

The business of a real estate agent may be carried on by a sole proprietor, without incorporation, using as his business style a company name or designation without registering a declaration of such company name under the Partnership Act (Alta.) 1908, ch. 5.

Lambert v. Munns, 7 D.L.R. 264.

The business of buying and selling real estate on his own account may be carried on by a sole proprietor, without incorporation, using as his business style, a company name or designation without registering a declaration of such company name under the Partnership Act (Alta.) 1908, ch. 5.

Lambert v. Munns, 7 D.L.R. 264.

(§ III C—21)—AS AGAINST CREDITORS AND SUBSEQUENT PURCHASERS.

The requirement of R.S.S. 1909, ch. 45, relating to the registration of lien notes and conditional sale agreements, does not, by the express provisions of section 11 thereof, apply to the re-sale by a vendor under such a note or agreement, upon a vendee's default, of goods or chattels of the value of $15 or over, which have the name of the vendor, who has an office in Saskatchewan, stamped thereon or affixed thereto.

The Great West Life Assurance Co. v. Leib, 4 D.L.R. 392, 21 W.L.R. 877.

A sale of a stack of hay is invalid against an execution creditor under sec. 3 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, ch. 11, providing that every unregistered sale must be accompanied by an immediate delivery followed by an actual and continual change of possession, where the sale was made by the owner of the hay giving it and some cash in payment of an overdue note of his, held by the buyer, who permitted the hay to remain on the premises occupied by the seller where it was seized on execution by the creditor under a judgment obtained after the sale. [Jackson v. Bank of Nova Scotia, 9 Man. R. 75; Brown v. Peace, 11 Man. R. 409; Parkes v. St. George, 10 A.R. (Ont.) 496, and Hyman v. Cuthbertson, 10 O.R. 443, specially referred to.]

Conn v. Hawes, and Gowan, 4 D.L.R. 4, 21 W.L.R. 622, 22 Man. L.R. 464.

The prior registration of a deed from the owner of the land will take precedence of a mortgage previously made by the owner which was not registered until after the deed under the provisions of the Manitoba Registry Act, R.S.M. ch. 150, if the purchaser had no notice or knowledge of the mortgage until after he had completed the purchase.

Siemens v. Dirks, 1 D.L.R. 757, 20 W.L.R. 768.

D. As notice; effect of recording.

(§ III D—31)—RECORDS AS NOTICE TO SUBSEQUENT PURCHASERS.

A purchaser of land takes with notice of the existence of a contract for its sale made by his vendor, where, at the time of purchase, an application to register such agreement, as well as the agreement itself, was on file in the land registry office.

Mills v. Marriott, 3 D.L.R. 266, 20 W.L.R. 917.

RE-ENTRY.

For breach of condition, see Covenants and Conditions.

By landlord, see Landlord and Tenant, III.

REFEREE.

Sole arbitrator, see Arbitration.

REFERENCE.

(§ I—1) — When necessary or proper generally.

In an action to recover instalments of purchase money due on a contract for the sale of lands the vendee is entitled to a reference, and to have the vendor's title manifested before being ordered to pay any of the instalments. [Mayberry v. Williams, 3 Sask. L.R. 350, referred to; Cameron v. Carter, 9 Ont. R. 426, specially referred to.]

McIlvenna v. Goss, 3 D.L.R. 690, 21 W.L.R. 180.

Motion for order to take accounts—Ont. C.R. 645.

Land Owners, Ltd. v. Boland (No. 1), 6 D.L.R. 902, 4 O.W.N. 242.

(§ I—3)—What included in order for.

In an action for an instalment of purchase money due on a contract for the sale of lands the Court will order a reference to ascertain what right or interest was held therein by the vendor, who, at the time and immediately before the commencement of the action, was in actual possession thereof, and under what right he holds, as well as what taxes are outstanding against it; and also require the vendor to produce all documents and writings in his possession that shew his title or interest therein; and that upon the filing of the report of the registrar either party may apply for such judgment as he may deem himself entitled to.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W.L.R. 180.

(§ I—4)—Powers of referee.

The clerk of a Court cannot, upon a reference to him to ascertain the plaintiff's damages, consider the question of the liability of the defendant in the action, since that was settled by the order of reference.

Lavallee v. Canadian Northern R. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

(§ I—4a)—Report and findings.

Where mortgage accounts are the basis of a Master's report, involving the marshalling of assets as between senior and junior mortgages, and the sale of part of an incumbered estate with various equities set up by defendant purchasers, the facts upon which the Master proceeds should be set out in his report so that in case of appeal all necessary material may be before the Court.

Home Buildings and Savings Association v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137.

The report of the clerk of the Court on a reference to him of the account of a receiver in an action for the dissolution of a partnership, must shew particularly: (1) the cash, (2) the outstanding assets, (3) the partnership liabilities, distinguishing between secured and unsecured, and those admitted, proved or disputed, (4) the individual liability of each partner for partnership debts, (5) the account between each partner and the firm, (6) the accounts of the receivers and of any auditor appointed to take the partnership accounts, (7) the interest of either partner in a mortgage on partnership land, and (8) the specific charges against the interest of each.

Henderson v. McGinn, 5 D.L.R. 205, 21 W.L.R. 397.

(§ I—7)—Recommitment.

If the clerk of a Court, on a reference to ascertain the plaintiff's damages, misconceiving his duty, hears evidence and, determining that the defendant was not liable, refuses to assess damages in the plaintiff's favour, the Supreme Court of Alberta may, on an application to vary the clerk's report, direct him to proceed with the assessment of damages.

Lavallee v. Canadian Northern R. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

REFORMATION OF INSTRUMENTS.

(§ I—1)—For mistake.

Where a lease describes the premises demised as being lot 7 in block 150, according to plan Q2, whereas the true description should be "lot 7, block 152," an action lies to reform the lease.

Pigeon v. Preston (No. 2), 8 D.L.R. 126.

Where the true agreement between landlord and tenant is shewn to have been that the fixtures should become the property of the landlord at the expiration of the term, but the lease does not express that agreement, the landlord is entitled to reformation of the lease, and, after the expiration of the term, even though no claim for reformation has been made, the equitable title to the fixtures is in the landlord.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

Assignments of lease—Knowledge of assignees of mistake—Reformation of assignments.

Empire Limestone Co. v. Carroll, 2 D.L.R. 907, 3 O.W.N. 1159.

Where the conveyance of the northern portion of a lot of land, lying on the south side of a street and having for its western boundary another street crossing the first street at an angle greater than a right angle, erroneously made the southern line of the portion sold run parallel to the street the lot faced instead of a fence and the line thereof continued running at right angles to the other street, as the parties intended, thus excluding a portion of the lot intended

to be conveyed, and afterwards the owner transferred the southern part of the lot by a conveyance describing its northern boundary to be the south line of the land first conveyed and the grantee in the second deed admitted that she had bought only to the fence, the first deed will be so reformed as to make the fence and its line produced the boundary line between two parcels. [Russell v. Davey, 6 Gr. (Ont.), 165, and Utterson Lumber Co. v. Rennie, 21 Can. S.C.R. 218, applied.]

McCabe v. McCullough, 3 D.L.R. 55, 3 O.W.N. 836, 21 O.W.R. 685.

Description — Boundary line—Mistake—Evidence—Trespass—Injunction.

Fraser v. Woods, 2 D.L.R. 909, 3 O.W.N. 1194, 21 O.W.R. 972.

REGISTRATION.

Of voters, see Elections, I.

In general, see Records and Registry Laws.

Of deeds, see Records and Registry Laws.

Of bills of sale, see Bills of Sale.

Of chattel mortgages, see Chattel Mortgages.

Of mechanics' liens, see Mechanics' Liens.

Of mining claims, see Mining.

Of transfers under land titles statutes, see Land Titles.

RELEASE.

I. In general.

II. What included in; effect.
- A. In general.
- B. What included in.

III. Validity; setting aside.

I. In general.

(No cases.)

II. What included in; effect.

B. What included in.

(§ II B—12)—Right to damages.

Where a vendor of a portion of land for the construction of a railway renounces the right to damages which may result therefrom, the renunciation only extends to those damages which are the necessary consequence of the work and not to those which can be avoided.

Marcotte v. Davis, 3 D.L.R. 851.

III. Validity; setting aside.

(No cases.)

RELEVANCY.

Of evidence, see Evidence, XI.

RELIGIOUS SOCIETIES.

I. Incorporation; change of name.

II. Change of constitution or doctrine.
- A. Constitution.
- B. Doctrine.

III. Title to, or control of, property.
- A. In general.
- B. Church identity.
- C. Rights of majority and minority.

IV. Pastors.

V. Officers.

VI. Expulsion or excommunication.

VII. Contracts.

VIII. Delegation of power.

IX. Power of ecclesiastical tribunals.

I. Incorporation; change of name.

(No cases.)

II. Change of constitution or doctrine.

(No cases.)

III. Title to, or control of, property.

(No cases.)

IV. Pastors.

(§ IV—35)—Pastors.

Article 64 of the Civil Code (Que.) 1904, providing among other things that the entries made in the registers should be signed by the person who performed the marriage and by the contracting parties, confers upon all rectors, priests and ministers of every religion, whether Catholic or Protestant, without distinction, the right to give the seal of authenticity to the consent to be married, that being what constitutes the marriage itself from the point of view of the civil law.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

(§ IV—38)—Decrees.

Where an ecclesiastical decree which a Roman Catholic secured from the Roman Catholic Archbishop of Montreal declared that the former's marriage with a Roman Catholic woman performed by a Protestant minister of the Methodist persuasion was null and void, on the ground that the Protestant minister was incompetent to perform the marriage, the ground being based upon a provision of a general decree of the Roman Catholic Church known as the "Ne Temere Decree" which declared that only those marriages of Roman Catholics could be valid which were contracted before the curé of the place it is not necessary for the Court to have regard for such decrees in a civil action brought by the man asking for a pronouncement of the invalidity of the marriage as regards the civil rights of the parties as neither of such ecclesiastical decree has any legal effect in the Province of Quebec.

Hébert v. Clouâtre, 6 D.L.R. 411, 41 Que. S.C. 249, 10 East. L.R. 336.

V. Officers.

(No cases.)

VI. Expulsion or excommunication.

(No cases.)

VII. Contracts.

(No cases.)

VIII. Delegation of power.

(No cases.)

IX. Power of ecclesiastical tribunals.

(No cases.)

REMAINDERMAN.

See Deeds, Wills.

REMAINDERS.

In general, see Life Tenants.

In real estate generally, see Deeds, II.; Wills, III.

REMEDIES.

In case of unlawful contract, see Contracts, III.

For enforcing liability of stockholder, see Companies, V.

Election of, see Election of Remedies.

In case of false representations, see Fraud and Deceit, VII.

In case of fraudulent conveyance, see Fraud and Deceit, VIII.

Of insured, see Insurance, VI.

For nuisance, see Nuisances, II.

Of parties to sale, see Sale, III.

For trespass, see Trespass, III.

REMOVAL OF CAUSES.

(§ I A—1)—RIGHT TO.

County Court action—Judgment in—Delivery of counterclaim ordered—Transfer to another country—Discretion of Court—Con. Rule 255.

Berthold & Jennings Lumber Co. v. Holton Lumber Co., 4 O.W.N. 458, affirmed on appeal, see 4 O.W.N. 523, 23 O.W.R. 839.

REPEAL.

Of statute, see Statutes, III.

REPLEVIN.

I. RIGHT OF ACTION AND RECOVERY.
- A. In general.
- B. Property in custody of law.
- C. Demand.

II. PROCEDURE.
- A. In general.
- B. Questions raised; defences.
- C. Recovery; verdict; judgment.

I. Right of action and recovery.

(No cases.)

II. Procedure.

A. In general.

(§ II A—21)—AFFIDAVIT AND ORDER.

Where a writ of replevin for recovery of a team of horses was issued upon affidavits never actually sworn to, an application in Chambers to set aside the writ will be allowed but an order to restore the personal property seized under it cannot be issued in Chambers in the absence of statutory provision. [Anderson v. McEwan, 8 U.C.C.P. 532; Carveth v. Greenwood, 3 P.R. (Ont.) 175, referred to.]

Chew v. Crockett (No. 1), 6 D.L.R. 368, 22 W.L.R. 119.

(§ II A—21a)—BOND.

Where, owing to the omission of certain words in the condition, a replevin bond was defective, the Court, in view of the property having been returned, refused to set aside the bond, but ordered it to be amended.

Hall v. Slocomb, 11 East. L.R. 125.

REPLY.

In general, see Pleading, V.

REPRESENTATIONS.

Estoppel by, see Estoppel, III.

False representations generally, see Fraud and Deceit.

In application for insurance, see Insurance, III.

REPUTATION.

Evidence of, generally, see Evidence, XI.

Opinion, evidence of, see Evidence.

Impeaching witness by evidence, as to, see Witnesses.

REQUETE CIVILE.

Proceedings by, to set aside judgment in Quebec, see Judgment, VII.

RESCISSION.

Of contracts, see Contracts, V.

Of sale, see Election of Remedies; Sale, III.

Of land contract for want of title, see Vendor and Purchaser, I.

RES GESTAE.

See Evidence, X.

RESISTING OFFICER.

See Obstructing Justice.

RES JUDICATA.

Former jeopardy as a bar, see Criminal Law, II.

See also, Appeal, VIII.; Judgment, II.

REPONDEAT SUPERIOR.

See Master and Servant, III.

RESTRAINT OF TRADE.

Contracts in restraint of trade generally, see Contracts, III.

Combinations in restraint of trade, see Monopoly and Combinations, II.

REVENDICATION (QUE.)

(See TROVER.)

I. RIGHT OF ACTION.
- A. In general.
- B. Conversion; what constitutes.
- C. Demand; tender.

II. LIABILITY; DEFENCES; EFFECT OF SUIT OR RECOVERY.

I. Right of action.

(No cases.)

II. Liability; defences; effect of suit or recovery.

(§ II—25)—LIABILITY; EFFECT OF SUIT OR RECOVERY.

The owner who brings an action of revendication to recover a team of horses left in the possession of the defendant by the person by whom they had been hired from the owner, and who accepts in settlement of suit the costs and a sum of money in full value of the said property which thus passes to the defendant, does not thereby waive his right to the value of the use of the property during the interval between the institution of the suit and the settlement thereof, and has an action against the defendant to recover the same.

O'Brien v. Maloney, 1 D.L.R. 760.

REVIEW.

Of order or judgment, see Appeal.
Of judgment, see Judgment, VII.
Of assessments, see Taxes, III.

REVIVAL.

Of action, see Abatement and Revivor, III.

REVIVOR.

See Abatement and Revival.

REVOCATION.

Revocability of option contract, see Contracts.
Of deed, see Deeds, II.
Presumption of, see Evidence.
Of letters of administration, see Executors and Administrators.
Of gift, see Gifts.
Of liquor license, see Intoxicating Liquors, II.
Of license from private person, see License, I.
Of license from public generally, see License.
Of physician's license, see Physicians and Surgeons.
Of agent's authority, see Principal and Agent.
Of power of attorney, see Principal and Agent.

SALE.

I. WHAT CONSTITUTES; VALIDITY; EFFECT.
- A. In general.
- B. Passing of title; delivery.
- C. Conditional sales.
- D. Acceptance; retention.

II. WARRANTY.
- A. In general.
- B. By description.
- C. Of quality, genuineness, or fitness.
- D. Effect of inspection; or opportunity to inspect.
- E. Test and demonstration.

III. RIGHTS AND REMEDIES OF PARTIES.
- A. In general.
- B. Lien for price; stoppage in transitu.
- C. Rescission.
- D. Rights of bona fide purchasers.

Of note, see Bills and Notes, V.
Mortgagor's power of, under chattel mortgage, see Chattel Mortgage.
Construction of contract for, see Contracts, II.
Of corporate stock, see Company, V.
Damages for breach of contract of, see Damages, III.
Election of remedies in case of purchaser's failure to pay, see Election of Remedies.
Of goodwill, see Contracts, Goodwill.
Of homestead, see Homestead, IV.
Of intoxicating liquors, see Intoxicating Liquors.
Of infant's property, see Infants.
Judicial sale, see Judicial Sale.
On foreclosure, see Mortgage, VI.
Pleading as to, see Pleading.
Of pledged property, see Pledge and Collateral Security.
By receiver, see Receivers, VII.
On Sunday, see Sunday.
For taxes, see Taxes, III.
By trustee, see Trusts.
Of land, generally, see Vendor and Purchaser.
As to offers and their acceptance, see Contracts, I.
Definiteness of contract of sale, see Contracts.
Sale as fraud on creditors, see Fraudulent Conveyances.

I. What constitutes; validity; effect.

A. In general.

(§ I—1)—IN GENERAL.

The plaintiffs submitted a written proposal to defendant to supply and erect in operating order in the basement of defendant's theatre, on foundations supplied by defendant, an engine, generator and switchboard for a sum mentioned. The proposal embodied specifications for the engine describing an "Ideal" engine in language evidently that of the manufacturers as follows: "The Ideal engine is particularly adapted to direct

connected work on account of its perfect balance, quiet running." The proposal was accepted by defendant who had previously selected the kind of engine he wanted from a number of different kinds mentioned in the preliminary discussions. The plaintiffs performed the contract, but the engine could not be made to run quietly enough to satisfy the defendant as the noise was heard in the auditorium above. It was held, that the bargain was not a sale of goods but a contract for work and materials and that there was no warranty that the engine would be "quiet running" but only a recommendation of the type of engine chosen for the work required. The clause was general in its terms and had not in view any particular use of the engine. [Chalmers v. Harding (1868), 17 L.T. 571, followed.]

Allis, Chalmers, Bullock v. Walker, 15 W.L.R. 357, 21 Man. L.R. 770.

(§ I A—2)—WHAT PASSES AS APPURTENANT.

Upon an agreement to sell a hotel premises and contents as a going concern at a fixed price to which was to be added the invoice cost price of the liquors on hand, the contract will be presumed to include quantities of wood and ice kept on the hotel premises and also the food supplies.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205.

B. Passing of title; delivery.

(§ I B—5)—PASSING OF TITLE.

The sale of stolen property (in this case a horse) is void and the owner has a right to an action for revendication against the purchaser in good faith who retains possession of it without being obliged to reimburse him the price he paid for it.

Lapointe v. Charlebois, 42 Que. S.C. 57 (Ct. Rev.).

(§ I B—7)—DELIVERY TO CARRIER.

Delivery to a carrier of the goods contracted for, to be shipped by a method different from that provided by the contract, is not such a delivery as is contemplated by sec. 31 of the Sale of Goods Act, R.S. Sask. ch. 147.

Where goods sold by the plaintiffs to the defendant were, by the contract made between the parties, to be shipped by freight, and were delivered by the plaintiffs to a railway company to be shipped by express to the defendant, and were not in fact delivered:—Held, that the defendant was not liable for the price of the goods. The fact that the goods were shipped by a faster means of transportation, which might be for the benefit of the defendant, but without his knowledge or consent, could not change the rights of the parties under the contract.

McGowan Cigar Co. v. O'Flynn, 19 W.L.R. 877.

(§ I B—9)—SUFFICIENCY OF DELIVERY.

Where a contract for the sale of goods is an entire one and the vendor withholds any of them, the purchaser need not accept delivery of the remaining portion, but may repudiate the agreement and recover back any money paid on account of the purchase-price. Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205.

(§ I B—11)—PLACE OR TIME OF DELIVERY.

Where the time for the delivery of a piano was omitted from an order therefor, it is deliverable within a reasonable time after the date of the order.

Heintzman & Co., Ltd. v. Rundle, 4 D.L.R. 688, 20 W.L.R. 202.

(§ I B—13) — FAILURE TO COMPLY WITH TERMS; RE-SALE.

Where, by terms of sale of horses at an executor's sale, the purchaser was to furnish an approved note by a certain time, the fact that the executor told the purchaser that if the animals were left on his unoccupied farm they would be at the risk of the buyer, and that by the seller's direction the horses were put into a livery stable by the buyer, does not conclude the seller from claiming that title to the property did not pass where the buyer failed to furnish the note in time. [Castle v. Playford, L.R. 7 Ex. 98, referred to.]

Chew v. Crockett (No. 2) 7 D.L.R. 730, 22 W.L.R. 384.

Where, by the terms of an executor's sale settlement was to be made at once and the purchasers of a chattel agreed that they would furnish an acceptable note before the next evening, their failure to do so justifies a re-sale of the chattel by the executor where the title to the chattel did not pass to the purchaser.

Chew v. Crockett (No. 2), 7 D.L.R. 730, 22 W.L.R. 384.

C. Conditional sales.

(§ I C—15)—CONDITIONAL SALE.

Plaintiffs sold defendants certain machinery under agreement for conditional sale, providing that upon default the company might repossess the goods sold and resell the same and proceed for the recovery of the deficiency, if any. There was no stipulation excluding the operation of the statutory provisions respecting such re-sale. The company repossessed the goods, and re-sold them without complying with the statutory conditions. In an action to recover the balance remaining unpaid after crediting the proceeds of sale:—It was held in a contract for conditional sale, reserving to the seller the right to possession of the property until payment, repossession and re-sale operates as a rescission unless such re-sale is expressly provided for in the contract. (2) The contract containing no provisions as to the manner in which the re-sale was to be made, the parties must be held to have had in contemplation the provisions of the statute in that regard, and the re-sale referred to in the contract must

be considered as a re-sale within the meaning of the statute. (3) The goods having been re-sold without the statutory conditions having been complied with, the re-sale was not as provided for in the contract and therefore operated as a rescission, and the plaintiffs could not recover.

The American Abell Engine and Threshing Co., Ltd. v. Weidenwilt et al., 4 S.L.R. 388.

Plaintiff sold defendant a threshing machine and a stacker under two agreements for conditional sale, one covering the threshing machine and one the stacker, and which agreements provided for payment for the purchase price by instalments. The threshing machine agreement provided for payment of $500 cash and $755 on the 1st of November, 1908, and the balance over the next three years; the contract for sale of the stacker provided for payment of $125 on November 1st, 1908, and the balance in two years. The cash payment was made on the machine, and the November payment on the stacker was also made, but default was made in the November payment in respect of the machine. While the stacker was in a separate agreement, it was alleged that this was for convenience and that the sale was an entire one. The agreements contained provisions for re-taking possession by the seller upon default, with the right on re-taking possession to re-sell and to collect the deficiency, if any, from the buyer. Before the threshing season of 1909 opened, a collector from the plaintiff company called upon the defendants to secure settlement for the payments in arrears. The defendants, being unable to pay, asked for an extension, which, it was found, the agent agreed to give upon receiving security, and the defendants thereupon agreed to mortgage their homestead when they received patent as consideration of receiving the extension. Subsequently, the company, while the machine was still in defendant's possession received and accepted an offer for the purchase thereof, and thereupon took possession of the same and delivered it to the purchasers immediately. No notice was given to the defendants. The company credited the amount received on the re-sale upon defendants' indebtedness, and sued for the balance remaining unpaid. The defendants alleged rescission, and counter-claimed for damages and for a return of moneys paid. It appeared, however, that while operating the machine the defendants had made a considerable sum of money over and above the amount paid the company. At the trial the plaintiffs applied to amend by withdrawing an admission as to the effect of a contract relating to other machinery purchased and collaterally involved in this action:—Held, that, while there was an agreement to extend the time for payment of the indebtedness, such agreement was made in consideration of defendants' agreement to give mortgages on their homesteads, which agreements were void under the Dominion Lands Act, and therefore the consideration failed, and the defendants at the time of the re-taking of the goods were in default. (2) That while two distinct agreements were taken for the engine and separator and for the stacker, yet in fact the sale was an entire one, and on default in one the company were justified in taking possession of all the goods covered by both agreements. (3) That parties should not be allowed upon the trial to amend by withdrawing the admissions made in the pleadings. (4) That where the seller, under agreement for conditional sale where no provision is made for payment of any deficiency upon re-sale, re-takes possession and sells, such sale operates as a recission of the contract, and the seller cannot recover. (5) That while the contract in question provided for payment of any deficiency after re-sale, such provision applied only to re-sale after taking possession, while here the machinery was sold before possession was taken, and therefore the provision did not apply, as, to secure the benefit of the provision, the seller must comply strictly with all the provisions of the contract. (6) That the seller, having the property and right to sell, may sell without reference to the contract, but by so re-selling the contract is rescinded. (7) That the contract being rescinded the defendants were entitled to a return of the notes and securities given and to be placed in statu quo. (8) But, as it appeared they had made a profit on the operation of the machinery, such profit should be set off against the amount paid, and no damages allowed.

Sawyer-Massey Co. v. Dagg, 4 S.L.R. 228.

Where an unconditional written order was given for the purchase of a plow, accompanied by promissory notes for the price thereof, the purchaser cannot, in an action on the notes, shew that the sale was not an absolute and unconditional one, but that it was binding only in a certain event.

The John Deere Plow Co. v. Shannon, 3 D.L.R. 746, 21 W.L.R. 192.

Where a conditional sale of goods is made subject to an express stipulation that in case of possession being re-taken and the goods being re-sold on his default, he shall remain liable for any loss on a re-sale, the resumption of possession by the conditional vendor followed by a re-sale by him will not cancel or revoke the whole contract so as to relieve the conditional purchaser from the stipulation by which he became liable for the deficiency.

Gaar-Scott v. Mitchell, 1 D.L.R. 283, 20 W.L.R. 6.

The vendor of goods sold at auction, upon discovering that the accommodation signer to a lien note given for the purchase money, as the terms of sale required, had made false statements as to his solvency, may retake the goods from the vendee, where the

latter failed to secure another satisfactory signer.

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408.

Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made. It was held, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower, and, however, that the proper attachment of the wind stacker was a condition precedent to the plaintiff's right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition.

New Hamburg Manufacturing Co., Ltd. v. Klotz, 7 Terr. L.R. 310.

The sale of a restaurant license under deed of transfer stipulating that the purchaser will become proprietor thereof only when he has paid to the vendor all the instalments of price due, and that failure to make any of these payments will cause the assets sold to revert to the vendor, is a valid sale under suspensive condition. Turgeon v. St. Charles, 7 D.L.R. 445.

There will be dismissal on the merits in an action for the recovery of the purchase price of a hay press, where it appears that the contract sued upon was not a sale, but was simply a promise of conditional sale, and that the machine in question was promptly returned, pursuant to a clause in the contract, containing a stipulation that the machine would be taken back by the vendor if the defendant could not make it work satisfactorily.

International Harvester Co. v. Ratelle, 17 Rev. de Jur. 458.

(§ I C—16)—RECORDING; FILING.

Where the plaintiff sold an account register to a purchaser under a hiring and purchase agreement within the meaning of ch. 42, of the Acts of Nova Scotia, 1907, and where such agreement was neither accompanied by an affidavit nor filed in the registry of deeds, the agreement although valid as between the parties is null and void as against the creditors, purchasers and mortgagees claiming under the purchaser in question. [Ch. 42 of the Acts of Nova Scotia, 1907, referred to.]

Dominion Register Co. v. Hall and Fairweather, 8 D.L.R. 577.

(§ I C—17)—STATUTORY REQUIREMENTS.

In order that a vendor may obtain protection thereunder, there must be a literal compliance with the provisions of sec. 1, ch. 145, R.S.O. 1897, of the Conditional Sales Act, that sales of manufactured goods or chattels on condition that the title shall not pass, shall be valid only "as against a subsequent purchaser or mortgagees without notice in good faith for a valuable consideration . . . which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor . . . painted, printed, stamped or engraved thereon, or otherwise plainly attached thereto," and, under such Act the use of the synonymous words in lieu of the actual name of the manufacturer or vendor is not permissible. [Toronto Furnace Co. v. Ewing, 1 O.W.N. 467, 15 O.W.R. 381, followed; see also Mason v. Lindsay, 4 O.L.R. 365.]

Ericsson Telephone Manufacturing Co. v. Elk Lake Telephone and Telegraph Co., 4 D.L.R. 576, 3 O.W.N. 1309, 22 O.W.R. 161.

A vendor of goods or chattels of the value of $15 or over, who has an office in the province, and whose name is stamped thereon or affixed thereto, as required by sec. 11, of ch. 45, R.S.S. 1909, relating to lien notes and conditional sales, need not, upon the vendee's default in payment, give the vendee the notice of re-sale requird by sec. 8 of the Act, since by the express terms of sec. 11, the Act is not applicable to sales of goods and chattels marked with the vendor's name.

The Great West Life Assurance Co. v. Leib, 4 D.L.R. 392, 21 W.L.R. 877.

(§ I C—18) — VENDOR'S NAME STAMPED OR AFFIXED.

The provision of sec. 11, ch. 45, of R.S.S. 1909, respecting lien notes and conditional sales, exempting from the operation of the Act as to recording the agreements, sales of goods or chattels of the value of $15 or over, where the name of a vendor, who has an office in Saskatchewan, is plainly stamped thereon, or affixed thereto, is not limited in its operation to the original sale only, but applies as well to re-sales by the vendor upon the vendee's default in making payment therefor.

The Great West Life Assurance Co. v. Leib, 4 D.L.R. 392, 21 W.L.R. 877.

(§ I C—19) — VENDORS RE-TAKING POSSESSION.

Conditional sale—Effect of re-taking possession.

Donnelly v. Roberts, 7 D.L.R. 926, 22 W.L.R. 379.

D. Acceptance; retention.

(§ I D—20)—ACCEPTANCE, RETENTION.

User of the thing sold as the buyer's pro-

perty, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar any resolutory action, more especially when the defendant was never notified thereof.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

An order for a quantity of goods ordered by defendant through a broker from G, was by mistake filled from plaintiff's goods, which were stored in the same warehouse. Defendant, with full knowledge of the facts, having retained the goods and used them as his own, it was held, dismissing the appeal, that the law implied a promise on the part of defendant to accept the goods and to pay for them at the invoice price.

Ackerman v. Morrison, 45 N.S.R. 185; 9 E.L.R. 198, 307.

In an action for the price of beer and ale sold the defendant, he is liable for the value of empty barrels not returned to the seller. [Parker v. Fulton, 21 L.C.J. 255, specially referred to.]

The Union Brewery, Ltd., v. Page, 5 D.L.R. 47, 18 La Rev. de Jur. 95, 41 Que. S.C. 421.

Under a sale of a quantity of beer and ale "à mesure qu'elle se dispensera," ten months' time is a reasonable period in which to dispose of it, after which the seller may recover its value, where it is shewn that brewers do not guarantee the soundness of beer for more than one year.

The Union Brewery, Ltd., v. Page, 5 D.L.R. 47, 18 La Rev. de Jur. 95, 41 Que. S.C. 421.

II. Warranty.

A. In general.

(§ II A—25)—Warranty.

In an action for the recovery of the contract price for the sale of an engine and dynamos under an express or implied warranty that they will "run properly," the purchaser is entitled to recoup, or counterclaim the money paid on account of the purchase price with interest in the event of a breach of such warranty.

Canadian Gas, Power and Launches v. Orr Brothers, 46 Can. S.C.R. 636 affirming 23 O.L.R. 616.

(§ II A—26)—Express.

Where a traction engine was sold upon the order of the buyer and upon the receipt thereof the seller shipped the engine and the order contained the warranties of the seller on its face and the seller's agent, without any knowledge on the part of his principal at the time the order was made or when the engine was shipped, gave the buyer, instead of a copy of the order, a somewhat similar document which had on its back warranties which, as far as they went, were practically the same as the ones in the order and the buyer was not told by the agent that it was a copy of his order and no fraud was practised upon him, and where it appeared that if the buyer had read it that he could not have avoided learning that it was no copy of the order, he was bound by his order and was not justified in considering the warranty in the instrument given him, the only express warranty, and ignoring the special provisions in the warranty clauses in the order signed by him which were not contained in the other document.

Lennox v. Goold, Shapley & Muir Co., Ltd., 5 D.L.R. 836, 21 W.L.R. 918.

A parol warranty which is inconsistent with a written warranty is invalid. Where there is an express warranty coupled with conditions an implied warranty or condition to the same effect cannot be set up so as to get rid of the express warranty. Where an agreement for the purchase of a chattel provides that the purchaser upon complying with certain requirements may return the chattel, compliance by the purchaser with such requirements is a condition precedent to his right to return the chattel.

Cockshutt v. Mills, 7 Terr. L.R. 397.

A notice of the failure of an engine to fulfil a warranty, sent by the purchaser to the vendor at Winnipeg, and not to him by registered mail to Seaforth, as the contract of sale required, is not a sufficient compliance therewith.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 19 W.L.R. 934.

(§ II A—27)—Implied.

A representation by a seller that a cow was "due to calve" on a certain day, does not amount to a warranty that the cow was "in calf"; all that the expression imports is a representation that the cow had been bred to a bull at a time from which it was expected the cow would calve on the day specified.

Wilson v. Shaver, 8 D.L.R. 627, 4 O. W.N. 71, 27 O.L.R. 218.

An auctioneer who sells goods, not as principal, but as auctioneer only, though not naming his principal then present and in possession of the goods, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell. [Wood v. Baxter, 49 L.T.N.S. 45, followed; compare Johnston v. Henderson, 28 Ont. R. 25; Cochrane v. Rymill, 40 L.T.N.S. 744, 27 W.R. 776; Barker v. Furlong, [1891] 2 Ch. 172, and Consolidated Co. v. Curtis, [1892] 1 Q.B. 495.]

Trapp & Co. v. Prescott, 5 D.L.R. 183, 17 B.C.R. 298, 21 W.L.R. 521.

Where an order for the purchase of a traction engine signed by the buyer upon the receipt of which the seller sent the engine, warranted that the engine would successfully operate a threshing outfit of the size and capacity usually operated successfully by an ordinary steam engine of the

same actual brake horse-power and that the engine should develop a certain horse-power and if it did not, the seller was, by a clause in the warranty part of the order to be notified and given reasonable time to get to the engine and test it, and, if unable to make the engine develop such horse-power, to take it back and replace it with another or, in place of this, to refund any payments made on the condition that no further claim was to be made against the seller, and where the order in one of its warranty clauses stated that if the purchaser failed to make the engine work satisfactorily through improper management, inefficient operators, or neglect to observe the directions of the manufacturers, the purchaser was to keep the engine and to pay all necessary expense incurred by any man sent at his request to put the engine in condition for successful operations, a compliance by both parties with the above provisions of the order should operate as a determination of all controversies respecting the subject matter, and, therefore, in an action by the buyer for breaches of the warranties in the order set out above and for the breach of the implied warranty arising under par. 1 of sec. 16, R.S.S. 1909, ch. 147, providing that there shall be an implied condition in sale of goods that if the particular purpose for which they are required is made known to the seller thus shewing that the buyer relied on the seller's judgment and if the goods are those which the seller sells in his business, in which action it was found by the trial Judge that the only breach of warranty the evidence shewed under the Act aforesaid, or under the order of purchase, was that the engine did not furnish the horse-power stipulated and in consequence did not successfully operate a threshing outfit according to the first warranty set forth above, no recovery can be had by the buyer on claims for breach of warranty, or by the seller on a counterclaim for the services of the experts to make the engine work properly where the evidence did not sufficiently shew that the buyer failed to make the engine do satisfactory work through improper management or inefficient operators as alleged in the counterclaim. [Head v. Tattersall, L.R. 7 Ex. 7, 41 L.J. Ex. 4, at p. 5, 25 L.T. 631, 20 W.R. 115; Hinchcliffe v. Barwick, 49 L.J. Ex. 495, referred to.]

Lennox v. Goold, Shapley & Muir Co., Ltd., 5 D.L.R. 836, 21 W.L.R. 918.

Implied warranty of fitness—Purchase of glass—Absence of any inspection before delivery—Purchaser's assumption of risk—Alleged custom—Sufficiency of evidence to establish.

Lethbridge Sash and Door Co. v. Taylor, 7 D.L.R. 913.

Action for price—Defence—Counterclaim—Appeal—Costs.

Mannheimer v. Forman, 1 D.L.R. 898.

Implied warranty—Purchase of specified animals—Burden of proof of shewing that animal delivered corresponds with those purchased—What amounts to acceptance—Refusal to accept—Notice of.

Sherman v. Mabley, 7 D.L.R. 793.

An implied warranty on the sale of a chattel exists, where the contract of sale provides that it was not sold by description, and that there was no condition or warranty either general, express, or implied, other than the condition or warranty either general, express, or implied, other than the condition and warranties set forth therein. [Sawyer & Massey Co. v. Ritchie, 43 Can. S.C.R. 614, referred to.]

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 19 W.L.R 934.

The warranty implied by law on the sale of a chattel is superseded by a guaranty in a written contract for the sale of an engine, that it was free from latent defects, and that it should, under certain fuel conditions, develop 50 horse-power, without varying more than 2 per cent. in speed under differing load conditions.

Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

B. By description.

(§ II B—30)—By description.

The admission, on examination as a witness, by the seller, as to a mare that he knew it was bought for breeding purposes, and that he had represented it to the purchaser as being from eight to nine years old, but without warranty, is a commencement of proof in writing which entitles the purchaser to give oral evidence of the warranty of the vendor that the mare was of the age mentioned. The representations by the vendor, as admitted by himself, were such as to lead the purchaser into error on a material element in the sale and, therefore, to make it void. Ont. 992 C.C.

Boulanger v. Fortier, 41 Que. S.C. 389 (Ct. Rev.).

Where a motor car company advertised a car for sale "that never goes lame, backed by a five years' guarantee"; and the sale is made under an agreement to supply a written guarantee, but without any definition of the scope of guarantee in the agreement of sale, the presumption is that the warranty is to be in accordance with the advertisement.

Middleton v. Black, 2 D.L.R. 209, 21 W.L.R. 249.

(§ II B—31)—Trade designation.

On a contract for the supply of a certain quantity of a factory product, under its trade name (ex. gr. waxed splits of leather) to a dealer in the same trade, there is a presumption that the contract is for goods of a quality which will answer the trade designation under which they were

sold, and the vendor is liable, as for breach of warranty, in respect of any portion which is so inferior in grade, either from a defect in the material itself or in the process of manufacture, as not to be merchantable goods under the trade designation.

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

C. Of quality, genuineness, or fitness.

(§ II C—35) — OF QUALITY, GENUINENESS, FITNESS.

A defence that the failure of machinery to work satisfactorily was due to its ill-usage by the vendee in not properly oiling it, fails, where it is shewn that oil was properly applied, but by reason of a concealed defect in workmanship, it did not reach the proper bearing surface.

The Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed. [Canadian Gas Power and Launches, Ltd. v. Orr Brothers, Ltd., 23 O.L.R. 616, applied.]

Alabastine Company, Paris, Ltd. v. Canada Producer and Gas Engine Co., Ltd., 8 D.L.R. 404, 4 O.W.N. 486.

Where the plaintiff bought from the defendant an engine with a distinct understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiff trusted to the defendant's judgment and skill in doing so; there is in such a contract an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed; and the fact that upon the engine shewing defects from time to time the plaintiff and the defendant for several months made joint efforts to put it into running order does not estop the purchaser from insisting upon the warranty against inherent defect and weakness.

Alabastine Company, Paris, Ltd. v. Canada Producer and Gas Engine Co., Ltd., 8 D.L.R. 404, 4 O.W.N. 486.

Where dealers sell an engine with an implied warranty as to fitness for a particular purpose, with certain provisions in the contract for replacing defective parts, such provisions have not the effect of impairing the obligations of the implied warranty but are in law considered as quite distinct therefrom. [Canadian Gas Power and Launches, Ltd. v. Orr Brothers, Ltd., 23 O.L.R. 616, 26 Can. S.C.R. 614, followed; Sawyer & Massey Co. v. Ritchie, 43 Can. S.C.R. 614, distinguished.]

Alabastine Company, Paris, Ltd. v. Canada Producer and Gas Engine Co., Ltd., 8 D.L.R. 404, 4 O.W.N. 486.

Plaintiffs approached defendant with a view to selling him a piano, and defendant stated that the piano which he had in mind to purchase was one manufactured by the Heintzman Co., known as "The Classic." They stated they had a piano of that description which they could sell at a lower price, and stated that it was of the same quality as "The Classic" manufactured by the Heintzman Co. The defendant then gave the order and they shipped to him a piano manufactured by them, and called "The Classic," which the defendant refused to accept. It was shewn that the Heintzman piano was a high-grade piano, while the one shipped was a low-grade piano. In an action for the price it was held, that the sale was one by description, and there was an implied condition that the goods should answer that description, and, as the piano shipped did not answer that description, the defendant was entitled to refuse to take delivery.

Mason & Risch Co. v. Mooney, 4 S.L.R. 303.

Plaintiff, being desirous of securing flax for seed, heard that defendant had seed flax for sale, and went to him with a view to purchasing. He inquired of defendant whether such seed was clean and free from noxious weeds and mustard, and was assured that it was. Plaintiff, therefore, as it was found, on the strength of such representations, purchased from defendant sufficient seed for the land to be sown. When the crop came up, it was found to be full of mustard, a very noxious weed. It was found that the crop had been deteriorated by at least 25 per cent. by reason of this mustard, and that to eradicate it, the land would require to be summer-fallowed during the two succeeding seasons. The plaintiff also relied on the provision of ch. 128 R.S.C. and the Noxious Weeds Act of Saskatchewan, prohibiting the sale of unclean grain. It was held, that it was the intention of the parties that the representations made by defendant at the time of sale should form part of the contract, and what took place constituted a warranty. (2) That the seed sold did not comply with the warranty, whereby the plaintiff suffered damage, for which he was entitled to recover, the damage sustained being that which would naturally flow in the ordinary course of things from the defendant's act. (3) The damage contemplated in this case would be the amount of injury which would ordinarily flow from a breach under the special circumstances

made known at the time of sale, and which would be injury to crop, loss of crop and injury to land. (4) In assessing such damages, the injury to crop by reason of loss occasioned by the growth of mustard should be allowed, and also the loss of the use of the land for the following year, when it would require to be summer-fallowed, the fair rental of the land being the basis of such damage. (5) Ch. 128 R.S.C. did not assist the plaintiff, as flax was not mentioned in that Act, nor did it apply to sales by a farmer at his own granary. (6) That the provisions of the Noxious Weeds Act of Saskatchewan prohibiting the sale of unclean grain gave no cause of action to the plaintiff, that statute being passed for the benefit of the general public, and had nothing to do with the private bargains of individuals.

Nargang v. Kirby, 4 S.L.R. 306.

Where a dealer in motor cars contracts to supply a car which shall be in all respects (except upholstering) the same as a certain car previously sold to a specified third party, the seller is bound to furnish a car duplicating such sample in appearance, equipment, and method of construction, and as efficient and satisfactory in operation, and in all other respects as good, as the sample, with the qualification mentioned as to upholstering, there being in the circumstances an implied warranty that the car should be fit for use in the manner in which such a car ordinarily would be used. [Drummond v. Van Ingen, 12 A.C. 284; Mody v. Gregson, L.R. 4 Ex. 49; Randall v. Newson, 2 Q.B.D. 102, applied.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O.W.N. 445, 23 O.W.R. 563.

Where a quantity of fruit purchased by a dealer from the grower for export to the English market and re-sale at a profit was discovered upon inspection not to be of the grades and quality contracted for, the buyer has the right either to reject the lot and to go into the market and replace the fruit in accordance with the contract grade, and hold the vendor responsible for the difference between the contract price and the market price; or he may retain the fruit, relying on the warranty or description of grade, and recover the loss sustained based on the market price at the time of the discovery of the fraudulent packing as compared with the contract price. [Smith v. Bolles, 132 U.S. 125, and Ashworth v. Wells (1898), 14 Times L.R. 227, 78 L.T. 136, specially referred to.]

Graham v. Bigelow, 3 D.L.R. 404, 11 E.L.R. 114.

Plaintiff sold defendant a gasoline engine guaranteed to be made of good material and in a workmanlike manner. The defendant accepted the machine and employed three different men having ordinary experience in operating such engines to operate it, but none of these men could get it to work. The company gave, it was found, no evidence which shewed that the failure of the defendant to operate the engine was due to any fault of the defendant. The trial Judge gave judgment for the plaintiff for the price of the machine, but allowed the defendant on counterclaim by way of damages the whole price of the engine. On appeal it was held, that the meaning of the warranty in question was not that the various parts of the engine were made in a workmanlike manner, but that the engine as a whole was made in a workmanlike manner; that is, that when completed it could be operated. (2) That such a warranty is not satisfied by shewing that the engine could be operated by experts, but must be so constructed that it can be operated by any person possessing the skill and knowledge necessarily possessed by the average operator. (3) The defendant having shewn that the engine could not be operated by the average operator, the onus was cast on the plaintiffs of shewing that the machine was in proper shape when delivered, and this not having been done the defendant was entitled to damages on breach of warranty.

Canadian Fairbanks Co. v. Thompson, 4 S.L.R. 475.

Plaintiff sued defendant to recover the price of a gasoline engine sold to defendant. It appeared that defendant had given an order for an engine warranted to be well made of good material and durable, and which stated that there were no conditions or warranties in connection with the sale other than as set out therein. The order was also expressed to be subject to the right of the defendant to cancel before a certain date if he found an engine that suited him better. On this reservation being brought to the attention of the company's sales manager he wrote the defendant specifying the qualities of the engine, comparing it with other engines, and guaranteeing it to develop 25 horse power, although nominally rated at 20 horse power, and as a result of this letter the defendant purchased the engine. The engine would not develop 25 horse power nor 20 horse power, and was unable to do the work for which it was procured, and the defendant returned it. The learned trial Judge gave judgment for the plaintiff for the amount of its claim, and for the defendant by way of damages for his counterclaim for the full amount of the sale price, treating the matter as if there had been a total failure of consideration. On appeal it was held, the letter written by the company sales manager is a subsequent agreement by the company for the purpose of inducing the defendant to purchase, and the provision in the order excluding all warranties other than therein expressed could apply only to what had taken place up to that time, and did not affect any subsequent warranties,

and consequently the warranty was binding upon the plaintiff company. (2) That the breach of warranty complained of being that contained in the letter as to the ability of the engine to do certain work, and not of the warranty of quality contained in the order, the defendant had no right to return the engine, as provided in the original order, and obtain an award on the basis of entire failure of consideration, but was entitled only to damages on the basis of the difference in value between the article delivered and the value of an article of the quality represented in the letter.

The Manitoba Windmill and Pump Co., Ltd. v. McLelland, 4 S.L.R. 500.

In answer to an action upon promissory notes given for a Frost and Wood binder, the defendant set up defects in the machine, but the only evidence of their existence was his own and that of a neighbour, neither of whom appeared to have much experience with binders, it was held, that, as the article had been sold under its trade name, there was no implied warranty of fitness for the purpose for which it was sold, and (Prendergast, J.; dissentiente) that the evidence did not shew that the difficulties the defendant had encountered in operating the machine were due to any defect in it.

Fros & Wood Co., Ltd. v. Ebert, 7 Terr. L.R. 293.

(§ II C—35a)—By sample.

A contract made by correspondence for a carload of specified articles of a specified grade "to be the same size and quality as samples submitted" is a sale by sample, and not a sale of a quality or grade.

Lachute Shuttle Co. v. Frothingham & Workman, Ltd., 8 D.L.R. 417.

(§ II C—36)—Seed.

Where grain is sold as "seed flax" by sample and the seed delivered does not correspond with the sample, the delivery being contaminated with noxious mustard seed, the seller may be held in damages under sec. 17 (2) (c) of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, although the buyer may have omitted to examine the goods delivered but relied upon his warranty and examination of the sample.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Where a contract is made for the sale of goods by description there is, under sec. 16, sub-sec. 1, of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, an implied condition that the goods were reasonably fit for the purpose intended; and if, by acceptance of the goods, this implied condition were waived, and reduced to a warranty only, such warranty would be covered by sec. 13 of the same Ordinance.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, the seller may be held in damages for a breach of warranty under sec. 16 (1) of the Sale of Goods Ordinance, N.W.T. Ordinances, (Alta.), 1911, ch. 39, on the ground that the seed was not reasonably fit for the purpose for which it was intended.

Carstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Plaintiffs, being desirous of purchasing flax for the purpose of seed, approached defendant, who dealt in flax, with a view of purchasing. They told defendant that they required the flax for seed, and asked if he could supply them. The defendant stated that he would give them what he could from his granary, but that he had a mortgage on some flax to be delivered later, and they could have that if they were satisfied with it. On this other flax being brought in, the plaintiffs examined it, and, on being asked how they liked it, stated it was all right and they would take it. They now alleged the flax to be unfit for seed, and that by reason thereof they lost the crop which they should have had during that season, alleging that, in buying, they relied on the defendant's skill and judgment to supply flax reasonably fit for the purpose required, it was held, that while the purpose for which the flax was required was made known, in order to raise an implied warranty of fitness, there must be evidence that the buyer relied on the seller's skill and judgment, and from the circumstances of this case no such implied warranty could be found.

Ordway et al. v. Olson, 4 S.L.R. 343.

Where a contract is made for the sale of goods by sample there is under sec. 17 (b) of the Sale of Goods Ordinance N.W.T. Ordinances (Alta.) 1911, ch. 39, an implied condition that the bulk should correspond to the sample.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

(§ II C—37)—Fitness for breeding.

A sale of a stallion cannot be rescinded by the purchaser because of the animal's vicious disposition where the evidence shewed that it had been quiet and gentle while the vendor owned it, except on one occasion when it attacked him, of which the vendor told the purchaser before the sale, though subsequently the horse became entirely unmanageable and dangerous.

McPherson v. Faris, 5 D.L.R. 385, 21 W.L.R. 654.

Fraud—Warranty.

Brothers v. McGrath, 1 D.L.R. 916.

D. Effect of inspection; or opportunity to inspect.

(§ II D—40)—EFFECT OF INSPECTION; OPPORTUNITY TO INSPECT.

Purchase of growing hay—Refusal to accept delivery—Opportunity given purchaser to inspect—Passing of property—Implied warranty—Judicial discretion as to awarding interest.

Garcis v. Watson, 7 D.L.R. 791.

The unloading of such merchandise as shovel handles by the buyer and taking them into his store, where it is shewn that inspection in the cars would not be practical and would entail payment of demurrage or storage charges, does not constitute acceptance of the goods, where, after examination of the goods and discovery of defects, the buyer promptly notifies the seller of his refusal to accept the same; under such circumstances the buyer need not bring a redhibitory action under 1530 C.C. (Que.), but has the right to bring an action for rescission of contract for non-fulfilment of the vendor's obligation (C.C. 1065), and therefore the buyer is not obliged to bring suit immediately.

Lachute Shuttle Co. v. Frothingham & Workman, Ltd., 8 D.L.R. 417.

(§ II E—44e)—TEST AND DEMONSTRATION.

The purchaser of a drill outfit cannot escape liability on notes given for the price thereof by shewing that a verbal agreement had not been carried out whereby the seller was to send him an expert driller at its expense to assist in digging the first well ,and to remain until the first well was completed, and that, if such were not done, the notes were to be void.

Ontario Wind Engine and Pump Co., Ltd. v. Eldred, 2 D.L.R. 270, 20 W.L.R. 697.

Where machinery is sold with a warranty that it shall work to the satisfaction of the purchaser, it is the duty of the seller to thoroughly test it, under conditions similar to those in which it is to be used before delivering the machine to the purchaser.

Bonin v. Ontario Wind Engine and Pump Co., 6 D.L.R. 785, 18 La Rev. de Jur. 446.

Where "seed flax" is sold by sample and the buyer would require an intricate analysis and test by a Government official in order to detect the presence of noxious mustard seed in the sample, the onus is not on the buyer to make a test involving such unreasonable trouble, and upon injury resulting to the buyer's land from "seed flax" contaminated with noxious mustard seed, the seller may be held in damages for same, without the Government test.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 21 W.L.R. 433.

Where a contract for the purpose of a gas producer, a gas engine, and an air compressor for starting it, provided that the vendor should for one year replace, free of charge, all defective parts; that the vendee could not reject the plant except for failure to develop the power guaranteed, and that the machinery should be tested at the vendor's factory; and the vendee was, by the terms of the contract, "urged to be present at the final test," the vendee is not concluded by a shop test of which he was not notified and which he did not attend, since such test was intended as an additional inducement to purchase, and not to put a vendee in a position of having irrevocably committed himself to the purchase on the test proving satisfactory.

Canada Producer and Gas Engine Co. v. The Hatley Dairy, Light and Power Co., 4 D.L.R. 599.

III. Rights and remedies of parties.

A. In general.

(§ III A—50)—IN GENERAL.

Plaintiff and defendant entered into a contract for the supply by the former to the latter of a quantity of sewer pipe of specified dimensions at an agreed price. Subsequently to the making of the contract plaintiff was requested to supply a quantity of pipe of a size not included in the contract, but for which a price had been quoted in correspondence leading up to the making of the contract. It was held, affirming the judgment of the trial Judge that plaintiff was not bound to accept the price quoted for pipe not included in the contract, but was entitled to recover the fair market price of the pipe supplied at the time the order was given.

Richey (Toronto Sewer Pipe Co.) v. The City of Sydney, 45 N.S.R. 202, 9 East. L.R. 313.

(§ III A—51)—RIGHT OF ACTION.

The seller of a dredge, who had knowledge of, or from the circumstances could infer the use the purchaser was to make of it, must compensate the latter for not delivering it within the stipulated time, so that he may be placed in the position he would have occupied had there been a prompt delivery. [Clydesdale Shipbuilding Co. v. Don Jose, etc., [1905] A.C. 6, specially referred to.]

Brown v. Hope, 2 D.L.R. 615, 20 W.L.R. 907, 17 B.C.R. 220.

§ III A—55)—WHERE VENDEE IS LIABLE ON "QUANTUM VALEBANT."

Notwithstanding a special contract for the sale of a quantity of goods at a specified price, where the vendee accepts a certain number of the goods, he is liable for their value on quantum valebant, though the goods accepted were not up to the contract. [Cutter v. Powell, 6 Term R. 320, 2 Smith's L.C., 9th ed., 1912 (and similarly 11th ed., 1903, vol. 2, p. 24), followed; Read v. Rann, 10 B. & C. 438, referred to.]

Harquail Co. v. Roy, 7 D.L.R. 282, 11 East. L.R. 190.

Where a vendee becomes liable on quantum valebant for goods sold and delivered, the liability accrues as soon as the goods are retained by him, notwithstanding that the period of credit under the original agreement had not expired.

Harquail Co. v. Roy, 7 D.L.R. 282, 11 East. L.R. 190.

(§ III A—57)—On breach of warranty.

Action for balance of price—Evidence—Set-off—Damages—Findings of trial Judge—Appeal.

Morgan v. Gordon, 2 D.L.R. 889, 3 O.W.N. 971.

Where a contract for the sale of several articles of machinery is expressed to be divisible, and the warranty given thereon is expressly made applicable to each article, separately, though the articles are intended to be used together and to form one outfit, a defect in one article will not entitle the purchaser to rescind the whole contract or to refuse payment for the articles which are not defective, but relief will be confined to the defective article.

Bell Engine and Threshing Co. v. Wesenberg, 3 D.L.R. 550, 3 O.W.N. 1169, 21 O.W.R. 969.

In an action by the buyer for breach of warranty on the sale of a motor car, where the evidence as to the efficiency of the car is conflicting, the Court will not sua sponte, appoint an expert to determine and report upon the efficiency of the car, even where the seller will not assist in proving the actual condition of the car; the onus being upon the buyer to establish the breach complained of.

Middleton v. Black, 2 D.L.R. 209, 21 W.L.R. 249.

The fact that a sub-warrantor had received pay for an article furnished a warrantor, does not absolve the former from liability to the plaintiff in warranty for damages caused by defects in the thing warranted.

Wilson v. The H. G. Vogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive and Machine Co., 4 D.L.R. 196.

Upon the failure of an engine to conform to a written warranty, the neglect of the purchaser to give notice thereof to the vendor by registered mail at his place of business, as the contract required, precludes the setting up the breach of warranty in an action to recover the purchase money.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 19 W.L.R. 934.

B. Lien for price; stoppage in transitu.

(§ III B—60)—Lien for price; stoppage in transitu.

The unpaid vendor of goods has the right to resume possession of them while in transit, so long as delivery within the meaning of article 1492 C.C., has not been made to the vendee, notwithstanding any sale or transfer by the latter to a third party, and without the necessity of revendication or other judicial proceeding.

Abinovitch v. Ehrenbach, 41 Que. S.C. 55 (C.R.).

(§ III B—61)—Vendor's lien.

The failure to insert the name of the vendor in the space intended therefor in a lien note given for property purchased at an auction, which provided that "the title, ownership and right of possession of the goods for which [the] note [was] given shall be and remain at my risk in . . . until this note . . . is paid in full," does not affect the vendor's title to and ownership of the personalty sold, where the terms of sale, which were known to the vendee, required such a note to be given. [Kirk v. Unwin, 20 L.J. Ex. 345, applied.]

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408.

(§ III B—62)—Reclaiming property.

When pulp wood from his principal's land was sold by an agent without authority, the principal is entitled to follow the pulp wood into the buyer's hands. [Greer v. Faulkner, 40 Can. S.C.R. 399, affirming Faulkner v. Greer, 16 Ont. L.R. 123, followed.]

British North America Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

(§ III B—66)—Acceptance of notes.

If the purchaser of a stallion did not, before the agreement for sale was made, have notice of an attack it had made on the vendor, and that was sufficient to amount to misrepresentation sufficient to avoid the sale, it was waived by the giving of a note for a part of the purchase money after learning such fact.

McPherson v. Faris, 5 D.L.R. 385, 21 W.L.R. 654.

(§ III B—66a)—Lien notes.

In order to justify the retention by the holder of a lien note upon a re-sale of the chattels for which it was given, of the expenses of re-taking them, he must shew that the charges were fair and reasonable, and they were actually paid or incurred by him.

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

The fact that a lien note was assigned by the payee will not prevent him maintaining an action thereon, notwithstanding it was not re-assigned to him in writing before suit was begun, where the assignment was to a bank as security only. [Covert v. Janzen, 1 Sask. L.R. 429, followed.]

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

A seizure under a "lien note" is an extra-judicial seizure within C.O. 1898, ch. 34. A vendor of chattels under a lien note, who has retaken possession under the powers contained in the note, is not entitled to add to the security or charge against the chat-

tels the expense of keeping and caring for the chattels after seizure.

Pease v. Johnston et al., 7 Terr. L.R. 416.

(§ III B—69)—LIEN ON LANDS.

Where an implement company sells certain machinery and its attachments, taking for the purchase price the buyer's so-called promissory notes, appending to the notes a specific lien agreement as well as an agreement to execute a mortgage against his lands, for the price of the goods, the delivery of all the goods is, by necessary implication, a condition precedent to the operation of the lien and execution of the mortgage against the lands; yet if some of the attachments are missing and their non-delivery is subsequently compromised orally between the seller and the buyer by a stipulated allowance satisfactory to the buyer, the seller is not thereby disentitled to the collateral security by way of lien on the lands, for the price as so reduced. [Rustin v. Fairchild, 39 Can. S.C.R. 274, discussed and distinguished. [Gaar-Scott v. Mitchell, 1 D.L.R. 283, affirmed.]

Gaar-Scott v. Mitchell (No. 2), 8 D.L.R. 129.

C. Rescission.

(§ III C—72)—FRAUD.

The purchaser of the stock in trade en bloc of a merchant who fails to obtain the names of the unpaid creditors who furnished the goods in order to pay them out of the purchase money cannot invoke his good faith; when for fear of fraud the law declares certain acts to be void, its provisions cannot be evaded on the ground that proof could be made that the acts were not fraudulent. Such purchaser cannot put aside the claim of a creditor because some of the goods which he furnished were not contained in the stock sold, having been previously disposed of.

Ramsay, Son & Co. v. Turcotte, 13 Que. P.R. 213 (Sup. Ct.).

(§ III C—74)—REJECTION OF GOODS.

The obligation of the purchaser of goods to use diligence in demanding cancellation of the contract of sale only exists in the case of warranty against latent defects in the goods sold. The right to demand cancellation for breach of warranty against eviction or warranty by contract is only subject to the prescription of thirty years. An action brought against a foreigner within a reasonable delay is evidence of diligence and the judgment given therein interrupts the prescription. [Cf. Almour v. Barrie, M.L.R., 2 Q.B. 439.]

Lapierre v. Drouin, 41 Que. S.C. 133 (Sup. Ct.).

(§ III C—74a)—DEFAULT OF VENDOR; LIEN OF VENDEE.

Upon breach of warranty by a seller of goods the Court on giving a judgment for the return of the purchase payment to the buyer will direct that upon such refund being made the goods be returned to the seller. [Canadian Gas Power v. Orr Brothers, 4 D.L.R. 641, applied.]

Alabastine Company, Paris, Ltd. v. Canada Producer and Gas Engine Co., Ltd., 8 D.L.R. 405, 4 O.W.N. 486.

Where a purchaser of an unexpired lease of a hotel and the chattels contained therein pays part of the purchase price for which a receipt is issued by the seller setting forth the terms of the contract and the seller told the buyer that the lessor of the premises would have to be satisfied with the new tenant, but did not disclose to him or to the agent that there was an arrangement between him and his lessor by which the lessor was to get a certain percentage of the purchase price in the event of the sale of the unexpired term and it subsequently developed that the lessee refused to carry out this arrangement but tried to get the purchaser to pay all or part of this sum to the lessor, the purchaser is justified in rescinding the contract.

Herbert v. Vivian, 8 D.L.R. 340, 22 W.L.R. 676.

A vendee of chattels, upon rescission of a contract of sale for the default of the vendor, has a lien thereon for the purchase money he has paid on the contract, which lien is not displaced by the recovery of a judgment against the vendor for the amount so paid. [Swainston v. Clay, 3 DeG. J. & S. 558, referred to.]

Canadian Gas Power and Launches, Ltd. v. Orr Brothers, Ltd., 4 D.L.R. 641, 3 O.W.N. 1362, 22 O.W.R. 351.

D. Rights of bona fide purchasers.

(§ III D—75) — RIGHTS OF BONA FIDE PURCHASERS.

A good title to a horse is acquired by one who, for a valuable consideration, purchased it from a dealer in such animals in the usual course of business, without notice that the person from whom the dealer obtained it had reserved the title thereto by an agreement that the law did not require to be registered, in which he was described as a dealer in horses. [Dedrick v. Ashdown (1887), 15 Can. S.C.R. 227, followed. McRorie v. Seward, 3 Sask. L.R. 69, specially referred to.]

Delaney v. Downey, 4 D.L.R. 474, 21 W.L.R. 577.

Where "The L. M. Ericsson Telephone Manufacturing Company," the vendor of a telephone switchboard, affixed its name thereto as the "L. M. Ericsson Tel. Mfg. Co." it is not entitled to a lien thereon, under ch. 145, sec. 1 of the Conditional Sales Act, R.S.O. 1897, for unpaid purchase money as against a purchaser who, in good faith, for a valuable consideration and without notice, acquired title through the vendee, as there was not a sufficient compliance with the provisions of such Act.

Ericsson Telephone Manufacturing Co. v.

Elk Lake Telephone and Telegraph Co., 4 D.L.R. 576, 3 O.W.N. 1309, 22 O.W.R. 161.

SALVAGE.

(§ I—2)—RIGHT TO.

The SS. Berwindmoor was picked up some seventy miles S.S.E. of Sable Island in a disabled condition, in consequence of having lost her rudder, by the SS. Energie on the morning of the 27th November and brought into the port of Halifax. The position in which the ship was found was a dangerous one at that time of year. During the operations heavy weather prevailed for the greater part of the time, in consequence of which the salving ship lost a number of lines, one of her anchor chains and anchor, had her windlass broken, and sustained other damage which necessitated detention and repairs at Halifax. The time consumed in the salving work and in the consequent repairs amounted to eleven and a half days. It was held, that the services rendered by the Energie were of a meritorious character and that the sum of $12,500 would be a reasonable allowance therefor, to be apportioned $10,500 to the owners of the ship and $2,000 to the officers and crew. (2) When the Energie with the Berwindmoor was within thirteen miles of the mouth of Halifax harbour, the weather at the time being fine and there being nothing to prevent the Energie completing her work without assistance, the SS. Mackay-Bennett was taken down by the agent of the owners of the Berwindmoor, and, by the directions of the agent, a line was put on board the disabled ship from the Mackay-Bennett and that ship assisted in the further work of getting the Berwindmoor into port, and held, that, under the circumstances, the services rendered by the Mackay-Bennett could only be regarded as in the nature of towage-salvage, but that, having regard to the size, power and equipment of the ship, the ordinary rule in relation to remuneration for towage services should not apply.

The SS. Energie v. the SS. Berwindmoor; The Commercial Cable Co. v. the SS. Berwindmoor, 14 Can. Ex. R. 23.

SANITY.

See Incompetent Persons.

SATISFACTION.

Of chattel mortgage, see Chattel Mortgage.
Of judgment, see Judgment, V.
Of mortgage, see Mortgage, V.

SCHEDULE.

Of assignment for creditors, see Assignment for Creditors.

SCHOOLS.

I. IN GENERAL.
A. Legislative power; constitutionality of statutes.
B. Admission; attendance; tuition.
C. Health regulations.
D. Suspension; control over pupil.
II. TEACHERS.
A. Employment; qualification.
B. Compensation; salary.
C. Removal; dismissal.
D. Liability of teacher.
III. OFFICERS AND ELECTIONS.
A. Officers.
B. Elections.
IV. DISTRICTS AND PROPERTY; SCHOOL TAXES.
V. BOOKS; INSTRUCTION.

I. In general.

A. Legislative power; constitutionality of statutes.

(§ I A—5)—LEGISLATIVE POWER.

The Court will prevent the invasion by a municipal council of the legislative territory assigned to a school board, and will compel by mandamus the discharge of a council's statutory duties which are merely ministerial and ancillary in their nature; and necessary for properly carrying out the lawful action of a school board. The fact that the ratepayers disapprove of the action of a school board is no excuse for interference by a municipal council.

Re West Nissouri Continuation School, 1 D.L.R. 252; 3 O.W.N. 478; 21 O.W.R. 533; 25 O.L.R. 550.

A school board is supreme within the limits of its own jurisdiction, and a municipal council has no right to review or render nugatory the action of a school board in the exercise of a power given by statute to the board.

Re West Nissouri Continuation School, 1 D.L.R. 252, 3 O.W.N. 478, 21 O.W.R. 533, 25 O.L.R. 550.

B. Admission; attendance; tuition.

(§ I B—12)—ATTENDANCE.

Where both parent and child have their permanent and principal place of residence within the limits of a school district, the child is not to be deemed a "non-resident pupil" and the trustees of the school district have no right to claim the payment of non-resident pupil's fees as a condition of such child being allowed to attend school. [Manitoba Public Schools Act, R.S.M. 1902, ch. 148, sec. 48, sub-sec. (n) and R.S.M. 1902, ch. 148, sec. 2, sub-sec. (m) as re-enacted by 10 Edw. VII. (Man.) ch. 51, sec. 1, and amended by 2 Geo. V. (Man.) ch. 65, sec. 2, construed.]

Inkster v. Minitonka School District, 6 D.L.R. 57, 22 W.L.R. 57.

II. Teachers.

B. Compensation; salary.

(§ II B—35)—COMPENSATION; SALARY.

The plaintiff, an unlicensed teacher, was employed to teach in a school district for one term, under a written contract purporting to be made by the defendants, who are school trustees, incorporated under the Schools' Act, C.S. 1903, ch. 50. The contract was signed by two out of the three trustees but the corporate seal was not affixed to it and no meeting of the trustees was held to authorize the contract. Under this contract the plaintiff taught for one full term. In an action to recover the amount agreed to be paid to her, it was held, (1) that the contract was made by the school trustees as a corporation and not as individuals. (2) The contract is unenforceable because under the Schools' Act, C.S. 1903, ch. 50, it is ultra vires of the school trustees to employ an unlicensed teacher. (3) The defendants are not liable on a quantum meruit for the services of the plaintiff because (a) the employment of the plaintiff was ultra vires, and (b) there was no completed work which the trustees could accept or reject.

Trustees of School District No. 7½, Parish of Bright, York County (defendants), appellants, and Yerxa (plaintiff), respondent, 40 N.B.R. 351.

D. Liability of teacher.

(§ II D—25)—TEACHERS.

On an appeal to the Commissioner of Education under sec. 153 of the School Ordinance (ch. 29 of the Ordinance of 1901) by a teacher against his dismissal by the Board of Trustees, the only matters which can be investigated are the reasons for the dismissal given by the trustees; the commissioner cannot hold that such reasons are insufficient and confirm the dismissal on other grounds. The adjudication of the commissioner when once made and communicated to the parties interested is final, and the commissioner cannot subsequently amend it so as to practically reverse it. Where a contract has been entered into by a school district which on its face shews a compliance with the requirements of the School Ordinance, the onus of shewing that the necessary formalities have not been in fact complied with is on the party setting up such non-compliance.

Clipsham v. Grand Prairie School District, 7 Terr. L.R. 374.

III. Officers and elections.

A. Officers.

(§ III A—55)—OFFICERS.

At a meeting of school commissioners (Que.) regularly opened with only three members present, a motion by one to appoint another of them chairman of the meeting is carried by the concurrence of the person so nominated, and is not subject to reconsideration or repeal by the whole meeting on the late arrival of two other members opposed thereto. [East v. Bennett Brothers, Ltd., [1911] 1 Ch. 163, 80 L.J. Ch. 123, 27 Times L.R. 103, referred to.]

Demers v. Moffet, 8 D.L.R. 234, 21 Que. K.B. 394.

Where the election of a chairman at a meeting of a board of commissioners has taken place in obedience to statutory requirements at the hour fixed for the session and while a quorum was present it cannot be considered to have been accomplished by trickery or stratagem, and cannot be reconsidered or disregarded at an adjourned sitting.

Demers v. Moffet, 18 Rev. de Jur. 419.

(§ III A—56)—RIGHTS AND LIABILITIES OF MEMBERS OF SCHOOL BOARD.

School commissioners are subject to the right of supervision by the Superior Court; and a suitor who demands the annulment of a resolution of the school commissioners "because it is illegal and constitutes a flagrant injustice to his rights," thereby sets up facts sufficient to give jurisdiction to the Superior Court.

Chaine v. School Commissioners of St. Severe, 18 Rev. de Jur. 508.

IV. Districts and property; school taxes.

(§ IV—71)—DISTRICTS.

A by-law passed by a County Council establishing a continuation school in a high school district which never existed in fact is valid, and does not contravene the High School Act, 9 Edw. VII., ch. 91, sec. 4 (Ont.).

Re Henderson and The Township of West Nissouri, 46 Can. S.C.R. 627, affirming 24 O.L.R. 517 and 23 O.L.R. 21.

(§ IV—74)—TAXATION.

The law relating to public instruction (arts. 2521 and following, R.S.Q. 1909), in declaring that the valuation of property made by the municipal authorities shall serve as the basis of the assessments to be imposed by school corporations (art. 2836) does not thereby authorize school corporations to tax all property valued in the municipal roll.

School Municipality v. Montreal Water and Power Co., 4 D.L.R. 776, 41 Que. S.C. 500.

School corporations cannot tax all property valued in the municipal roll but only so much of such property as they may tax under the law of public instruction, i.e., that which constitutes "real estate" under that law (art. 2521, pars. 15 and 16).

School Municipality v. Montreal Water and Power Co., 4 D.L.R. 776, 41 Que. S.C. 500.

Where the application of a school board for funds under sec. 38 of the Ontario High Schools Act, has been once approved by the municipal council to whom it is made, it is the duty of the council to pass a by-law and

do all that is necessary for the raising of the money, and this duty cannot be evaded by a subsequent disapproval or by repealing the by-law that had been passed in compliance with that duty. [Re West Nissouri Continuation School, 1 D.L.R. 252, 25 O.L.R. 550, 3 O.W.N. 478, affirmed on this point.]

Re West Nissouri Continuation School (No. 2), 3 D.L.R. 195, 3 O.W.N. 726, 21 O.W.R. 533, 25 O.L.R. 550.

When the application of a school board for funds under sec. 38 of the Ontario High Schools Act has been once approved, by the municipal council to whom it is made, it is the duty of the council to pass a by-law and do all that is necessary for the raising of the money, and this duty cannot be evaded by a subsequent disapproval or by repealing the by-law that has been passed in compliance with that duty.

Re West Nissouri School, 1 D.L.R. 252, 3 O.W.N. 478, 21 O.W.R. 533, 25 O.L.R. 550.

(§ IV—77)—SCHOOL LANDS.

Waste Crown lands that were, by an order of the Lieutenant-Governor in Council set apart for school purposes pursuant to the Public School Act, 35 Vict., No. 16 (1872), were thereby absolutely and unqualifiedly dedicated for school purposes, and such order constituted an alienation by the Crown within the meaning of sec. 6 of ch. 14 of 47 Vict. (1884), so that such lands could not be subsequently granted by the Crown to another without the consent of the trustees of the school district under the 1882 amendment to the School Act, notwithstanding a school house was not erected thereon until twelve years later, although sec. 30 of the Public School Act of 1872 required that the trustees should take possession of land acquired or given for school purposes.

Attorney-General v. Esquimault and Nanaimo R. Co., 4 D.L.R. 337, 21 W.L.R. 549.

V. Books; instruction.

(No cases.)

SEAL.

Effect of, on contract, see Contracts.

Revocability of contract under, see Contracts.

Presumption of consideration from, see Evidence.

SEAMEN.

As to, see Shipping.

Master's duty to injured seaman, see Master and Servant.

(§ I—4)—WAGES.

In proceedings for the recovery of seamen's wages had before a stipendiary magistrate the magistrate found that the wages claimed were due and gave judgment in favor of the claimants and a warrant issued under which defendant, a constable, levied upon the vessel of which plaintiff was master. There being nothing on the face of the warrant disclosing error on the part of the magistrate. It was held, that the Court had no jurisdiction to retry the matter or reverse his finding. Also, that the warrant, being good, on its face protected the constable levying under it and defeated the action brought against him. And also, that it could be clearly inferred from the face of the warrant that the magistrate had jurisdiction.

Horwood v. Nicholson, 45 N.S.R. 206, 9 E.L.R. 309.

SEARCH AND SEIZURE.

(§ I—5)—WHAT CONSTITUTES.

A seizure of goods under authority of law requires that there should be a formal taking possession of the articles seized and a dispossession from the person having the custody thereof by the seizing official.

City of Montreal v. John Layton & Co., 1 D.L.R. 160.

A letter or notice addressed by a food inspector to a company having certain articles in storage not to dispossess itself of said articles or otherwise dispose of the same does not constitute a valid seizure of said articles.

City of Montreal v. John Layton & Co., Ltd., 1 D.L.R. 160.

SECONDARY EVIDENCE.

See Evidence, III.

SECOND JEOPARDY.

See Criminal Law, II.

SECOND OFFENCE.

Punishment of, see Criminal Law, IV.

SECURITY.

For costs, see Costs.

On appeal, see Appeal and Error, III.

SEDUCTION.

I. CIVIL LIABILITY.

II. CRIMINAL LIABILITY.

I. Civil liability.

(No cases.)

II. Criminal liability.

(§ II—7)—UNDER PROMISE OF MARRIAGE; CRIMINAL CODE (1906) SEC. 212.

The promise of marriage referred to in sec. 212 of Cr. Code (1906) must be an absolute promise and not a conditional promise only to be performed in the event of pregnancy happening, or it will be insufficient to support a charge of seduction under promise of marriage.

The King v. Comeau, 5 D.L.R. 250, 11 E.L.R. 37 and 104.

The words "previously chaste character" as used in the Criminal Code (1906) sec. 212, as to seduction under promise of marriage, do not necessarily imply that the female shall be "virgo intacta."

The King v. Comeau, 5 D.L.R. 250, 11 E.L.R. 37 and 104.

SECURITY FOR COSTS.

See Costs, I.

SEED GRAIN.

Lien for, see Liens, I.

SEIGNIORIAL RIGHTS.

(§ I—1)—SEIGNIORIAL GRANT.

The grant of fief by the Governor and Intendant of New France in the usual form and confirmed by the King passes a proprietary title in which are specified all the obligations imposed on the grantee. No others can be added drawn from the circumstances under which the grant was made or from the negotiations and correspondence preceding or accompanying it. An Act passed before the abolition of the seigniorial tenure, confirming the grant and declaring that it was made "for the moral and religious instruction of the Indians, etc.," does not affect the title conferred and gives no real rights in the fief to the Indians named.

The religious instruction mentioned in the Act is that to be given by the grantees when it was passed and does not oblige them to resort to any other kind whatever change may since have taken place in the religious belief of the Indians.

Corinthe v. Seminary of Ste. Sulpice, 21 Que. K.B. 315, affirming 38 Que. S.C. 268.

[An appeal to the Privy Council was dismissed, Corinthe v. Seminary of Ste. Sulpice, 5 D.L.R. 263, 28 Times L.R. 549.]

SELF-DEFENCE.

In committing assault, see Assault and Battery.

Commission of homicide in, see Homicide, III.

SENTENCE.

In criminal case, see Criminal Law, IV.

Suspension of sentence, see Criminal Law, IV.

For crime, see Criminal Law, IV.

SEPARATE ESTATE.

Of married woman, see Husband and Wife, II.

SEPARATE MAINTENANCE.

Suit for, see Divorce and Separation.

SERVANTS.

See Master and Servant.

SERVICE.

Of process, see Writ and Process, II.

SERVICES.

Construction of contract for, see Contracts, II.

Implied contract to pay for, see Contracts, I.

SET-OFF AND COUNTERCLAIM.

I. OF WHAT DEMANDS.
- A. In general.
- B. Recoupment.
- C. Mutuality of claims.
- D. As against transferee or assignee.
- E. By or against decedent's estate.
- F. Effect of insolvency.

II. OF AND AGAINST JUDGMENTS.

I. Of what demands.

A. In general.

(§ I—1)—OF WHAT DEMANDS.

Contract for sale of mining share—Failure of plaintiffs to furnish shares—Counterclaim—Leave to amend.

Neil v. Woodward, 2 O.W.N. 533, 18 O.W.R. 230.

Relation to subject matter—Embarrassment—Delay.

Kearns v. Kearns, 3 D.L.R. 872, 3 O.W.N. 1151.

(§ I A—2)—BREACH OF CONTRACT.

In an action by a contractor against building owners to recover a balance alleged to be due for work done under a building contract and for extras, and upon a counterclaim by the defendants for damage done to their goods by the plaintiff and for delay. It was held, that the question of completion or non-completion, in any particular case, must depend upon the terms of the contract and the facts and circumstances of the particular case; and, where there is honesty and a bona fide intention to complete, there is completion if the contract is completed in all essential and material respects, and there exist only slight imperfections in the work or slight deviations from the specifications, which can be easily cured and corrected at an expense trifling as compared with the amount of the contract-price; and in this case, there was completion in that sense—the contract-price being about $20,000, the plaintiff having deposited with the defendants the sum of $1,000 by way of security, designed to cover trifling imperfections, and the owner being entitled to retain 20 per cent. of the contract-price until completion. And held, also, that, if there was non-completion, the architect, having under the authority of a clause in the agreement, elected to give a notice to the plaintiff

calling his attention to certain parts of the work remaining incomplete, requiring him to complete them within three days, and stating that, failing compliance, the contract would be cancelled and the work completed by the architect, had, by taking advantage, on behalf of the defendants, of the benefits of this clause, conferred upon the plaintiff the corresponding benefits, viz., that the work must be paid for by the defendants with a deduction of the cost of such labour and materials as was incurred in completing the contract; and, an election having once been made, neither the owners nor the architect could withdraw. The only reference to a written certificate of the architect was in a clause of the contract relating to payments, in these words: "The remaining 20 per cent. on the contract-price to be paid 33 days after the works are entirely completed to the satisfaction of the architect and accepted by him, provided that in each case where payment is demanded a certificate shall be obtained from and signed by the architect in charge to the effect that he considers the payments properly due:—Semble, that, under this, a written certificate was not a condition precedent to recovery by the contractor; and, if a certificate was required, the architect could be forced, by mandamus or otherwise, to execute one. But the question of the necessity for a final certificate did not really arise, because the defendants took over the completion of the contract, and were liable to pay the contract-price with the proper deduction. Even where the contract provides that a final certificate shall be a condition precedent to recovery by the contractor, the condition becomes ineffective where the employer interferes with the architect, either before or in the giving of the certificate. And held, upon the evidence, that the architect would, if he had been left to exercise his own independent judgment, have certified to the final completion of the building, with a deduction for defects or imperfections to the amount of $150, and that he refrained from doing so, and refused to do so, because he was instructed by the defendants and their solicitors not to do so; and thus, if a certificate was necessary, it was dispensed with. And held, further, upon the evidence that the architect did eventually give an effective certificate. Held, therefore, that the plaintiff was entitled to recover the balance of the contract-price, with a small deduction for imperfections or defects in the work; and was also entitled, upon the evidence, to recover for certain extras both within and without the contract. Upon the counterclaim it was held, that the defendants were entitled to $300 for damage to goods by rain, through the negligence of the plaintiff; but were not entitled to any further damages for loss of or injury to goods. The contract provided for the payment by the plaintiff of $20 a day for each day's delay after the time fixed for completion—"the said amount to be deducted from the amount of consideration for this contract as for liquidated damages, and not by way of penalty . . . provided, however, that, should the contractor be delayed by strikes of any trade, or from any other cause which he cannot reasonably be expected to control, then the architect shall give the contractor such extension of time as, in his, the architect's, opinion, is fair and just":—Quære, whether these sums of $20 a day could be recovered in the action, or whether the only remedy was to deduct them from the amounts owing by the owners to the contractor upon the final ascertainment. But held, that, in any event, the architect, by his absolute refusal to deal with the question of damages, which necessarily involved the question of allowances for delays, abdicated his quasi-judicial office; and, therefore, the ascertainment of the amount of the damages—involving the allowance for delays—was for the Court. And held, that, once the owner has seen fit to take possession of a building, although this may have no bearing on the question of completion or non-completion, it prevents the owner from claiming so-called liquidated damages for non-completion; and, upon the evidence, having regard to the time or times when possession was taken, the days of delay should be fixed at 26 and allowed for at $20 a day.

Watts v. McLeay, 19 W.L.R. 916.

(§ I A—5)—WAGES.

A claim for wages can neither be made the subject of a set-off nor used as a defence to an action for tort. (Per Riddell, J.).

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

C. Mutuality of claims.

(§ I C—15)—MUTUALITY OF CLAIMS.

A defendant can counterclaim against the plaintiff and a third party only when the relief claimed relates to or is connected with the original cause of action. Where in an action for the price of goods the defendant counterclaimed against the plaintiff and a third party for damages for alleged malicious prosecution, the counterclaim was struck out.

Macdonald v. Logan, 7 Terr. L.R. 423.

In an action for goods sold and delivered defendant sought to avail himself of a set-off against the person employed to manage the business on behalf of the plaintiff. It was held, that the burden was upon defendant to show that he believed the manager of the business to be the principal at the time the goods in question were purchased or that the plaintiff by his conduct induced such belief. Also, assuming a partnership to be established, defendant could not succeed inasmuch as, upon a settlement of the partnership accounts, there would be no-

thing coming to the partner against whom his claim was asserted.

Chapman v. Prest, 9 E.L.R. 201, 45 N.S.R. 231.

A third person brought into an action by the defendant's counterclaim against the plaintiff, cannot himself set up a counterclaim against the defendant. (Per Riddell, J.). [Street v. Gover, 2 Q.B.D. 498; Alcoy and Gandia R. and Harbour Co. v. Greenhill, [1896] 1 Ch. 19; General Electric Co. v. Victoria Electric Light Co. of Lindsay, 16 P.R. 476, 529; Green v. Thornton, 9 C.L.T. Occ. N. 139, specially referred to.]

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

II. Of and against judgments.

(§ II—40)—Of and against judgments.

Where damages have been awarded in respect of part of the plaintiffs' claim and the defendants succeed in part on their counterclaim for damages for breach of contract, the Court may direct a set-off of the damages pro tanto.

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405.

Where plaintiff obtains a judgment for a sum of money against defendant, and where, on an opposition to annul same, the defendant opposant sets up two certain accounts against plaintiff contestant exceeding in amount the judgment, and the opposition is maintained and the judgment declared compensated and extinguished; the right of the defendant opposant, in recourse against the plaintiff for the excess, will be adjudged in the same proceeding.

Reader v. Calumet Metals Co., 6 D.L.R. 496, 10 La Rev. de Jur. 346.

A judgment may be extinguished by set-off (compensation) under the Civil Code (Que.), by an account when both are equally liquidated and demandable where the subject of each is a sum of money. [Art. 1188 of the Civil Code (Que.), and Fisher v. Sheridan, 17 Que. K.B. 296 referred to.]

Reader v. Calumet Metals Co., 6 D.L.R. 496, 19 La Rev. de Jur. 346.

SETTLEMENT.

Of decedent's estate, see Executors and Administrators, IV.

See also Compromise and Settlement.

SEWERS.

See Drains and Sewers.

SHAREHOLDERS.

See Corporations and Companies.

SHERIFF.

(§ I—1)—Liability.

The authority of a sheriff as to official acts, that is, acts which a private individual could not do, is confined to the county of which he is sheriff. (Per Riddell, J.).

Malouf v. Labad (No. 2), 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99.

Money paid to a sheriff by the defendant upon arrest for debt under the provisions of C.S. 1903 ch. 30, sec. 5, is held by the sheriff as a statutory trustee and the interest, if any, upon such money must be accounted for by him in the same way as the principal.

McKane v. O'Brien, 40 N.B.R. 392.

(§ I—3)—Right to collect fees and charges.

Rules 432 and 433 of the Judicature Ordinance (C.O. 1898, ch. 21), are not intended to alter the law so as to create any liability for sheriff's costs where none existed by law previously. They are intended to limit the liability, where by law such exists, to those fees and expenses set out in rule 432. A sheriff who makes a seizure without specific instructions is not entitled to any costs of seizure if the seizure prove abortive.

Elliott v. McLean and McLean, claimants, 7 Terr. L.R. 413.

The sheriff at Moosomin, under the instructions of the solicitor for the execution creditor, took with him when he was going to attend Court at Oxbow, a writ of execution against goods to seize thereunder while in the vicinity of Oxbow, where the execution debtor resided. The execution debtor informed the sheriff at the time of seizure that he had arranged with the execution creditor for an extension of time to pay, and this being communicated to the solicitor, he instructed the sheriff to withdraw. No steps had been taken by the sheriff other than making seizure. The sheriff having charged for mileage, all the way from Moosomin, where his office was, and also charged poundage on the whole execution, the solicitor reviewed such charges before the Judge. It was held, that under the tariff the sheriff was entitled to mileage from his office at Moosomin, and, further, that apart from rule 374 of the Judicature Ordinance, the sheriff would not be entitled to poundage, but that under that rule the sheriff was entitled to poundage.

In re Murphy, Sheriff, 7 Terr. L.R. 271.

SHIPPING.

I. In general; limitation of liability.

II. Ownership and employment of vessels.

III. Powers and liability of master.

IV. Offences under shipping laws.

Vessel as common carrier, see Carriers.

Collision between vessels, see Collision.

As to marine insurance, see Insurance.

As to salvage, see Salvage.

As to wharves, see Wharves.

Obstruction of floatable streams, see Waters, I.

Rules of the road in navigation, see Waters, I.

Procedure in Admiralty cases, see Admiralty.

I. In general; limitation of liability.

(No cases.)

II. Ownership and employment of vessels.

(No cases.)

III. Powers and liability of master.

(No cases.)

IV. Offences under shipping laws.

(§ IV—20) — OFFENCES UNDER SHIPPING LAW.

A certificate of discharge furnished by the master of a ship to the second officer under sec. 176 of the Canada Shipping Act, R.S.C. 1906, ch. 113 (Form K.) is not a certificate of service within section 123 of that Act making it an offence for a person to fraudulently make use of a certificate of service to which he was not entitled.

The King v. Wright, 2 D.L.R. 678, 3 O.W.N. 851, 21 O.W.R. 433, 20 Can. Cr. Cas. 23.

The offence of making a false representation for the purpose of obtaining a certificate of competency as master of a passenger steamer under the Canada Shipping Act, R.S.C. 1906, ch. 113, is negatived if it appears that there was no guilty knowledge or intent on the part of the accused and that the only error in his application papers was that believing that service as second mate counted in like manner as would service as first mate, he represented that he had served as mate "on a certain boat for a year," whereas a part of the time had been served as second mate and the remainder as mate (i.e., first mate), particularly where the examining officer when called as a witness testified that he would have passed the applicant's papers had the actual facts been shewn.

The King v. Wright, 2 D.L.R. 768, 3 O.W.N. 851, 21 O.W.R. 433, 20 Can. Cr. Cas. 23.

One who complains of a breach of regulations under Part XIV. of the Canada Shipping Act, R.S.C. 1906, ch. 113, is not required to shew any guilty intent on the part of the person committing such breach or any actual damage resulting therefrom.

Eastaway v. Lavallee, 5 D.L.R. 229.

SIGNAL.

To or by driver of automobile, see Automobiles.

Duty as to, at highway crossing, see Railroads, II.

SITUS.

For purposes of garnishment, see Garnishment, I.

For purpose of taxation, see Taxes, II.

SLANDER.

See Libel and Slander.

SOLICITORS.

I. RIGHT TO PRACTISE.
- A. Admission.
- B. Disbarment.
- C. License.

II. RELATION TO CLIENT.
- A. In general; liability.
- B. Authority.
- C. Compensation; lien.
- D. Summary proceedings.

III. REMEDIES AGAINST; MOTIONS.

Champertous agreements for compensation for services, see Champerty.

I. Right to practise.

A. Admission.

(§ I A—1)—RIGHT TO PRACTISE.

A solicitor, whose name appeared on the roll of the Law Society of Saskatchewan, but who resided in Winnipeg, entered an appearance in this action on behalf of the defendant. The solicitor's address was not stated, but a proper address for service was given. On a motion to strike out the appearance on the grounds that no address was given, and that a solicitor resident out of the jurisdiction was not entitled to practise as such in the province. It was held, the omission to give an address was an irregularity which could be cured by amendment. (2) That anyone duly enrolled as a solicitor by the Law Society of Saskatchewan and in good standing is entitled to practise as such, notwithstanding that he may reside out of the Province.

Fraser v. Grand Trunk Pacific Branch Lines Company, 4 S.L.R. 311.

B. Disbarment.

(§ I B—12)—PRACTICE AS TO DISBARMENT.

The syndic (or attorney for the Council of the Bar) who lays a complaint in his professional quality has no right to sit as a member of the committee which investigates the charge, and the order of suspension by a committee including the syndic is illegal and against the fundamental principles of justice.

Gosselin v. Bar of Montreal (No. 1), 2 D.L.R. 19.

II. Relation to client.

A. In general; liability.

(§ II A—21)—SUBSTITUTION.

Change—Right of majority of adminis-

trators to choose solicitor for estate—Solicitor's charges.

Re Solicitor, 1 D.L.R. 899.

(§ II A—24)—Right to payment for services rendered as director.

In the absence of an express promise by the client to pay for services rendered by a solicitor as director of a company incorporated by the client, no remuneration for such services will be allowed.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

B. Authority.

(§ II B—25)—Authority.

Plaintiff was employed by the master and managing owner of a vessel, of which defendant was part owner, to act as solicitor in connection with proceedings against several seamen for desertion, and also in resisting an application for their discharge from imprisonment. After the imprisonment of the seamen the master was removed from his position as managing owner, and defendant, who was appointed in his stead, paid a note given by the master for plaintiff's services in securing the conviction of the men and successfully resisting the application for their discharge. Subsequently a second application for the discharge of the men was made before another Judge, and, in the absence of the master, the papers were brought by a member of his family to plaintiff, who notified defendant and another owner of the application. Plaintiff had no notice of the removal of the master and was merely told by defendant that he had no instructions. It was held, by Graham, E. J., and Drysdale, J., affirming the judgment of Russell, J., that if defendant objected to plaintiff opposing the second application he should have told him so, and having failed to do so, and having paid the note given for services, rendered after the removal of the master, the principle of estoppel applied. Per Sir Charles Townshend, C.J., and Meagher, J., that plaintiff's retainer was at an end when he was paid for the services rendered, and that he was not justified in opposing the second application without fresh authority.

Lane v. Duff, 45 N.S.R. 336.

Where solicitors have appeared for a company and the action has been contested down to judgment, neither the company nor the plaintiff can then raise any question as to the authority of the solicitors on the ground of defects or omissions in the organization of the company of which the latter had no notice. [Thames Haven Dock and Railway Co. v. Hall, 5 M. & Gr. 274; and Faviell v. Eastern Counties Railway Co., 2 Ex. 344.]

Campbell v. Taxicabs Verrals, Limited, 7 D.L.R. 91, 4 O.W.N. 28, 23 O.W.R. 6, 27 O.L.R. 141.

(§ II B—28)—To act for both parties.

A solicitor who acted for the plaintiff in a mortgage foreclosure proceeding, may act for a defendant therein, where it appears that the interests of the two parties are not adverse, or that the interest of the plaintiff in the subject-matter of the litigation had ceased.

Allin v. Ferguson, 5 D.L.R. 19, 21 W.L.R. 246.

A motion on behalf of a subsequent mortgagee to obtain payment from the proceeds of the sale of the encumbered property under a prior mortgage, will be denied where the motion was made by the solicitor of record of the plaintiff in the foreclosure proceedings, without it appearing that the rights of the two mortgagees were not adverse, or that the plaintiff's interest in the litigation had ceased.

Allin v. Ferguson, 5 D.L.R. 19, 21 W.L.R. 246.

(§ II B—29) — To pay off judgment against client.

Where the plaintiff was acting as solicitor for the defendant and in the course of doing the latter's legal business paid certain registered judgments against his client, in order to enable him to transfer certain property that he desired to sell, the solicitor is entitled to be reimbursed for the money paid by him to discharge the judgments on proof of instructions to pay the judgments.

McLaws v. Wellband, 4 D.L.R. 24, 20 W.L.R. 657, 21 W.L.R. 592.

C. Compensation; lien.

(§ II C—30)—Compensation; lien.

The tariff of advocates for the Province of Quebec does not apply as between solicitor and client, but only as between the successful attorney and the losing party.

Jacobs v. Wener, 8 D.L.R. 543.

Where an advocate acts as arbitrator and mediator at the request of his client, and without being appointed by authority of the Court, he is entitled to recover his fees from his client on a quantum meruit basis irrespective of the tariff for advocates.

Jacobs v. Wener, 8 D.L.R. 543.

Services rendered by an advocate as an arbitrator at the request of his client are professional services of an advocate and are recoverable as such.

Jacobs v. Wener, 8 D.L.R. 543.

Bill for services rendered in county where solicitor resides—Reference of bill to Toronto—Irregular order—Objection not taken at proper time—Con. Rules 1187, 311.

Re Solicitor, 4 O.W.N. 461, 23 O.W.R. 621.

Unless there is a contract between a solicitor and his client for a percentage under sec. 65 of the Legal Profession Act (Man.), the tariff promulgated under rule 990 of the Manitoba King's Bench Act, is the only measure of a solicitor's remuneration for

litigious business. [In re Richardson, 3 Ch. Ch. R. 144, distinguished.]

Re Phillipps and Whitla (No. 2), 1 D.L.R. 847, 20 W.L.R. 533, 22 Man. L.R. 154.

Where the bill of costs of the solicitor against his client, brought in for taxation at the instance of the client, consists of a lump sum charged as a "fee on settlement," in addition to disbursements, and the amount allowed by the taxing officer in respect of such fee was based upon a percentage of the value recovered or preserved by the solicitor for the client, a question of the principle of taxation is raised and the client may appeal from such allowance although he has not carried in written objections for review before the taxing officer, the rules as to written objections (Manitoba King's Bench Rules 968 and 969) not being applicable to questions of principle. [Re Robinson, 17 P.R. 137; Re Mowat, 17 P.R. 180, and Clark v. Virgo, 17 P.R. 260, specially referred to. Sparrow v. Hill, 7 Q.B.D. 362, and Re Fletcher and Dyson, [1903] 2 Ch. 688, applied.]

Re Phillipps and Whitla, 1 D.L.R. 291, 20 W.L.R. 229, 48 C.L.J. 198, 22 Man. L.R. 150.

The Master in Chambers has no jurisdiction to entertain a motion by a client for delivery of a bill of costs under the Solicitors Act, 9 Edw. VII. (Ont.) ch. 28, sec. 33.

Re Solicitor, 3 D.L.R. 718, 21 O.W.R. 948, 3 O.W.N. 1132.

Where no specific notice of any claim for a lien as to their costs appears to have been given at any time by the solicitors representing the prevailing party in an action to the party against whom judgment was rendered and who settled with the winning party at a sum less than that which the judgment called for, the Court will, in the absence of evidence that there was collusion or improper conduct on the part of the losing party aiming to deprive the solicitors of their costs, refuse to grant a petition by such solicitors asking for an order declaring them entitled to a lien upon the judgment recovered by their client and for the payment of these costs by the losing party. [Reynolds v. Reynolds, 26 Times L.R. 104, specially referred to.]

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 3 O.W.N. 1588, 22 O.W.R. 786.

Where a client delivers money to his solicitor not as a retainer but as security for the payment of his remuneration, the latter is bound to account therefor, and to deliver to the client a bill of his actual charges, which will be referred for taxation.

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

A counsel fee advising on evidence is taxable as between solicitor and client at any stage of the suit if the client consults his solicitor in that respect, but the counsel fee for settling pleadings is not taxable until after all the pleadings have been delivered. The fees authorized by the tariff apply as between solicitor and client with respect to the services covered thereby, but in cases where there is no tariff the solicitor can recover the value of his services upon a quantum meruit.

Re A Solicitor, 7 Terr. L.R. 262.

The plaintiffs were a firm of barristers and solicitors. A. of that firm was retained by defendant to act as counsel in a suit then pending. It was found that defendant agreed to pay for this the sum of $100 per day. The trial lasted seven days. One day was occupied in consultation and two days going and returning from the trial, and a proper bill for $1,000 was rendered. In an action to recover the balance due it was held, that the defendant, by agreeing to pay the fee stated, had contracted himself out of the Legal Profession Act, and the Court could not order taxation, but must give judgment for the plaintiffs.

Allan, Gordon & Bryant v. Dangerfield, 4 S.L.R. 363.

A writing signed by a person in custody on a criminal charge which stated that "I hereby retain (a solicitor) to make application for my release from gaol, and hereby deliver him a cheque for $300 as retainer," the cheque being claimed by the solicitor as a retainer and not as remuneration for his services, is not an agreement in writing with the client respecting the "amount and manner of payment for the services of a solicitor in respect of the business done or to be done by him" within the meaning of the Law Reform Act, 9 Edw. VII. ch. 28, sec. 22 et seq., which permits agreements in writing between solicitor and client respecting the amount and manner of payment for either past or future services.

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

A retainer is a gift of money by a client to his solicitor outside of and apart from his remuneration, which he is not bound to bring into account, but in order that it be construed as a retainer the former must know the true nature thereof as a gift

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

A solicitor cannot elect to render services gratuitously and keep as a retainer money received from his client, where the latter did not understand the nature of a retainer, and supposed such money was delivered as security for the remuneration of the solicitor, or as a part payment thereon.

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

(§ II C 1—31) — CONTRACT FOR CONTINGENT FEE.

One Draper retained a solicitor in connection with certain divorce proceedings pend-

ing in the United States, entering into an agreement for an expressed consideration to pay the solicitor $300 for such services. Subsequently the solicitor received the proceeds of a loan obtained by Draper, and was asked by the latter to account, whereupon he deducted $300 and paid over the balance. It did not appear that the proceedings in respect of which the solicitor had been engaged were terminated. On a motion to compel the solicitor to deliver a bill, it was held, that, notwithstanding an agreement to pay a fixed amount for fees in respect of any particular matter, the Court, if not satisfied that the amount so agreed upon is reasonable under the circumstances, may direct a bill to be delivered and taxed. (2) But, as it was not shewn that the relationship of solicitor and client had been ended, or that the proceedings in respect of which the solicitor had been engaged had been terminated, no order could be made.

Re W. S. Walker, 4 S.L.R. 402.

(§ II C—33)—FEES ON SETTLEMENT.

Where solicitors acting for clients in important litigious matters, succeed in effecting a settlement and there is no special agreement under sec. 65 of the Legal Profession Act (Man.) for their remuneration, the solicitors must deliver an itemized bill which may include a fee on settlement, the amount of which is subject to taxation by the taxing master. [See Thomson v. Wishart. 19 Man. R. 340, as to sec. 65 of the Legal Profession Act, and see Re Attorneys, 26 U.C.C.P. 495, and Re Johnston, 3 O.L.R. 1.]

Re Phillipps and Whitla (No. 2), 1 D.L.R. 847, 20 W.L.R. 533, 22 Man. L.R. 154.

(§ II C—35)—LIEN; RIGHTS IN FUND OR PROPERTY.

A solicitor's agreement to divide with his law partner remuneration that he was to receive under a contract with a third person in respect to a real estate purchase, is not affected by the Law Society Act, R.S.M. 1902, ch. 95.

McLaws v. Smith, 5 D.L.R. 449, 21 W.L.R. 780.

(§ II C 2—36)—DIRECT ACTION (QUEBEC PRACTICE).

The attorney for a plaintiff is by the institution of suit placed in the position of incidental plaintiff against defendant for recovery of his costs, and he has a direct action therefor subject, however, to the same fate as the main action of his client either in the Court of instance or in appeal.

Seale v. Bowers, 1 D.L.R. 632.

III. Remedies against; motions.

(No cases.)

SPECIAL ASSESSMENTS.

See Public Improvements, III.

SPECIFIC PERFORMANCE.

I. RIGHT TO REMEDY.
- A. In general.
- B. Oral contracts.
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II. DECREE OR JUDGMENT.

Right of one seeking, to discovery, see Discovery and Inspection.

As to mandatory injunction, see Injunction.

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I. Right to remedy.

A. In general.

(§ I A—1)—RIGHT TO REMEDY.

In an action for specific performance, the plaintiff's readiness and eagerness to perform his part of the contract must be judged as of the time the action is commenced. (Per Walsh and Scott, JJ.)

Evans v. Norris, 8 D.L.R. 652, 22 W. L.R. 818.

(§ I A—2) — MUTUALITY OF OBLIGATION OR REMEDY.

One cannot be compelled to specifically perform a contract for the sale of land owned by him, which was made by a person who acted without instructions from or the authority of the owner.

Boland v. Philp, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 849.

(§ I A 3)—CERTAINTY AND DEFINITENESS.

A memorandum of sale of land which recites a consideration of $2,700 and provides for six yearly payments aggregating $2,400 only, does not contain all of the terms of the contract between the parties so as to satisfy the requirements of sec. 4 of the Statute of Frauds, when the document is silent as to the manner of paying the remaining $300 whether in cash or otherwise, nor can it be presumed even as against the vendor that such balance was to be paid in cash, although the purchaser assents thereto by his pleading. [Hussey v. Horne-Payne, 4 A.C. 311, 316; Chinnock v. The Marchioness of Ely, 4 DeG. J. & S., 638, 646; Munday v. Asprey, 13 Ch.D. 855, and Fowle v. Freeman, 9 Ves. 351, specially referred to; see also annotation to this case.]

Fenske v. Farbacher, 2 D.L.R. 634, 21 W.L.R. 53.

Where it appears that the terms of a written agreement are indefinite or uncertain, specific performance will not be decreed. [Fenske v. Farbacher, 2 D.L.R. 634, specially referred to; see also annotation, 2 D.L.R. 636, as to oral contracts generally.]

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

Specific performance of a written instrument will not be decreed where it is shewn that this instrument did not contain the whole agreement of the parties, but that it was the intention of the parties at the time of the execution of the instrument that a formal agreement should be later entered into between them. [Stow v. Currie, 21 O.L.R. 486; Thompson v. McPherson, 3 D.L.R. 269, referred to.]

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

If two parts of a contract are mutually exclusive, specific performance of one part may be decreed if specific performance of the whole is impossible. But where the two parts are dependent one upon the other, and it is impossible to decree specific performance of the one part, it will be denied as to the entire agreement. [See annotation on Specific Performance generally, 1 D.L.R. 354.]

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

(§ I A—5)—Default on initial payment; when remedy applies.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum, of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot rely upon a tender made on the day following the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Where a purchaser, under an agreement to purchase lands, insists upon something unprovided for in the agreement as a sine qua non of his performing his own express obligations under the contract, he thereby raises an impassable barrier to his own action for specific performance. (Per Idington, J.).

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Where an agreement for the sale of land expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the document and where the purchaser prior to the execution thereof knew of an outstanding mortgage amounting to much less than the subsequent instalments of the purchase price, his explicit refusal to comply with the provisions for the $10,000 payment gives his vendor the right to treat such refusal as an abandonment, or, at least, a repudiation of the agreement entitling the vendor to rescind. (Per Idington, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Where an agreement for the sale of land expressly stipulates for a down payment of $10,000 on a $33,750 purchase, and there is outstanding a mortgage (of which the purchaser had notice prior to the agreement) which amounts to less than the balance of the purchase price, if the purchaser refuses on an objection to title based upon the outstanding mortgage to make the down payment, the vendor is entitled upon reasonable notice to cancel the contract, and where such notice is given and the purchaser still refuses to comply he cannot afterwards enforce specific performance. [Knight v. Cushing, 1 D.L.R. 331, 20 W.L.R. 28, reversed; and see as to the remedy of specific performance generally, annotation, 1 D.L.R. 354. and as to want of title, annotation, 3 D.L.R. 795.]

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

(§ I A—9)—Knowledge of plaintiff as to defendant's inability to perform.

Where house premises were sold for a lump sum and the purchaser knew that the vendor had title only to the frontage of twenty feet occupied by the dwelling, and a right of way jointly with an adjoining owner over and upon a passageway eight or nine feet wide at the side of the house, but the property was in good faith described in the contract of sale as having a frontage of "twenty-four and one half feet more or less" (that frontage being the basis of the tax assessment) the purchaser who has declined either to receive back his deposit or to accept the property as it stands without abatement in price and who has insisted upon his requisition of title for the full twenty-four and one-half feet frontage or compensation for a deficiency of four and one-half feet without reference to the value of the right of way, will not be allowed, after the dismissal of his action for specific performance against the vendor tried upon that issue, to change his position upon an appeal from such dismissal and to then elect to take specific performance without compensation, if such claim would raise a new cause of action not upon the record, especially where there was no evidence that the value of the twenty feet frontage and of the vendor's rights over the passageway which the vendor offered to convey was any less than would have been the value of the frontage contracted for, and where the contract provided that the agreement should be null and void if any objection to title was insisted upon, which the vendor was unable or unwilling to remove.

Bullen v. Wilkinson, 2 D.L.R. 190, 3 O.W.N. 859, 21 O.W.R. 427.

(§ I A—11)—Enforcing partial performance.

Where the proposed purchaser knew that

the vendor was not the sole owner and the vendor did not assume to contract as such on taking a deposit and giving a receipt embodying the terms of sale expressed to be "subject to owners' approval," the purchaser, on the co-owners' rejection of the agreement, is not entitled to specific performance pro tanto for even the partial interest which his vendor had.

Tremblay v. Dussault, 8 D.L.R. 348, 22 W.L.R. 716.

In an action by the purchaser for specific performance of an agreement to sell land, if it appears that the vendor has a part interest only in the land, the purchaser is entitled to specific performance to the extent of such interest, with compensation in respect of any outstanding estate. [Kennedy v. Spence, 24 O.L.R. 535, 3 O.W.N. 76, followed.]

Gottesman v. Werner, 3 D.L.R. 296, 3 O.W.N. 1042.

Where the terms of an agreement for the sale of a mine are uncertain, and it further appears that this agreement was not the final agreement but that a more formal agreement was to be drawn up later, the fact that part of the purchase price has been paid by the purchaser, is not such part performance of the contract as would entitle him to specific performance, and he will have to avail himself of another remedy for the recovery of the moneys so paid.

Treadgold v. Rost, 7 D.L.R. 741, 22 W.L.R. 300.

(§ I A—12)—Persons entitled to enforce performance.

Where land is described in a letter from the owner to a real estate broker, which letter also contains the words, "I hereby give you the right to sell the above property," and the broker arranged for a sale thereof with the plaintiff, who executed a formal agreement of sale, and where the subsequent conduct of all the parties and the evidence in the case shews that the ordinary meaning of the word "sell" was considered as modified or restricted, the plaintiff is not entitled to specific performance of the said agreement of sale as against the owner.

Schaefer v. Millar et al.; the Battleford Realty Co., 8 D.L.R. 706, 22 W.L.R. 745.

Though payment of a cash deposit on a purchase of land is not such part performance as to remove the case from the operation of the Statute of Frauds, yet a receipt given for said deposit which sets out a sale by an agent, upon terms authorized by his written instructions from the owner, may furnish the written memorandum of the sale required by the statute, so as to warrant specific performance as against the owner. [Hussey v. Horne-Payne, 3 A.C. 316, specially referred to.]

Lloy v. Wells, 3 D.L.R. 315, 21 W.L.R. 50.

A trifling deficiency in the amount tendered as the balance due under an agreement for the sale of land, will not necessarily disentitle the purchaser to specific performance of the agreement.

Gillespie v. Wells, 2 D.L.R. 519, 22 Man. L.R. 355, 21 W.L.R. 231.

The granting of relief in a proceeding for the specific performance of a contract, lies in the discretion of the Court, and will not be exercised arbitrarily or capriciously, but only where it would be inequitable to deny such relief. [Clowes v. Higginson (1813), 1 V. & B. 524; Harris v. Robinson (1892), 21 Can. S.C.R. 390; Lamare v. Dixon (1873), L.R. 6 H.L. 414; Coventry v. McLean (1892), 22 O.R. 1, referred to.]

Fuller v. Maynard, 5 D.L.R. 520, 3 O.W.N. 1602, 22 O.W.R. 809.

(§ I A—13) — Performance or offer to perform.

A party cannot call upon a Court of equity for specific performance unless he has shewn himself ready, desirous, prompt and eager, to perform his own part of the contract. (Per Simmons and Stuart, JJ.). [Milward v. Earl of Thanet, 5 Ves. 720n; Eads v. Williams, 4 DeG. M. & G. 674, 691, referred to.]

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 22 W.L.R. 91.

(§ I A—14)—Failure as to time.

Under an agreement to sell lands, where the purchaser, by his continued default on an instalment of the purchase price, placed upon the contract the earmarks of abandonment, and thereby entitled the vendor to cancel the contract, but, instead of cancelling, the vendor brought action to compel payment of the purchase-price under the terms of the agreement, this election by the vendor entitled the purchaser (had he acted promptly) to have the sale carried out.

Dunlop v. Bolster (No. 2), 6 D.L.R. 468, 21 W.L.R. 695.

A claim for specific performance must fail where the alleged contract failed to become complete because of failure to accept the offer within reasonable time.

Kelly v. Holley et al., 8 D.L.R. 176, 22 W.L.R. 587.

A Court of equity may either relieve against or enforce specific performance, notwithstanding failure to keep the dates assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if there is nothing in the express stipulations between the parties or in the nature of the property or surrounding circumstances which would make it inequitable to interfere with and to modify the legal right. (Per Perdue, J.A.). [Tilly v. Thomas, L.R. 3 Ch. 61, specially referred to.]

Hicks v. Laidlaw, 2 D.L.R. 460, 20 W.L.R. 479, 22 Man. L.R. 96.

A decree for specific performance of an agreement of sale will not be refused because of any misrepresentations by the purchaser, unless they are material, that is, relate to some part of the contract or its subject matter. Misrepresenting the seller's chance of sale or the probability of his getting a better price for his property than the buyer offers is not a material misrepresentation. [Archer v. Stone (1898), 78 L.T. 34, and Vernon v. Keys (1810), 12 East. 632, 4 Taunt. 488, followed.] Applying this principle, statements made by the plaintiff to the defendants, during negotiations for the purchase of the property in question, that there was nothing in a rumour (said to be current) of a big concern having bought, or being about to buy a large parcel of land on the opposite side of the street, of part of which the plaintiff was one of the owners, with the intention of erecting extensive improvements thereon; that he, the plaintiff, had never been approached by any one with a view to purchasing his interest in such property and that part of that property could then be bought at a price per foot frontage very much lower than the defendants were asking for the property in question, were held not to be material to the contract. A misrepresentation as to who the real purchaser was might, under some circumstances, be so material to the contract as to vitiate it, but in this case the defendants, although they had been told by the plaintiff that he was buying for another named person, could only say that, if they had known that the plaintiff was buying for himself, they would have been suspicious that he was concealing facts which would have made the property more valuable and would not have sold to him at the price actually fixed, and they actually made out and signed the contract of sale in the plaintiff's own name. It was held, that the alleged misrepresentation as to the identity of the proposed purchaser was not, under the circumstances, material to the contract.

Dart v. Rogers, 21 Man. L.R. 721.

B. Oral contracts.

(§ I B—15)—Oral contracts.

Where plaintiff made a verbal arrangement for the purchase of land for $4,000, as follows: assuming a mortgage thereupon, paying $1,000 "as soon as I could," and two payments of $750 each in one and two years respectively, and no time was fixed, nor rate of interest agreed upon, the contract is too indefinite upon which to decree specific performance upon acts of part performance referable thereto, which, had they referred to a definite contract, might have taken it out of the operation of the Statute of Frauds.

Beck v. Duncan, 8 D.L.R. 648, 22 W. L.R. 878.

An agreement of a vendor to repurchase land he agreed to sell, notwithstanding it is unenforceable because within the Statute of Frauds, constitutes a good defence to an action by the vendee for specific performance of the agreement for the sale. [Miles v. New Zealand Alfred Estate Co. (1886), 32 Ch. Div. 266; McGuiness v. Kennedy (1869), 29 U.C.Q.B. 93; and Eaton v. Crook (1910), 3 A.L.R 1, followed.]

Frith v. Alliance Investment Co., 5 D.L.R. 491, 20 W.L.R. 551.

C. Subject-matter of contracts in general.

(§ I C—24b)—Contract to lease.

The failure to carry out an agreement to lease a hotel for a year and to sell its furniture and fixtures does not present a case for specific performance of contract, there being an ample remedy in damages.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

E. Contracts for real property.

(§ I E 1—30) — Contracts for real property.

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement, and ignored a subsequent demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due. [Langan v. Newberry, 2 D.L.R. 298, affirmed; Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, distinguished.]

Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, 23 W.L.R. 93.

The purchaser under a contract for the sale of land whereby it was stipulated that the price was to be fixed later by officials of a railway company acting in the same interests as the vendor, is not entitled to specific performance if he has rejected the prices fixed by those officials, and in consequence the parties came to no agreement as to the price. [Frewen v. Hays, 16 B.C.R. 143, affirmed on appeal.]

Frewen v. Hays, 8 D.L.R. 715, 106 L.T. 516.

Where, under a contract for the sale of land providing for payment in four instalments and making time of the essence of the contract, the vendee defaults in the payment of the last two instalments, though the first two instalments amounted to one-half of the entire purchase price, he is guilty of such laches, in waiting three years before bringing his action, as will defeat his right to specific performance.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O.W.N. 536, 23 O.W.R. 699.

Where the only written evidence of an agreement for the sale of lands is in the form of a receipt for part payment of the purchase price which does not purport to contain all the terms of the agreement made by the parties and does not state the time when the balance of the purchase price shall be payable, specific performance cannot be ordered if a plea of the Statute of Frauds is raised by the vendor, even though the purchaser offers to pay cash instead of deferring any payments. [Rogers v. Hewer, 1 D.L.R. 747, reversed; May v. Platt, [1900] 1 Ch. 616, 622, applied.]

Rogers v. Hewer (No. 2), 8 D.L.R. 288, 22 W.L.R. 807.

Where the written evidence of a contract for the sale of lands is a mere receipt, and where the terms including interest on deferred payments are missing therefrom and were oral only, if the defendant is not obliged to seek any special equitable favour in defending himself against the plaintiff's claim for specific performance, the Court under its equitable jurisdiction, cannot impose terms upon him to prevent effect being given to his plea of the Statute of Frauds. [Rogers v. Hewer, 1 D.L.R. 747, reversed; Green v. Stevenson, 5 O.W.R. 761, applied; Martin v. Pycroft, 2 DeG. M. & G. 785, 42 English Reports 1079, distinguished.]

Rogers v. Hewer (No. 2), 8 D.L.R. 288. 22 W.L.R. 807.

A purchaser of land from A, whose only title to the land is under an agreement of purchase from B the owner, may, after default of A in carrying out his contract with B, on notifying B of his interest and tendering the full amount owing to him by A, if it be refused, maintain an action against both A and B for specific performance and for an order that B convey to him on payment of the amount due under his agreement with A. [Smith v. Hughes (1903), 5 O.L.R. 245; Dyer v. Pulteney (1740), Barn (Ch.) 160, and Fenwick v. Bulman (1869), L.R. 9 Eq. 165, followed. Dictum of Perdue, J.A., in Hartt v. Wishard Langan Co. (1908), 18 Man. L.R. at 387, not followed.]

Sveinsson v. Jenkins, 21 Man. R. 746.

The defendant having sold land to the plaintiff under agreement of sale in which the purchase price was payable by instalments, subsequently brought action against the plaintiff to recover the amount of the instalments then overdue, and recovered judgment upon which he placed an execution against the plaintiff's goods in the sheriff's hands. The plaintiff paid the execution in full to the deputy sheriff, and then tendered to the defendant the balance of the purchase money, which, the defendant refusing to accept, the plaintiff began this action for specific performance. The defandant contested the action on the ground that the plaintiff by his laches in making payment had disentitled himself to relief, and also on the ground that, although time was not expressly made of the essence of the contract, yet the nature and character of the property and the transaction were such as to render time of the essence. It was held, that the defendant by his conduct in forcing the plaintiff through the pressure of execution to pay the deferred instalments, had waived his right to rescind the agreement and had also waived the plaintiff's laches.

Guest v. Boston, 7 Terr. L.R. 173.

Where a purchaser of land offers to pay the whole purchase price the fact that his contract of purchase omitted to state the terms of payment will not disentitle him to a specific performance of the contract.

Rogers v. Hewer, 1 D.L.R. 747, 19 W.L.R. 868.

Where the Statute of Frauds is pleaded in an action for specific performance of an agreement for the sale of land, the question raised is really one of fact as to the intion of the parties; if their intentions were that the existing writing should contain the whole agreement, and nothing more was contemplated than is expressed therein, the statute affords no defence, notwithstanding that it was intended that a more formal agreement should be drawn up subsequently; but, if it was contemplated that such formal agreement should include material provisions not contained in the existing writing, the statute is a good defence, because a memorandum, to satisfy the statute, must contain the whole of the terms agreed upon.

Strickland v. Ross, 5 D.L.R. 706, 21 W.L.R. 945.

Where the vendor, upon failure to pay an instalment of the purchase price under an agreement for the sale of land, brings an action for the recovery of the whole purchase price under an acceleration clause in the agreement, which he subsequently discontinues, and the purchaser then, while the vendor's intentions are unknown, tenders the purchase money overdue, and begins an action for specific performance, after which the vendor serves notice of cancellation of the agreement, under a provision in that behalf contained therein, the vendor cannot insist on cancellation, but the purchaser may be compelled to pay the whole purchase money at once as a term of obtaining specific performance.

Dunlop v. Bolster, 4 D.L.R. 451, 20 W.L.R. 561.

Specific performance cannot be granted to enforce against his personal interest in the lands a contract to which the defendant was not a party made by a person deceased, of whose estate he is the personal representative where the suit is brought against him in his representative capacity only.

Adolph v. Good, 1 D.L.R. 750, 20 W.L.R. 401.

A summary application under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) ch. 58, is substituted for an action for specific performance of a contract to sell lands when the contract is admitted and the only question is as to title. [See also Armour on Titles, 3rd ed., 39.]

Re Jones and Cumming, 2 D.L.R. 77, 3 O.W.N. 672, 21 O.W.R. 248.

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement and ignored a subsequent demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due.

Langan v. Newberry, 2 D.L.R. 298, 20 W.L.R. 826.

Where, to the knowledge of a vendee, a vendor was ready and willing as well as in a position to carry out a contract for the sale of land, but the vendee repudiated the contract before the time fixed for its completion, the vendor may maintain an action for specific performance of the agreement.

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838.

Where a purchaser buys vacant land on the small monthly instalment plan and after a few monthly payments shews no further intention during a period of three or four years of continuing the payment of the instalments, such conduct on the part of the purchaser not only disentitles him to the equitable relief of specific performance but amounts to a repudiation of the contract. [Howe v. Smith, 27 Ch.D. 95, referred to.]

Handel v. O'Kelly, 8 D.L.R. 44, 22 W.L.R. 407.

Plaintiff, through an agent, applied to purchase certain land from defendant. A price was quoted and accepted, and a deposit paid. It was also understood that a formal contract was to be drawn up. Several letters passed between the parties after the acceptance of the price quoted, and in these letters terms were discussed; but it did not appear that the plaintiff specifically agreed to the terms quoted. No formal contract was ever drawn up. In an action for specific performance it was held (1) When a proposal is made and accepted and reference therein made to a formal contract, although not expressly stated to be subject to such formal contract being prepared and executed, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement, the terms of which are not expressed in detail. (2) The parties here having contemplated a formal contract being prepared and there being many necessary matters as to which no agreement had been concluded, it must be held that there was no concluded contract of which specific performance could be ordered.

Ross v. The Eastern Saskatchewan Land Co., Ltd., 4 S.C.R. 346.

Where a completed agreement for the sale of land, of which there is a sufficient memorandum in writing to satisfy the Statute of Frauds, is varied by a subsequent parol agreement, the parol variation may be ignored, and specific performance may be granted of the original agreement; but, if the plaintiff admit the parol variation and the defendant insist upon it, specific performance may be refused, unless the plaintiff allows to the defendant the benefit of the variation. [Goss v. Lord Nugent, 5 B. & Ad. 58; Stowell v. Robinson, 3 Bing. N.C. 928; Noble v. Ward, L.R. 2 Ex. 135, specially referred to; see also Halsbury's Laws of England, vol. 7, p. 422; and Leake on Contracts, 6th ed., 583.]

Maloughney v. Crowe, 6 D.L.R. 471, 3 O.W.N. 1488, 22 O.W.R. 635, 26 O.L.R. 579.

Under an agreement to sell lands, where the vendor after default on an instalment of the purchase-price brought action demanding, under an acceleration clause, payment of the full balance of purchase-money, and the purchaser tenders only the amount of the defaulted instalment when the vendor was entitled to the full balance, this shews on the purchaser's part a want of readiness and eagerness to carry out the contract and is in effect an abandonment of it, and when followed up by notice of rescission from the vendor, a subsequent action by the purchaser for specific performance must fail. [Dunlop v. Bolster, 4 D.L.R. 451, reversed on appeal; Harris v. Robinson, 21 Can. S.C.R. 404, applied.]

Dunlop v. Bolster (No. 2), 6 D.L.R. 468, 21 W.L.R. 695.

Where an agreement for the sale of lands provides for payment in six instalments, and two full instalments only are paid and a payment is made on account of the third instalment a few days after it is due, and the purchaser then leaves the province without notifying the vendor, who, two months later, served notice of cancellation based upon the default in paying the balance of the third instalment, and nothing is heard from the purchaser thereafter for over two months, and, in the meantime, another instalment falls due, and is not paid, the purchaser on afterwards tendering the arrears of principal and interest, which the vendor refuses to accept, will be refused specific performance where he gives no ex-

planation of the delay, and the property is of speculative value.

Chadwick v. Stuckey, 6 D.L.R. 250, 21 W.L.R. 788.

A company purchased certain land from defendant Borm on deferred payments under a contract containing provision for cancellation on default, and also providing that no assignment thereof should be valid against the vendor unless approved by him. Default having been made, Borm caused a notice of cancellation to be given, but at the request of the company waived this notice and granted an extension. Default having been again made, defendant served a new notice, which, however, did not comply with the provisions of the contract and was therefore ineffective. He then resold the land. Subsequently the company assigned the contract to plaintiff, but such assignments were never approved of by Borm. After this assignment plaintiff opened negotiations with Borm, who put himself in a position to complete; but plaintiff failed to make payment. Subsequently plaintiff tendered the amount due, but Borm refused to have anything more to do with the matter. Thereupon plaintiff brought action for specific performance or return of the moneys paid:—It was held, that the delays on the part of the company and the plaintiff precluded any relief by way of specific performance. (2) That while by reason of the fact that the notice of cancellation was ineffective the defendant Borm might be liable to return anything received by him under the contract, yet the plaintiff could not secure such relief, as he had not secured Borm's approval of the assignment from the company, and without this had no standing to maintain the action.

Stewart v. Borm et al., 4 S.L.R. 260.

One of two owners of partnership real property, holding a power of attorney from the other partner authorizing him to lease the property and to consent to the assignment of an existing lease upon said property, which lease contained an option to purchase exercisable at any time during the term of the lease, may bind the other partner to an agreement consenting to the assignment of that lease and giving a new option for the same amount and with a like limitation as to time as was contained in the original lease, especially where the agreement made by the one partner was shewn to the other and no objection was interposed for several months.

Morrison v. Bernhardt, 7 D.L.R. 278.

Where, under an executory contract for the sale of land providing for the payment of the purchase price in instalments, the vendee made default in the payment of an instalment when due, though it was expressly agreed that time should be of the essence of the contract, and notice was given by the vendor to the vendee declaring that the agreement was terminated pursuant to the terms of the contract, yet a forfeiture will not be allowed by the Court where it appears that a substantial amount, both absolutely and relatively to the whole purchase price, has been paid and the default had continued for only two months after the notice was given, at which time the vendee tendered the amount in which he was in default, and the vendee may notwithstanding be declared entitled to specific performance of the contract. [Chadwick v. Stuckey (No. 1), 6 D.L.R. 250, reversed; Labelle v. O'Connor, 15 O.L.R. 519, distinguished; B.C. Orchard Land Company v. Kilmer, 2 D.L.R. 306, 20 W.L.R. 892, specially referred to.]

Chadwick v. Stuckey (No. 2), 8 D.L.R. 357, 22 W.L.R. 787.

In a speculative purchase of vacant lands where the purchaser on the monthly instalment plan makes a few small monthly payments, and then for some years is neither ready nor willing to make any further payments and makes none, and where the vendor urges him to keep up the payments but without effect, and where, upon a tender subsequently of the balance of the purchase price the vendor refuses to accept it or to carry out the contract, a suit by the purchaser for specific performance or in the alternative a refund cannot be maintained, and this especially where time was expressly of the essence.

Handel v. O'Kelly, 8 D.L.R. 44, 22 W.L.R. 407.

Sale of land—Specific performance—No written agreement—Part performance—Damages—Effect of Judicature Act, secs. 41, 58 (10).

McIntyre v. Stockdale, 4 O.W.N. 482.

Sale of land—Specific performance—Principal and agent.

Foran v. Martel, 4 O.W.N. 496, 23 O.W.R. 626.

Sale of land—Specific performance—Conveyance to wife.

Mussellwhite v. Lucas, 4 O.W.N. 495, 23 O.W.R. 605.

(§ I E—32)—OPTION; CONTRACTS.

When five dollars has been paid for an option for purchase of land under which a first payment of $1,000 is stipulated to be made if the option is exercised, a tender of $995 on the last day of the option is bad, unless the option stipulates that the consideration therefor shall in the event of sale be applied on the deposit.

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595.

An agency contract between the owner and a real estate agent is not necessarily established by the owner's answer quoting price sent in reply to a telegram from the real estate agent asking the best cash price although it also stated a reason for an immediate answer that the sender had a man "who will buy this if he can get it right,"

and the owner may still shew that his negotiations with the sender of the telegram were only as with a prospective purchaser.

Locke v. Snyder & Webber, 7 D.L.R. 457, 22 W.L.R. 287.

One who purchases land with notice of the rights of the holder of an option thereon is subject to a decree for specific performance at the suit of the holder of the option. [Savereux v. Tourangeau, 16 O.L.R. 600, referred to.]

Carey v. Roots, 5 D.L.R. 670, 21 W.L.R. 795.

(§ I E 1—33)—NOTICE TO COMPLETE.

Facts known to the vendor, at the time the contract was made, as having influenced the purchaser to agree to the time fixed for completion in a contract for sale of land, will be considered in determining what is a reasonable notice where the contract does not provide that time shall be of the essence of the contract. [Parkin v. Thorold, 16 Beav. 59, 22 L.J. Ch. 174; Forfar v. Sage, 5 Terr. L.R. 255; Wallace v. Hesslein, 29 Can. S.C.R. 171, specially referred to; see also 7 Halsbury's Laws of England, p. 413.]

Mitchell v. Wilson, 2 D.L.R. 714, 20 W.L.R. 671.

(§ I E 2—35)—DOUBTFUL TITLES.

Where the vendor has contracted to sell subject to an unmatured incumbrance or charge which by the terms of the contract he represents to be subject to a privilege of pre-payment at any time, not however contained in the mortgage, and the contract does not reserve to the vendor the right to rescind if he shall be unable or unwilling to remove an objection to title, the vendor is not entitled to rescind on the purchaser insisting on specific performance of the contract under the best conditions procurable; the vendor in such case must either obtain the mortgagee's consent to pre-payment or give some equitable indemnity securing the purchaser against loss in respect of the refusal of the privilege guaranteed under the contract. [Wilson v. Williams (1857), 3 Jur. N.S. 810, and Nimmons v. Stewart, 1 Alta. L.R. 384, followed; see also Dart on Vendors and Purchasers, 7th ed., vol. 2, p. 1079.]

Knight v. Cushing, 1 D.L.R. 331, 20 W.L.R. 28.

Specific performance of a contract to sell real estate will not be ordered where the prospective vendors are executors and trustees of the individual estate of their testator who held the property as a trustee only if the Court considers the will was insufficient in form to constitute the vendors trustees with power to convey the trust estate, although it was stipulated by the contract that the purchaser would accept a transfer from the vendors as executors and trustees on their having the probate resealed under Manitoba laws. [See Fry on Specific Performance, 5th ed., p. 431, and Re Baker and Selmon, [1907] 1 Ch. 238.]

Mansfield v. Toronto General Trusts Corporation, 1 D.L.R. 503, 20 W.L.R. 344, 22 Man. L.R. 49.

(§ I E—36) — IMPOSITION OF TERMS UPON ORDER COMPLETING SALE.

An interim order may be made, in an action of specific performance brought by the vendor, in which both the purchaser and an adverse claimant are joined as defendants, allowing a sale of lands to be carried out pending the trial of the adverse claim against the vendor (notice of which is the sole objection to the purchaser closing) on proper terms to secure the claimant if he should substantiate his claim at the trial, and a vesting order may be made thereon in favour of the purchaser as to all the estate and interest in the lands of the other parties to the action.

Jennison v. Copeland, 3 D.L.R. 52, 21 O.W.R. 689, 3 O.W.N. 795.

II. Decree or judgment.

(§ II—42)—PERFORMANCE PRO TANTO AND DAMAGES FOR COMPENSATION.

In an action to enforce specific performance of a contract for the sale of land which stipulated that the purchaser upon completing payment should have a Torrens title to the land, the Court has the power to decree a conveyance in respect of such title as the defendant has and also to award damages for breach of the agreement to give a Torrens title, even though the land is not within its jurisdiction and though the defendant did not own the land at the time the contract was entered into, if he took over the vendor's rights in the agreement and received the greater part of the purchase money with full knowledge that the plaintiff's contract with the owner called for a Torrens title.

Smith v. Ernst (No. 2), 2 D.L.R. 213, 20 W.L.R. 772.

Where in addition to a claim for specific performance of a contract for the sale of land, a claim is made by the purchaser for compensation for an alleged deficiency in the quantity, a Court of equity has a discretion to refuse the relief sought and to leave the purchaser to his rights at law if any. [Mortlock v. Buller, 10 Ves. 292, specially referred to.]

Bullen v. Wilkinson, 2 D.L.R. 190, 3 O.W.N. 859, 21 O.W.R. 427.

In an action to enforce specific performance of a contract for the sale of land which stipulated that the purchaser upon completing payment should have a Torrens title to the land, the Court has the power to decree a conveyance in respect of such title as the defendant has and also to award damages for breach of the agreement to give a Torrens title even though the land is not within its jurisdiction and though the de-

fendant did not own the land at the time the contract was entered into, if he took over the vendor's rights in the agreement and received the greater part of the purchase money with full knowledge that the plaintiff's contract with the owner called for a Torrens title. [Smith v. Ernst (No. 2), 2 D.L.R. 213, affirmed on appeal.]

Smith v. Ernst (No. 3), 3 D.L.R. 736, 22 Man. L.R. 363, 21 W.L.R. 483.

(§ II—43)—BINDING EFFECT ON PARTIES.

Where the plaintiff brought an action upon an agreement entered into between him and the defendant to have the same cancelled and to have a cash payment made thereon declared forfeited, and the defendant, by counterclaim resisting the plaintiff's claim, sets up an agreement to sell or purchase land and asks the Court to order specific performance, he necessarily submits on his part to perform it and the judgment which he afterwards succeeds in obtaining is as binding upon him as it is upon his opponent. [Leckie v. Marshall, 3 O.W.N. 86, 20 O.W.R. 117, affirmed with a variation on appeal.]

Leckie v. Marshall, 4 D.L.R. 94, 3 O.W.N. 1527.

Where the plaintiff brought an action upon an agreement entered into between him and the defendant to have the same cancelled and to have a cash payment made thereon declared forfeited, and the defendant, by counterclaim resisting the plaintiff's claim, sets up an agreement to sell or purchase land and asks the Court to order specific performance and judgment goes for the defendant, he cannot, when the litigation has finally ceased, complain that owing to the delay caused by the litigation, which was wholly due to his opposition to the plaintiff's claim, the property has so much decreased in value that it is now inequitable to compel him to accept it.

Leckie v. Marshall, 4 D.L.R. 94, 3 O.W.N. 1527.

SPEED.

Of automobile, see Automobiles.
Opinion evidence as to, see Evidence, VII.
Of railroad train, see Railways, II.
Of street car, see Street Railways.
Question for jury as to, see Trial.

SPEEDY TRIAL.

Right of accused to, see Criminal Law.

SPLITTING.

Of causes of action, see Action, II.

STANDING TIMBER.

See Timber.

STARE DECISIS.

See Courts, V.

STATUTE OF FRAUDS.

In general, see Contracts, I.
Necessity of specially pleading, see Pleading.
Specific performance of oral contract, see Specific Performance.
As to parol trusts, see Trusts, I.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTE OF USES.

See Trusts.

STATUTES.

I. ENACTMENT; VALIDITY.
- A. Enactment.
- B. Time of passage and taking effect.
- C. Validity; in general.
- D. Judicial examination; legislative journals.
- E. Entitling; expression of subject.
- F. Plurality of subjects.
- G. Local or special legislation.

II. CONSTRUCTION; OPERATION; EFFECT.
- A. In general; use of words.
- B. Strict or liberal construction.
- C. Adopted or re-enacted statutes.
- D. Prospective or retrospective operations.

III. REPEAL; AMENDMENT; REVISION; RE-ENACTMENT.

Arrest for violation of, see Arrest.
Illegality of contract under express provisions of, see Contracts, III.
Construction of statutory constitution, see Constitutional Law, I.
Construction of Statute of Limitations, see Limitation of Actions.
Statute regulating marriage, see Marriage.
Employers' Liability Act, see Master and Servant.
Statute imposing succession tax, see Taxes.

I. Enactment; validity.

G. Local or special legislation.

(§ I G 2—86)—ROADS, BRIDGES AND FERRIES.

Power granted under 43 Vict. (Man.) ch. 36 to a company to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways, and other public places in any municipality . . . as may at any time be necessary or required for laying down or erecting [or repairing] the mains, pipes or wires to conduct" gas or electricity, will permit the erection of poles therein to carry wires necessary for the conveyance of electricity. [Winnipeg v. Winnipeg Electric R. Co., 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

A clause in a general Act making it a

condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works.

Toronto and Niagara Power Co. v. Town of North Toronto, 2 D.L.R. 120. 3 O.W.N. 609, 21 O.W.R. 175, 25 O.L.R. 475.

II. Construction; operation; effect.

A. In general; use of words.

(§ II A—95) — CONSTRUCTION; OPERATION; EFFECT.

Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law:—It was held, that the Act was not retrospective in this regard and did not apply; and as the old Act contained no provision for the deportation of such a person, he could not be deported thereunder.

Re Rahim (No. 1), 16 B.C.R. 469.

The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order-in-council passed since the coming into force of the Act could not be held to deal with such a person.

Re Rahim (No. 2), 16 B.C.R. 471.

The articles of the Quebec Code of Civil Procedure being derived from the English law, the terms and expressions used therein are to be interpreted according to English practice and jurisprudence.

Feigleman v. Montreal Street Railway Co., 3 D.L.R. 125.

(§ II A—96)—LEGISLATIVE INTENT.

Section 248 of the Railway Act, R.S.C. 1906, ch. 37, shews that, where Parliament intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

Toronto and Niagara Power Co. v. Town of North Toronto, 5 D.L.R. 43, 32 C.L.T. 826, 28 Times L.R. 563, 23 O.W.R. 85.

The language of the Railway Act, R.S.C. 1906, ch. 37, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned.

Toronto and Niagara Power Co. v. Town of North Toronto, 5 D.L.R. 43, 23 O.W.R. 85, 32 C.L.T. 826, 28 Times L.R. 563.

It is not to be presumed that the legislature intended to encroach on the rights of any one; and to justify such an interpretation of a statute there must be either express words to that effect or such an interpretation must be implied beyond a reasonable doubt. [Western Counties R. Co. v. Windsor and Annapolis R. Co., 7 A.C. 178, applied.]

Gundy v. Johnston, 7 D.L.R. 300, 4 O.W.N. 121, 23 O.W.R. 101.

In construing a statutory provision, it is presumed that the legislature does not desire to confiscate the property or to encroach on the rights of persons, and it is therefore expected, that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt, especially where the objects of the Act do not obviously imply such an intention. [Special Survey Act, R.S.M. 1902, ch. 158, sec. 3, considered.]

Peterson v. Bitulithic and Contracting Co., 7 D.L.R. 586, 22 W.L.R. 398.

In an action on a promissory note which, but for part payment, would be barred by the Statute of Limitations, where a legislature re-enacts that portion of the English statute of 21 James I. which places a time limitation upon actions for simple contracts, without making any reference to established judicial interpretations of that statute, and without embodying them in the Legislative Act itself; it will be presumed that the legislature must have intended those judicial interpretations to be applied.

Sawyer-Massey Co. v. Weder, 6 D.L.R. 305, 22 W.L.R. 150.

In considering the constitutionality of any enactment of a Provincial Legislature, every intendment will be made to support it, and it is not the business of the Courts to pass upon its wisdom or reasonableness, but simply to say whether it is fairly within the area of the constitutional powers of the legislature.

Kerley v. London and Lake Erie Transportation Co., 6 D.L.R. 189, 3 O.W.N. 1498, 22 O.W.R. 646, 26 O.L.R. 588.

(§ II A—98) — GIVING EFFECT TO ENTIRE STATUTE.

Statutes are to be construed in accordance with the ordinary rules of the common law and are not presumed to make any alteration therefrom further than what the statute itself expressly declares: hence the Workmen's Compensation Act must be read together with C.C. 1053 and 1054, which lay down the general rules as to responsibility.

Houle v. Asbestos and Asbestos Co., 3 D.L.R. 466, 42 Que. S.C. 176.

In deciding a question of statutory construction, a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole.

Toronto and Niagara Power Co. v. Town of North Toronto, 5 D.L.R. 43, 23 O.W.R. 85, 32 C.L.T. 826, 28 Times L.R. 563.

(§ II A—100) — AMBIGUITY; REASONABLENESS.

Upon a question of construction of certain words in a statute, if the words in themselves are susceptible of either of two meanings, the Court will adopt the more reasonable construction. [Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

Rex v. Ley, 7 D.L.R. 764.

(§ II A—103) — CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION.

The rule as to giving to the words of a statute their plain and ordinary meaning, when applied with due regard to the law existing in Canada at the time of the passing of the British North America Act, gives to the words "solemnization of marriage" as contained in subjects which a provincial legislature has jurisdiction under sub-sec. 12 of sec. 92, of the B.N.A. Act, an effect in the nature of a limitation upon the words "marriage and divorce" as contained in sub-sec. 26, sec. 91, of the said Act as regards the constitutional power of the Parliament of Canada to legislate upon the subject of marriage.

Re the Marriage Law of Canada 7 D.L.R. 629, 11 East. L.R. 629.

(§ II A—104)—MEANING OF WORDS; MANDATORY OR DIRECTORY.

In sec. 20 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, the expression "greater speed than one mile in four minutes" means any speed for any distance less than a mile which if continued would result in a full mile being covered in less than four minutes, the word "speed" as therein used meaning rate of motion, and the words "one mile in four minutes" simply supplying the measure of the same. [Sec. 20 of Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

Rex v. Ley, 7 D.L.R. 764.

The words, "the solemnization of marriage in the province" as used in sub-sec. 12, sec. 92, of the B.N.A. Act, primâ facie, import all that was ordinarily meant by solemnization in the systems of law in force in the various provinces of Canada at the time of the passing of the Act, including conditions which affect the validity of the marriage.

Re the Marriage Law of Canada, 7 D.L.R. 629, 11 East. L.R. 255.

B. Strict or liberal construction.

(§ II B—110) — STRICT OR LIBERAL CONSTRUCTION.

Sub-section 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," should receive a liberal construction in the interests of the workman. [Gibbs v. Great Western R. Co., 12 Q.B.D. 108; McCord v. Cammell & Co., [1896] A.C. 57, referred to.]

Martin v. Grand Trunk R. Co., 8 D.L.R. 590, 4 O.W.N. 51, 27 O.L.R. 165.

Legislation extending the classes of property to which execution will attach is to be strictly construed. (Per Riddell, J.). [Morton v. Cowan (1894), 25 O.R. 529, 534, 535; and Reilly v. Doucette, 2 O.W.N. 1053, referred to; R.S.O. 1897, ch. 119, sec. 8, considered.]

Re Clarkson and Wishart, 6 D.L.R. 579, 3 O.W.N. 1645, 22 O.W.R. 901, 27 O.L.R. 70.

If the liability expressly imposed upon the "employer" or "undertaker" by the Workmen's Compensation Act, 2 Edw. VII. (B.C.) ch. 74, now R.S.B.C. 1911, ch. 244, for injury to a workman by accident arising out of and in the course of employment is to be cut down at all, or if the "employer" or "undertaker" is to be relieved from it to any extent, this must be done either by some statutory provision express or implied, and not by any conjecture as to the policy of the Act which its language does not suggest, even where that conjecture may be that the purpose of the Act in question is a shifting from the province to the employer as a quasi duty to provide for the destitute.

Krzus v. Crow's Nest Pass Coal Co., 8 D.L.R. 264, [1912] A.C. 590.

(§ II B—111)—PENAL OR CRIMINAL STATUTES.

The provisions of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, respecting proceedings for offences against part 1 of the Act in case of previous conviction or convictions are applicable to the procedure only and as such are directory and not imperative.

Rex v. McNutt, 7 D.L.R. 651.

(§ II B—112)—STATUTES IN DEROGATION OF COMMON LAW.

In applying a statute making exigible what was not exigible at common law, attention must be paid to the exact wording of the statute; and, when the statute prescribes a method of procedure, that method must be followed, at least in substance. (Per Riddell, J.) Goodwin v. Ottawa and Prescott Railway Co., 22 U.C.R. 186, followed.]

Malouf v. Labad (No. 2), 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99.

A statute should not be construed as interfering with or injuring persons' rights without compensation, unless a Court is so obliged to construe it. [Maxwell on Statutes, 4th ed., p. 427, applied; Special Survey Act, R.S.M. 1902, ch. 158, considered.]

Peterson v. Bitulithic and Contracting Co., 7 D.L.R. 586, 22 W.L.R. 398.

(§ II B—113a)—STATUTORY GRANTS.

Where the legislature requires that privileges shall be granted by by-law, they cannot be granted or acquired in any other manner, e.g., by overt act, waiver or acquiescence either by a committee of the council or by the whole municipal council itself.

Montreal Street Railway Co. v. The City of Montreal, 3 D.L.R. 812.

(§ II B—114)—EXEMPTIONS.

In construing legislation merely confirming a contract between a municipality and a company exempting the company from taxation, the effect of which must be to increase the burdens of all other tax payers, the general presumption is that it was not intended to afford relief to the company or to diminish the civic rights of the citizens of the municipality beyond what can be clearly gathered from the contract as to the intention of the parties.

The City of Halifax v. The Nova Scotia Car Works, Ltd., 4 D.L.R. 241, 45 N.S.R. 552.

(§ II B—115)—MAKING VOID A LEGITIMATE TRANSACTION.

The Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) ch. 65, being one which makes void perfectly legitimate and proper transactions, must be read strictly.

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 3 O.W.N. 1476, 22 O.W.R. 585, 26 O.L.R. 564.

(§ II B—116)—TAXES.

An Act legalizing and confirming all assessments made in rural municipalities in a designated year, when based upon the assessment rolls of the previous year, does not validate an assessment not made according to law.

The Rural Municipality of Minto v. Morrice, 4 D.L.R. 435, 21 W.L.R. 256, 617, 22 Man. L.R. 391.

A taxation statute is to be construed strictly. [Cox v. Roberts, 3 App. Cas. 473, applied.]

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

(§ II B—117)—LIENS.

A person must bring himself strictly within the terms of the Miners' Lien Ordinance in order to secure the benefit thereof, since any irregularity in the proceedings will invalidate a lien claim.

Bradshaw v. Saucerman, 4 D.L.R. 476, 21 W.L.R. 65.

(§ II B—118)—CORPORATIONS.

The conversion of a public company into a private company is not to be deemed to be impliedly prohibited under the maxim "expressio unius" by reason of a statutory enactment as to the method of converting private companies into public companies where the purpose of the enactment is merely to make provision for publicity in constituting public companies. [Colquhoun v. Brooks, 21 Q.B.D. 52, 57 L.J.Q.B. 439, referred to.]

Leiser v. Popham Brothers, Ltd., 6 D.L.R. 525, 17 B.C.R. 187.

Where a statute authorizing municipalities to widen streets does not expressly or by necessary implication provide to that end for expropriating the lands of adjoining owners, and contains no provisions for awarding compensation upon such expropriation, the Act will be construed strictly in favour of vested rights of adjoining owners, especially where another class of statute confers upon municipalities the powers of expropriation necessary for such purpose.

Peterson v. Bitulithic and Contracting Co., 7 D.L.R. 586, 22 W.L.R. 398.

(§ II B—119)—DUTIES; CUSTOMS.

In construing customs and revenue laws, the intention of the legislature, in the imposition of duties, must be clearly expressed, and, in cases of doubtful interpretation, the construction should be in favour of the importer, nor are duties or taxes to be imposed upon terms of vague or doubtful interpretation. [The Queen v. J. C. Ayer Co., 1 Can. Ex. C.R. 232, 270, 271; Cox v. Rabbits, 3 A.C. 473; Partington v. Attorney-General, L.R. 4 H.L. 100, applied.]

Foss Lumber Co. v. The King; and The British Columbia Lumber Co., Ltd., 8 D.L.R. 437, 47 Can. S.C.R. 130.

C. Adopted or re-enacted statutes.

(§ II C—120) — ADOPTED OR RE-ENACTED STATUTES.

In any case where an ancient English statute has been the subject of a long series of judicial interpretations, and a settled rule of English law adopted by the highest Courts in England has been laid down in regard to that statute, a jurisdiction, whose legislature has enacted a statute in practically the same terms, is bound by those judicial interpretations, in the construction of its own new statute enacted in the same terms as such ancient statute.

Sawyer-Massey Co., Ltd. v. Weder, 6 D.L.R. 305, 22 W.L.R. 150.

The effect of the amendment to the Division Courts Act, 4 Edw. VII. (Ont.) ch. 12, sec. 1, respecting claims the amount of which is ascertained by the signature of the defendant (see now 10 Edw. VII. (Ont.) ch. 32, sec. 62), was to declare the law as previously laid down, and it was not in-

tended to narrow the jurisdiction already conferred. [Kreutziger v. Brox, 32 O.R. 418, referred to.]

Renaud v. Thibert, 6 D.L.R. 200, 27 O.L.R. 57, 3 O.W.N. 1649, 22 O.W.R. 923.

D. Prospective or retrospective operation.

(§ II D—125) — PROSPECTIVE OR RETROSPECTIVE OPERATION.

A proceeding to ascertain by arbitration the compensation for land taken for a public street, which has been referred to a single arbitrator by the Court of King's Bench by virtue of a provision of a city charter under which the proceedings were instituted, constitutes a "legal proceeding or other remedy for ascertaining or enforcing" a liability, which was exempted by 1 Geo. V. ch. 13, sec. 2, in repealing rules 773 and 774, pertaining to the power of the Courts of King's Bench to deal with awards on motion, as to any rights acquired or liabilities incurred before the coming into effect of the repealing Act. (Per Cameron and Richards, JJ.A.)

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351.

III. Repeal; amendment; revision; re-enactment.

(§ III—131)—GENERAL AND SPECIAL LAWS.

In construing a remedial Act of Parliament the construction should be a liberal one giving effect, if possible, to all parts of the Act. [Sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

Wasson v. Harker (No. 4), 8 D.L.R. 88.

A remedial statute, relieving mortgagors in default from acceleration clauses, which covers by the express statutory provision "any mortgage" is not limited to mortgages made subsequent to the passing of the Act. [Sub-sec. 10 added to sec. 93 of the Land Titles Act by 1 Geo. V. (Sask.) ch. 12, sec. 7, referred to.]

Wasson v. Harker (No. 4) 8 D.L.R. 88.

The British Columbia statute R.S.B.C. 1897, ch. 22, as to a surviving husband's tenancy by the courtesy in his wife's lands is to be interpreted as subject to the modifications introduced by the same Act as that by which the Revised Statutes of British Columbia were declared to come into force and effect expressly subject to the amendments accompanying such declaratory Act.

Romang v. Tamourni, 2 D.L.R. 295, 20 W.L.R. 825.

(§ III—132)—REFERENCE TO PRIOR ACT.

Where a general clause of another statute is by the incorporating Act made applicable to a corporation, and its undertakings by a reference which does not specify an amendment already made to such general clause, such amendment is to be read as forming part of the company's Act of incorporation and will control the powers granted to the company. [The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (b) construed.]

Toronto and Niagara Power Co. v. Town of North Toronto, 2 D.L.R. 120, 3 O.W.N. 609, 21 O.W.R. 175, 25 O.L.R. 475.

(§ III—134)—EFFECT ON EXISTING RIGHTS, REMEDIES, AND LIABILITIES.

The Interpretation Act of Ontario, 7 Edw. VII. ch. 2, sec. 7 (52), has changed the previous rule of law by enacting that a re-enactment, revision or consolidation of a statute shall not be deemed an adoption of the judicial construction which the same or similar words in the prior statute had received. (Per Anglin and Brodeur, JJ.)

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

The rights of a lessee to cut timber acquired under a lease from the Crown, pursuant to R.S.O. 1897, ch. 36. sec. 40, are not affected by the repeal of the said Act in 1906, 6 Edw. VII. ch. 11, sec. 222, as the latter statute provided that such repeal should not affect any rights acquired or any act or thing done under the repealed statute, nor are such rights affected by the terms of the later Act, the Mines Act, 1908, 8 Edw. VII. ch. 21. [Gordon v. Moose Mountain Mining Co. (1910), 22 O.L.R. 373, followed.]

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

STATUTORY DUTY.

Negligence by breach of, see Negligence, I.

STAY OF PROCEEDINGS.

I. GENERALLY.

II. OTHER PENDING LITIGATION; RES JUDICATA.

By abatement, see Abatement.

I. Generally.

(§ I—5)—JURISDICTION TO GRANT.

When a claim appears to have been made the subject of another action actually pending in the Court of Review and inscribed for appeal to the Court of King's Bench a motion to suspend proceedings in the later action will be granted.

Molson's Bank v. Klock, 13 Que. P.R. 202 (K.B.)

Under section 37 of the Mechanics' and Wage Earners' Lien Act, 10 Edw. VII. (Ont.) ch. 69, all things necessary to work out mechanics' liens, quoad the land, are within the jurisdiction of the officer hearing the mechanics' lien actions; but such officer has no power, merely because there are mechanics' lien actions already pending against both the contractor and the owner, to stay proceedings in an action by the contractor against the owner for damages for breach of an alleged agreement to supply

materials to carry on a construction contract made between them, in which action the contractor is not claiming a lien.

Dick & Sons v. Standard Cable Co., 7 D.L.R. 64, 4 O.W.N. 57, 23 O.W.R. 19.

Until a judgment of the Supreme Court of Canada has been certified to the Court below, a Judge of the Supreme Court has jurisdiction to order a stay of proceeding pending an appeal to the Privy Council. (Per Beck, J.) [Union Investment Co. v. Wells, 41 Can. S.C.R. 244; and Peters v. Perras, 42 Can. S.C.R. 361, referred to.]

Alfred & Wickham v. Grand Trunk Pacific R. Co., 6 D.L.R. 147, 22 W.L.R. 65.

Where the plaintiffs in an action have succeeded at the trial and in the provincial appellate Court, and the defendants have elected to appeal to the Supreme Court of Canada, in which also they have been unsuccessful, and, while the Supreme Court still had jurisdiction over the case, a Judge of that Court has refused a stay of proceedings pending an appeal to the Privy Council, and it appears that there has not been any miscarriage of justice through accident, mistake or otherwise, but that every question in dispute has been fully considered, and that the case involves merely a question of fact and nothing of public importance, and that the Privy Council is likely to refuse leave to appeal, a Judge of the provincial Court of first instance should not grant a stay of proceedings pending an appeal to the Privy Council. [Alfred v. Grand Trunk Pacific R. Co., 5 D.L.R. 154, and Grand Trunk Pacific R. Co. v. Alfred, 5 D.L.R. 471, specially referred to.]

Alfred & Wickham v Grand Trunk Pacific R. Co., 6 D.L.R. 147, 22 W.L.R. 65.

(§ I—11)—Delay in prosecuting generally.

Even if marginal rule 973 of the English judicature rules is in force in Alberta, a plaintiff who has not taken a step in the cause for a year and who by that rule of Court is required to give a month's notice if he desires to proceed, is not subject to have his action entirely stayed on the defendant's motion; the remedy of the latter is to apply to set aside the proceeding next taken by the plaintiff. [As to Eng. marginal rule 973, see Webster v. Myer, 14 Q.B.D. 231; Houlston v. Woodall, 78 L.T. Jo. 113; Taylor v. Roe, 68 L.T. 253.]

Evans v. Evans, 5 D.L.R. 546, 21 W.L.R. 925.

(§ I—12)—Want of authority to plaintiff's solicitor.

Notice of an application by the defendant to stay the action on the ground that the solicitor purporting to act for the plaintiff is not authorized to do so, must be served upon the plaintiff personally as well as upon the solicitor who is prosecuting the action, and the Court will so order although no objection to the want of notice is taken by the solicitor whose authority is in question. [Thatcher v. D'Aguilar, 11 Ex. 436, and Barrie v. Weaymouth, 15 P.R. (Ont.) 95, specially referred to.]

Ross v. Webb, 2 D.L.R. 416, 21 W.L.R. 254, 22 Man. L.R. 257.

(§ I—13)—Non-payment of costs.

An action will not be stayed by the Court merely on the ground that the costs of another action between the same parties awarded against the present plaintiff had not been paid, unless the prior action was for the same cause or for a cause of action substantially the same.

Evans v. Evans, 5 D.L.R. 546, 21 W.L.R. 925.

Non-payment of costs of—Previous actions.

Rickart v. Britton (No. 2), 6 D.L.R. 887, 4 O.W.N. 258.

Non-payment of costs of prior action—Ground for staying second action.

Wasserman v. Gold, 7 D.L.R. 934.

Practice—Staying proceedings—Unpaid costs—Vexatious action—Discretion of Court.

Rickert v. Britton, 4 O.W.N. 499, 23 O.W.R. 972.

II. Other pending litigation; res judicata.

(§ II—21)—Other pending litigation; res judicata.

Pending action by second mortgages—New action by first mortgagee—Multiplicity of suits—Sask. Rules 180 181.

Haig v. Rogers, 7 D.L.R. 930.

An action in Ontario by the personal representative of a deceased person for an accounting against a person alleged to be indebted to the estate in respect of foreign lands held in trust, will not necessarily be stayed because of an action pending in the foreign jurisdiction brought by the beneficiaries against the same defendant to declare the trusts.

Greer v. Greer, 4 D.L.R. 169, 3 O.W.N. 584, 21 O.W.R. 139.

Plaintiff sued defendant to recover the amount of a promissory note. On the next day he issued a further writ against defendant to foreclose a mortgage and claiming personal judgment on the covenant. It was conceded that the indebtedness was the same in both actions. On motion to stay the second action until the conclusion of the first:—It was held, that while a plaintiff cannot while one action is pending bring another action claiming similar relief, and if he does so the Court will interfere by directing a stay, there is no rule that the second action will be stayed, and if the circumstances shew that it would be more equitable to stay the first and permit the second to proceed, the Court can do so; and therefore, as the plaintiff seeks in the second to enforce the mortgage, he should

be permitted to proceed with that action, and the first should be stayed.
Milloy v. McGill, 4 S.L.R. 399.

Where a party raises by his pleading a point of law to be decided at a hearing before the trial, the Court will not, as a rule, stay the trial of the issues of fact, pending an appeal from the decision upon the point of law. [Re J. B. Palmer, 22 Ch. D. 88, referred to.]
Imperial Life Assurance Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372.

(§ II—25)—RES JUDICATA.

Prior judgment against company without assets—Estoppel—Negligence.
Campbell v. Verral; Gibson v. Verrals, 6 D.L.R. 898, 4 O.W.N. 300.

(§ II—30) — PRIOR QUESTION TO BE FIRST DETERMINED.

A person sued for an account, under the terms of a document, in this case a will, which the plaintiff seeks to have annuled, is entitled to have the proceedings stayed by a dilatory exception, until the legality or illegality of the will is decided.
Derrick v. Elvidge, 14 Que. P.R. 63 (Sup. Ct.).

Where the County Court Judge adjourns argument for extension of time for appeal from a decision of a magistrate, all proceedings in the magistrate's Court will be stayed until the motion for extension is determined.
Rex v. White, 19 Can. Cr. Cas. 156, 10 East. L.R. 297.

STIPULATED DAMAGES.

See Damages, III.

STOCK.

Of corporations, generally, see Companies, V.

STOCK BROKERS.

See Brokers, I.

STOLEN PROPERTY.

Possession of stolen property as prima facie evidence of guilt, see Evidence.
See also Theft.

STORAGE.

By warehousemen, see Warehousemen.

STREAM.

Navigability of, see Waters, I.
Right in bed and shore of, see Waters, I.
Riparian rights in, see Waters.

STREET RAILWAYS.

I. FRANCHISES; CONSTRUCTION.
II. MOTIVE POWER.
III. OPERATION.
A. In general.
B. Duty and care of railway company.
C. Contributory negligence.

Negligence causing death, actions for, see Death.
As carriers, see Carriers.
As to safety of place and appliances, see Master and Servant, II.
Municipal regulation as to, see Municipal Corporations, II.
Proximate cause of injury by, see Proximate Cause.
Question for jury as to negligence, see Trial.

I. Franchises; construction.

(§ I—3)—RIGHTS IN, AND USE OF, STREETS AND HIGHWAYS.

The provisions of sub-sec. (b) of sec. 8 of the Railway Act, R.S.C. 1906, ch. 37, purporting to subject to the Federal Railway Act the through traffic upon any railway or street railway authorised by special Act of a provincial legislature which connects with a Federal railway, although such provincial railway or street railway had not been declared by Federal statute to be a work for the general advantage of Canada, is ultra vires of the Parliament of Canada. [Opinion of Fitzpatrick, C.J., Girouard, and Duff, JJ., in Montreal Street R. Co. v. City of Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed on this point on appeal to the Privy Council.]
Montreal v. Montreal Street R. Co., 1 D.L.R. 681, 10 E.L.R. 281.

(§ I—5)—REGULATION BY CITY BY-LAW.

A requirement of a city by-law that a street railway company should keep and maintain its engines, machinery and power houses within the city limits, is complied with by the maintenance therein of a substation containing apparatus for the reduction of the voltage of electricity generated beyond the city limits, and also for transforming it into a direct current.
Winnipeg Electric Railway Co. v. City of Winnipeg, 4 D.L.R. 116.

II. Motive power.

(No cases.)

III. Operation.

B. Duty and care of railway company.

(§ III B—25)—DUTY AND CARE OF RAILWAY COMPANY.

Apart from statutory enactment, a street car and other vehicles have equal rights of the same kind to the concurrent use of the streets, the rights and duties of both are reciprocal and mutual, and each is bound to the exercise of reasonable care in self-protection, and in avoiding harm. [Jones v. Toronto and York Radial Ry. Co., 25 O.L.R. 158, specially referred to.]

Carleton v. City of Regina, 1 D.L.R. 778, 20 W.L.R. 395.

By common law he who wants to pay to a conductor of a street car, the amount required for the passage on such a car, must offer an exact amount and not a coin or a bill of a much greater value and which the conductor has to change. Nevertheless the usage and the jurisprudence do compromise such a strict rule of the common law, on account of the inconvenience in which it may result for the public and the public carriers. In consequence it is recognized now that the railway company will be obliged to change a reasonable sum, and that the sum of two dollars will be considered as to be such a reasonable amount.

Cadieux v. Montreal Street Ry. Co., 18 Rev. de Jur. 42.

The refusal of a conductor of a street railway to change a $5 bill, which was offered by a passenger to permit the latter to pay his fare, and at the same time warning the passenger that he should either pay or leave the car, does not constitute an injury which will give the passenger a right of action for damages against the company, as responsible for the act of its employees. The company will be held to change a reasonable amount not exceeding two dollars, but it will not be held to change $5 or any other bill of a greater amount which the passenger may offer in payment.

Cadieux v. Montreal Street Ry. Co., 18 Rev. de Jur. 42.

(§ III B—26)—Cars passing street crossing.

It is the duty of a motorman in taking his car over a crossing to keep a reasonable lookout for pedestrians and vehicles using the same crossing.

Carleton v. City of Regina, 1 D.L.R. 778, 20 W.L.R. 395.

A passenger who had just alighted from a street car which was followed by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom and habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track where she was struck by a car which was negligently run past the stationary car. [Wright v. Grand Trunk R. Co., 12 O.L.R. 114, specially referred to.]

Cooper v. London Street R. Co., 5 D.L.R. 198, 3 O.W.N. 1277, 22 O.W.R. 87.

(§ III B—27a)—Rear end collision.

Where it appears from plaintiff's own evidence that he was familiar with a rule of the railway company calling for a five minute interval between cars and he, as motorman of a car, failed to observe that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal. (Per Macdonald, C.J.A., and Galliher, J.A.)

Daynes v. B.C. Electric R. Co., 7 D.L.R. 767, 22 W.L.R. 549.

(§ III B—28)—Rate of speed.

Where a municipal by-law fixes a limit of speed, e.g., eight miles an hour, for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than five or six miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection of streets the company will be liable in damages.

Montreal Street R. Co. v. Conant, 7 D.L.R. 261.

(§ III B—30)—Riding on steps of car.

Although it was beyond the scope of the authority of a street car conductor to give the plaintiff, an intending passenger, permission to stand on the car step, the jury may properly find that the intending passenger had the leave and license of the defendants, where it was shewn that the practice of standing on the car steps was so common at the particular time and place, and was followed under such circumstances, that the defendants must have known, or ought to have known of it.

Williams v. British Columbia Electric R. Co. (No. 2), 7 D.L.R. 459.

(§ III B—31)—Equipment of cars.

A street railway company is obliged to use the best known appliances to conduct its business with safety to the public, and the use of the ratchet brake instead of the more modern electric air brake is of itself a fault.

Edmunds v. Montreal Street Railway, 8 D.L.R. 772.

(§ III B—33)—Duty as to persons on or near track.

A motorman seeing a vehicle driving at right angles to his track, as if to cross, is justified in not reversing his controller until he sees that the driver of the vehicle does not intend to stop at the track and allow the car to pass, but the moment he perceives that there is danger it is his duty to act as promptly as he can to avert the danger.

Carleton v. City of Regina, 1 D.L.R. 778, 20 W.L.R. 395.

(§ III B—35) — NEGLIGENCE TOWARDS PASSENGERS.

The fact that the motorman and the conductor exchanged places on a street car in contravention of the company's rules, and that the conductor so permitted to drive the car allowed it to collide with another car either from negligence or incompetence, may form the basis of an action by a passenger for the resulting personal injuries he received. [Hill v. Winnipeg Electric R. Co., 21 Man. L.R. 442, affirmed.]

Winnipeg Electric R. Co., v. Hill, 8 D.L.R. 106, 46 Can. S.C.R. 654.

C. Contributory negligence.

(§ III C—42)—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In a personal injury case arising from a street car colliding with a rig, where the trial Judge submits the question of ultimate negligence, but the jury did not deal with it (or there is doubt as to whether they did deal with it), even in a case where, upon unravelling confused jury findings, the effect may be that both were to blame and that the motorman after he saw the plaintiff in danger could not have stopped the car, but there is no finding by the jury as to whether the motorman could by reasonable diligence have avoided the accident after he should have known that the plaintiff was about to cross in front of the car, and where the finding at most is that the motorman could not have stopped the car after he saw (not might have seen) the plaintiff, such findings are incomplete and ground for a new trial to the plaintiff if there was evidence before the jury sufficient to support a finding, had there been one, of ultimate negligence on the part of the defendant.

Harron v. Toronto R. Co., 6 D.L.R. 215, 4 O.W.N. 12, 22 O.W.R. 933.

Duty of motorman—Reversing of power—Injury avoidable notwithstanding contributory negligence—"Last clear chance"—Ultimate negligence.

Harnovis v. City of Calgary, 7 D.L.R. 789.

(§ III C—47)—PERSON CROSSING TRACK.

Where a street car approaches a stopping place at an excessive speed, and there are persons waiting to board the car, and the car slackens speed as though to stop, but does not stop, and the highway is in such a condition as to demand the close attention of any one making use of it, an attempt to cross in front of the car does not necessarily constitute contributory negligence, but the question must be left to the jury.

Slingsby v. Toronto R. Co., 3 D.L.R. 453, 3 O.W.N. 1161, 21 O.W.R. 980.

It was held, reversing the judgment of a Divisional Court, in favour of plaintiff for injuries while crossing tracks of defendant, 23 O.L.R. 331, that there was no reasonable evidence to support such of the findings of the jury as were in favour of the plaintiff; and the action was properly dismissed by Riddell, J. [Jones v. Toronto and York Radial R. Co., 23 O.L.R. 331, 12 Can. Ry. Cas. 436, reversed.]

Jones v. Toronto and York Radial R. Co., 13 Can. Ry. Cas. 107, 25 O.L.R. 158.

(§ III C—48) — DRIVERS OF VEHICLES AND PERSONS THEREIN.

It is contributory negligence for the driver of a horse-drawn vehicle not to look, immediately before attempting to cross a street railway crossing to see that he has plenty of time to cross in safety and before any properly operated car can approach dangerously close to him.

Carleton v. City of Regina, 1 D.L.R. 778, 20 W.L.R. 395.

STRIKE.

Giving strike benefits, see Accessory.
As conspiracy, see Conspiracy.

STRIKING OUT.

Of appeal, see Appeal, VI.
Of pleading, see Pleading, I.

SUB-CONTRACTORS.

Liens of, see Mechanics' Liens, IV.

SUB-LEASE.

See Landlord and Tenant.

SUBPOENA.

Sufficiency of, see Witnesses, I.

SUBROGATION.

I. RIGHT TO SUBROGATION GENERALLY.
II. AS TO LOAN.
III. ON PAYMENT OF DEBT OR NOTE.
IV. AS TO JUDGMENTS.
V. AS TO MORTGAGES.
VI. OF SURETY OR GUARANTOR.
VII. TO VENDOR'S LIEN.
VIII. TO TAX LIEN.

I. Right to subrogation generally.

(No cases.)

II. As to loan.

(No cases.)

III. On payment of debt or note.

(§ III—10)—ON PAYMENT OF DEBT OR NOTE.

Where certain directors of a company personally paid off a claim against the company secured by collaterals (the property of the company), but, instead of taking over such collaterals to themselves, had them transferred by the creditor then being paid off to certain other creditors of the company, who were pressing for payment, as collateral security for their claims, in the

bona fide belief that such arrangement was in the best interests both of the general creditors and of the company, such directors are properly allowed a preferential claim, in subsequent winding-up proceedings taken on the company's insolvency, upon the proceeds of such collateral securities so far as realized by the liquidator in excess of the amount collected in payment of their claims by the creditors who held such collaterals, but are not entitled to any preferential lien upon the general assets of the company in respect of such advances.

Re Okotoks Milling Co., Ltd., 8 D.L.R. 76.

IV. As to judgments.

(No cases.)

V. As to mortgages.

(No cases.)

VI. Of surety or guarantor.

(§ VI—25)—OF SURETY OR GUARANTOR.

Where a surety of a debt for an insolvent debtor pays it off and by subrogation takes over from the creditor an assignment of the debtor's book debts, but instead of collecting them himself allows the debtor to retain and collect and appropriate same, he cannot demand as a preferred claim against the estate as against the other creditors the amount by which the insolvent estate had been enhanced in value by the mixing with it of the sum so collected and appropriated when no portion of the fund is earmarked to any specific asset. [Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R. 503, varied; Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, varied; see annotation to this case.]

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

VII. To vendor's lien.

(No cases.)

VIII. To tax lien.

(No cases.)

SUBSTITUTED SERVICE.

Service by publication, see Writ and Process, II.

SUBSTITUTION.

On death of party, see Abatement and Revival, III.

SUCCESSION.

Inheritance by descent, see Descent and Distribution.

SUCCESSION TAX.

See Taxes, V.

SUFFRAGE.

Right of, see Elections.

SUMMARY CONVICTIONS.

I. GENERALLY.
II. JURISDICTION AND DUTY OF MAGISTRATE.
III. PROCEDURE.
IV. EFFECT.
V. PENALTIES AND COSTS.
VI. RECORD OF CONVICTION AND PROCEEDINGS.
VII. AMENDMENT.
A. On appeal.
B. On motion to quash or habeas corpus.
VIII. DUPLICITY AND UNCERTAINTY.

Right of appeal from summary conviction in criminal matter, see Appeal, I.

Removal of summary conviction by certiorari process, see Certiorari.

I. Generally.

(No cases.)

II. Jurisdiction and duty of magistrate.

(§ II—20) — JURISDICTION AND DUTY OF MAGISTRATES.

A summary conviction under a by-law which prohibits the use of "abusive, insulting and provoking language" upon a public street sufficiently designates the offence under the Summary Convictions Act, R.S.N.S. 1900, ch. 161, if the conviction sets out the words used and declares their use to be contrary to such by-law, although the conviction does not in terms state that the words were "abusive, insulting and provoking." [Re Peckham, 5 H. & N. 30, specially referred to.]

The King v. Elderman, 19 Can. Cr. Cas. 445.

An appearance in a summary conviction matter waives all irregularities in the summons and even the want of a summons. [Geller v. Loughrin, 24 O.L.R. 18, 18 Can. Cr. Cas. 461, specially referred to.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

III. Procedure.

(§ III—30)—PROCEDURE.

A conviction will not be quashed on the ground that the magistrate did not comply with sub-sec. (a) of 85 of the Liquor License Act of N.B. 1903 by asking accused as to his former conviction of a similar offence where counsel appearing for accused in the absence of the latter, was interrogated thereto, but made no answer. [Ex parte Groves, 24 N.B.R. 57, applied.]

Rex v. Matheson; Ex parte Martin, 2 D.L.R. 835, 10 E.L.R. 585.

The omission of the magistrate on the trial of a summary conviction matter to swear the stenographer before taking the evidence, is a matter of substance and goes

to the jurisdiction of the magistrate so as to invalidate a conviction. [Rex v. L'Heureux, 14 Can. Cr. Cas. 100, followed.]

Rex v. Johnson, 5 D.L.R. 523, 21 W.L.R. 900, 20 Can. Cr. Cas. 8.

The omission to swear the stenographer appointed to take down the evidence at the hearing of a prosecution under the summary conviction clauses of the Criminal Code (1906), as required by Code sec. 683, is a matter of jurisdiction and not a mere defect of form, and the depositions taken by the unsworn stenographer are invalid. [The King v. L'Heureux, 14 Can. Cr. Cas. 100, followed.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203.

The provisions of Cr. Code, sec. 655 as to a preliminary hearing of the allegations of "the complainant and his witnesses" apply only to cases of indictable offences and not to cases punishable on summary conviction. [R. v. Neilson, 44 N.S.R. 488, followed.]

The King v. Sweeney, 1 D.L.R. 476; 19 Can. Cr. Cas. 222; 45 N.S.R. 494.

A conviction for selling liquor without a license will be quashed where the magistrate before whom three informations were lodged charging sales to different persons, heard evidence at one time tending to prove sales in the three cases, some of which were not relevant to the case in which the accused was convicted.

Rex v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 22 O.W.R. 601, 20 Can. Cr. Cas. 98.

Where a statutory offence is made punishable upon summary conviction and a statutory method of compelling the attendance of the accused is provided, an omission of such statutory method and the illegal arrest of the accused as a means of bringing the accused before the magistrate will constitute a valid objection to a summary conviction obtained as a result of the illegal proceedings, where the irregular procedure was objected to by the accused. [Pearks v. Richardson, [1902] 1 K.B. 91, 71 L.J.K.B. 18. applied; and see contra, Re Paul (No. 1), 7 D.L.R. 24.]

Re Baptiste Paul (No. 2), 7 D.L.R. 25.

Unless the accused who has been brought before a magistrate to answer a charge punishable on summary conviction objects before the magistrate to the illegal method whereby his attendance has been compelled, ex. gr., by an arrest without warrant where a warrant is essential, the objection is considered as waived. [Regina v. Hughes, 4 Q.B.D. 614, and Dixon v. Wells, 25 Q.B.D. 249, considered.]

Re Baptiste Paul (No. 2), 7 D.L.R. 25.

Whether the defendant was illegally arrested or not is not material to the jurisdiction of a magistrate under the summary convictions clauses of the Criminal Code when the accused is brought before him to answer a charge as to which an information had been properly laid before such magistrate. [Reg. v. Hughes, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied; McGuiness v. Dafoe, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see contra, Re Paul (No. 2), 7 D.L.R. 25.]

Re Baptiste Paul (No. 1), 7 D.L.R 24.

Upon an application by the informant for process in a summary conviction matter calling upon the accused to answer the charge, the magistrate need not first hear other evidence than that of the informant in swearing to the information if that satisfies him that the process should issue without hearing other witnesses for the complainant under Cr. Code (1906) sec. 655, as amended by 8 & 9 Edw. VII. ch. 9. [Ex p. Archambault, 16 Can. Cr. Cas. 433, approved; R. v. Smith, 16 Can. Cr. Cas. 425, disapproved.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

IV. Effect.

(No cases.)

V. Penalties and costs.

(§ V—50)—PENALTIES AND COSTS.

The costs which may be awarded by a justice in summary conviction cases do not include attorney's fees. Neither are attorney's fees included in an award of costs made in general terms by the judgment upon an appeal to the Court of King's Bench (Crown side), in such cases, but the Court sitting in appeal may, under secs. 751 and 752 of the Criminal Code, exercise its discretion to include an attorney's fee in an award of costs.

Garneau, appellant, v. Gauthier, respondent, 18 Rev. de Jur. 172.

Where a defendant fined on summary conviction under the Liquor License Act (Ont.) and ordered to be imprisoned in default delivers himself up at the place of imprisonment before the warrant is made out, and the magistrate is made aware of that fact, no expenses of conveying the defendant to gaol should be ordered as a condition of release nor included in the warrant, but the warrant, being subject to the Ontario Summary Convictions Act, may be amended by striking out such costs. [R. v. Townsend (No. 3), 11 Can. Cr. Cas. 153; R. v. Gow, 11 Can. Cr. Cas. 81, and R. v. Smith, 16 Can. Cr. Cas. 425, referred to.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

VI. Record of conviction and proceedings.

(§ VI—60) — RECORD OF CONVICTION AND PROCEEDINGS.

A mistake by misdescription of the official capacity of the magistrate in the proceedings before the final adjudication whereby a "commissioner of police" having the authority of two justices of the peace was wrongly described in the preliminary proceedings as a "justice of the peace" will not

invalidate a summary conviction made by him as a commissioner of police if he was correctly designated as such both in the memorandum of adjudication and in the formal conviction.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462.

VII. Amendment.

(§ VII—70)—AMENDMENT.

Where there is no Court of general or quarter sessions of the peace, or officer thereof, in a province, with whom a warrant and conviction may be filed by a stipendiary magistrate, under sec. 793 of the Criminal Code, if filed with a city clerk, they are still under the control of the magistrate who issued them, and he may amend them at any time before the conviction is quashed.

The King v. Sarah Smith, 19 Can. Cr. Cas. 253.

A reasonable time may intervene between the date of a conviction and the filing by a stipendiary magistrate of a warrant and conviction with the clerk of the peace, as required by sec. 793 of the Criminal Code, and where but a few days elapse, it will be presumed, unless the contrary is shewn, that during such time the warrant and conviction remain in the custody of the magistrate, and so long as they are in his possession he may make amendments thereto.

The King v. Sarah Smith, 19 Can. Cr. Cas. 253.

A. On appeal.

(§ VII A—75)—ON APPEAL.

A stipendiary magistrate cannot amend a warrant or conviction after it is filed with the clerk of the peace, or other proper officer, under the provisions of sec. 793 of the Criminal Code, to be kept among the records of the general or quarter sessions of the peace or of any Court discharging the functions thereof. [Reg. v. Learmont, 23 N.S.R. 24, and Ex p. Austin, 44 L.T. 102, distinguished.]

The King v. Sarah Smith, 19 Can. Cr. Cas. 253.

Where a summary conviction was made by a magistrate of several persons upon a charge of unlawfully playing or looking on in a common gaming-house and the evidence returned on certiorari was sufficient for the conviction of all the defendants for unlawfully playing, the Court will not quash the conviction for duplicity and uncertainty, but will amend the conviction under Code sec. 1124 by striking out the charge of looking on.

The King v. Toy Moon, 19 Can. Cr. Cas. 33, 19 W.L.R. 480.

B. On motion to quash or habeas corpus.

(§ VII B—80)—ON MOTION TO QUASH; HABEAS CORPUS; CERTIORARI.

Section 1124 of the Criminal Code permits the Court itself to amend a summary conviction removed by certiorari proceedings as to certain defects, but the right of the magistrate to tender another conviction in substitution for the one attacked is one independent of Code sec. 1124.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462.

An amendment may be made to a conviction under the Liquor License Act (Ont.) to state that the township was one in which there was, at the time, a by-law in force passed under sec. 141 of such Act prohibiting the sale of liquors by retail therein, and so cure the failure to mention that fact in the conviction as originally made, where the record returned to the Court by the convicting magistrates shewed that counsel for the accused at the trial admitted that such by-law was in force in that township.

Rex v. O'Connor, 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 3 O.W.N. 840, 21 O.W.R. 691.

It is the duty of the Court on certiorari to receive an amended conviction in substitution for the one first made if the amended conviction is supported by the evidence and other proceedings at the trial.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462.

A magistrate, who still has control of a warrant and conviction, may amend them after notice has been given of an application for a writ of certiorari and for the release of a person convicted under habeas corpus. [Ex p. Austin, 44 L.T. 102, and Reg. v. Learmont, 23 N.S.R. 24, distinguished. Re Macdonald, 26 N.S.R. 406; Regina v. Bennett, 3 Ont. R. 45; Ex p. Smith, 3 H. & N. 727; R. v. Richards, 5 Q.B. 296; The King v. Leconte, 11 Can. Cr. Cas. 41; and Regina v. Manse, 2 Man. R. 58, specially referred to.]

The King v. Sarah Smith, 19 Can. Cr. Cas. 253.

The intention of sec. 1124 of the Criminal Code, 1906, in giving the power to amend a summary conviction on a motion to quash is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by defects in form occasioned either by the error or by the stupidity of the magistrate.

The King v. Demetrio, 1 D.L.R. 515, 3 O.W.N. 602, 20 O.W.R. 999.

VIII. Duplicity and uncertainty.

(No cases.)

SUMMARY JUDGMENT.

See Judgment, I.

SUMMONS.

See Writ and Process.

SUMMONS ON SUMMARY CONVICTIONS.

See Summary Convictions, III.

SUMMARY PROCEEDINGS.

(§ I—6)—Enforcement of undertaking.

A motion to enforce an undertaking given by a defendant through his solicitor to submit to judgment upon a certain event or contingency is not properly enforceable upon a Chambers application, although it was given in respect of a Chambers motion; a summary application for its enforcement may be made to the Court or an independent action may be brought for its enforcement. [Pirung v. Dawson, 9 O.L.R. 248 specially referred to.]

Clarkson v. McNaught (No. 2), 2 D.L.R. 55, 3 O.W.N. 741, 21 O.W.R. 350.

SUNDAY.

I. Judicial proceedings.

II. Sport; amusements.

III. Labour and business.

A. In general.

B. Works of necessity and charity.

IV. Contracts.

V. Violation of Sunday law as a defence.

Validity of statutes as to Sunday observance, see Constitutional Law, II.

I. Judicial proceedings.

(No cases.)

II. Sport; amusements.

(No cases.)

III. Labour and business.

B. Works of necessity and charity.

(§ III B—15)—Works of necessity and charity.

Where the substituted holiday provided for by the Lord's Day Act is being claimed, it is the duty of the employee to do the work and then demand the substituted holiday during the next six days. [Lord's Day Act, R.S.C. 1906, ch. 153, sec. 6, referred to.]

Murray v. Coast Steamship Company, 8 D.L.R. 378, 22 W.L.R. 572.

(§ III B—23)—Loading or unloading ship or car.

As to "cases of emergency in connection with transportation," as applied to an able-bodied seaman at cargo work on a ship, the word "emergency" must be given an elastic and varying meaning according to the circumstances, especially in the case of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessels and those on board. [Lord's Day Act, R.S.C. 1906, ch. 153, secs. 6, 12 (h), referred to.]

Murray v. Coast Steamship Company, 8 D.L.R. 378, 22 W.L.R. 572.

IV. Contracts.

(§ IV—25)—Contracts.

The fact that the initial payment on account of purchase money for lands was made on a Sunday and that the receipt therefor was also signed on Sunday will not nullify the formal contract of purchase made on the following day in furtherance of the negotiations of which such initial payment formed a part.

Bailey v. Dawson, 1 D.L.R. 487, 3 O.W.N. 560, 20 O.W.R. 908, 25 O.L.R. 387.

A contract executed on the Lord's Day giving an option for the purchase of land, is void under sec. 3 of ch. 91 of C.O. (N.W.T.), 1898, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, which declares void all contracts or agreements for the sale or purchase of real or personal property made on that day.

Fallis v. Dalthaser, 4 D.L.R. 705, 21 W.L.R. 171.

V. Violation of Sunday law as a defence.

Professional services — Dentist — Work performed on Sunday—Lord's Day Act—Special plea necessary.

DesBrisay v. Morash, 8 East. L.R. 176.

SUPPLEMENTARY PROCEEDINGS.

See Execution, II.

SUPPORT.

Contract for, generally, see Contracts.

Agreement for separate support of wife, see Divorce and Separation, VII.

Husband's liability for, see Husband and Wife.

In insane asylum, see Incompetent Persons, III.

SUPREME COURT OF CANADA.

See Appeal, II.; Constitutional Law.

SURETIES.

In general, see Principal and Surety.

Fidelity bonds, see Bonds, II.

SURGEONS.

See Physicians and Surgeons.

SWINDLING.

See False Pretences.

TAXATION.

Of costs, party and party, see Costs.

Solicitor and client, see Solicitors.

TAXES.

I. Powers of taxation; what taxable.

A. Taxation districts.

B. Power of Province or territory to tax Federal agencies, instrumentalities and property.

C. Equality; uniformity; discrimination; double taxation.
D. For what purpose or use.
E. What taxable.
F. Exemptions.
II. WHERE TAXABLE; SITUS OF PROPERTY.
III. ASSESSMENT; ENFORCEMENT.
A. In general; levy and apportionment.
B. Assessment.
C. Tax officers.
D. Review; correction; equalization; appeal.
E. Personal obligation; action for collection.
F. Sale; deed; rights of purchasers.
G. Redemption; notice to redeem.
H. Who must pay; corporation taxes.
I. Payment; tender; remedies as between individuals.
J. Remission or abatement of taxes.
K. Use of proceeds.
IV. LIEN.
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A. In general.
B. Exemptions; uniformity.
C. Persons, property, transfers and interests subject to tax.
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VI. INCOME TAX.

License tax on sale of liquors, see Intoxicating Liquors, II.

As to license generally, see License, II.

As to assessment for public improvements, see Public Improvements, III.

I. Powers of taxation; what taxable.

E. What taxable.

(§ I E 1—48)—PERSONAL PROPERTY.

Coal towers forming part of a coal plant, and depending on the power house for power, may be said to form part of the business premises of the owner thereof and are therefore liable to taxation under the provisions of the charter of the city of Montreal.

Nova Scotia Coal and Steel Co. v. City of Montreal, 3 D.L.R. 750.

(§ I E 1—52)—WATERWORKS.

Pipes of a water company laid in the public streets are not "real estate" within the meaning of the law of public instruction, and are not liable to school taxes. [Bell Telephone Co. v. Corporation of Ascot, 16 Que. S.C. 436, disapproved.]

School Municipality v. Montreal Water and Power Co., 4 D.L.R. 776, 41 Que. S.C. 500.

(§ I E 1—55)—BUSINESS TAXES.

A person who has a contract with the city of Montreal by which, on payment of an annual sum, he has the privilege of removing dead animals from the streets and private premises and conveying them beyond the city limits to an establishment of his own is not a carter or a contractor doing business in the city and cannot be taxed as such.

Lesage v. City of Montreal, 13 Que. P.R. 402 (Sup. Ct.).

(§ I E 2—70)—STREET RAILWAY TAXES.

A city by-law relating to the taxation of an electric street railway company, which provided that the company should keep and maintain within the city limits all of its engines, machinery, power houses and shops, will not prevent the company importing, for the operation of its plant, electricity generated at a point beyond the city limits.

Winnipeg Electric R. Co. v. City of Winnipeg, 4 D.L.R. 116.

(§ I F 1—75)—EXEMPTION.

An exemption from "general municipal taxation" does not include school taxes under the Municipal Ordinance.

Osment v. The Town of Indian Head, 7 Terr. L.R. 462.

(§ I F 2—80)—CORPORATIONS AND THEIR PROPERTY.

Under the Assessment Act, 4 Edw. VII. (Ont.), 1904, ch. 23, sec. 226, providing that the Act shall not affect the terms of any agreement made with a municipality, a railway company is exempt from the ordinary business tax under an agreement with the city exempting its property from all taxes other than school rates.

Re Sandwich, Windsor and Amherstburg R. Co. and City of Windsor, 3 D.L.R. 43, 3 O.W.N. 575, 21 O.W.R. 44.

(§ I F 2—81) — MANUFACTURING CORPORATIONS.

In an agreement by which a city granted to a company a total exemption from taxation on its buildings and on the land on which its buildings were established, a further provision that "the foregoing exemption shall not apply to the ordinary water rate for fire protection nor to the rate for water used by the company," limits the operation of the exemption and does not enlarge it so as to exempt the company from all other liability for contributing its share of the cost of such public work as bettered its property, because not mentioned in the exception.

The City of Halifax v. The Nova Scotia Car Works, Ltd., 4 D.L.R. 241, 45 N.S.R. 552.

"A total exemption from taxation" for a certain time upon the "buildings, plant and stock" of a company and upon "the lands on which its buildings used for manufacturing purposes are situated," agreed to be granted to the company by a city, does not include the company's liability to contribute its share of the cost of sewers constructed in streets upon which its land fronts, where the city charter expressly preserved the liability of every person or company for the construc-

tion of sewers in streets in front of his or its land, and the agreement of the city aforesaid was merely sanctioned by a private Act of the Legislature which did not further affect any statute touching the city's right to recover for the cost of sewers. [Les Ecclesiastiques de St. Sulpice v. The City of Montreal (1889), 16 Can. S.C.R. 399, distinguished.]

The City of Halifax v. The Nova Scotia Car Works, Ltd., 4 D.L.R. 241, 45 N.S.R. 552.

(§ I F 2—83) — CORPORATION HAVING TWO BUSINESSES; EXEMPTION AS TO ONE.

An agreement between a city and a railway company which also conducted an electric lighting plant exempting from certain taxes "the tracks, right of way, wires, rolling stock, and all super-structures and sub-structures and all the properties of the" railway company does not entitle the company to an exemption from taxes on its buildings, machinery, poles and wires used in connection with its lighting plant.

Re Sandwich, Windsor and Amherstburg R. Co. and City of Windsor, 3 D.L.R. 43, 3 O.W.N. 575, 21 O.W.R. 44.

(§ I F 3—85)—PROPERTY DEVOTED TO EDUCATIONAL, CHARITABLE OR RELIGIOUS PURPOSES.

The Assessment Act, R.S.N.S., 1900, ch. 73, sec. 4, exempts from taxation "every church and place of worship and the land used in connection therewith, and every churchyard and burial ground." It was held, not to extend to and include lands and buildings not being churches or places of worship, such as glebe houses and lands, rectories, parsonages, etc., occupied and used by the pastors in actual charge of the churches, and not rented to third persons or used otherwise than as a means of aiding in the support of such pastors.

The Catholic Corporation of Antigonish v. The Municipality of Richmond, 45 N.S. R. 320.

(§ I F 3—86) — INSTITUTIONS ENTITLED TO EXEMPTIONS.

Where a statute provides for exemption from taxation of buildings used as a seminary of learning maintained for religious or educational purposes only when the whole profits are applied to such purposes and when the buildings are actually used and occupied by such seminary, the letting of rooms to persons other than students of the seminary in one of the buildings belonging to and used by that seminary for its ordinary purposes does not render either the whole of the buildings and property of such seminary, or the whole of the building in which the rooms are let, liable to taxation if the whole income derived from the room rents is used for seminary purposes. [See also Weir's Law of Assessment, p. 30; Ottawa Y.M. C.A. v. City of Ottawa, 20 O.L.R. 567; Sisters of Charity v. Vancouver, 44 Can. S.C.R. 29.]

Re Sisters of the Congregation of Notre Dame and City of Ottawa, 1 D.L.R. 329, 3 O.W.N. 693, 21 O.W.R. 394.

(§ I F 4—90)—PUBLIC PROPERTY.

Interest of licensee from Crown.

Cruikshank v. Rural Municipality of Coulee, 7 D.L.R. 934.

II. Where taxable; situs of property.

(No cases.)

III. Assessment; enforcement.

B. Assessment.

(§ III B—110)—ASSESSMENT.

In order to shew that taxes are due, it must appear that the imperative requirements of the statute as to assessment have been complied with and that the rate of taxation has been fixed.

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

(§ III B 1—112)—ASSESSMENT AND APPORTIONMENT OF RAILWAY PROPERTY.

The assessment of the real property of a steam railway company does not become fixed for the next following four years, under sec. 45 of the Ontario Assessment Act, 1904, upon the mere formal receipt by the clerk of the municipality of the company's annual statement of such property, and the transmission to the company of a notice of the amount of the assessment thereof, such amount being the same as the amount of the previous year; the only assessment which remains so fixed is an actual assessment after inspection and valuation.

Re Town of Steelton and Canadian Pacific R. Co., 3 D.L.R. 402, 3 O.W.N. 1199, 22 O.W.R. 94.

(§ III B 1—113)—PERSON IN WHOSE NAME PROPERTY MUST BE ASSESSED.

A purchaser of land, who has fulfilled all the conditions and paid the purchase money for it as to entitle him to a conveyance thereof, is in equity deemed the owner thereof, and such land is liable to be assessed for school purposes by virtue of sec. 132 of the School Ordinance (Sask.) even though the instrument purporting to convey the title could not be registered for want of a definite power of attorney.

Junic's Case, 7 Terr. L.R. 269.

The purposes of denominational school assessments by virtue of sec. 132 of the School Ordinance, the status of the denomination of the owner of the land governs and not that of the occupant thereof.

Junic's Case, 7 Terr. L.R. 269.

A purchaser of land, who has fulfilled all the conditions and paid the purchase money for it so as to entitle him to a conveyance thereof, is in equity deemed the owner thereof, and such land is liable

to be assessed for school purposes by virtue of sec. 132 of the School Ordinance (Sask.) even though the instrument purporting to convey the title could not be registered for want of a definite power of attorney.

Junic's Case, 7 Terr. L.R. 269.

A purchaser of land under agreement who has not paid all the moneys or performed the conditions to entitle him to a conveyance, although he has at the particular time done all his agreement calls for, is not the "owner" of the land so as to entitle him to pay the taxes to the school district of which such purchaser is a ratepayer under the School Ordinance, C.O. 1898, ch. 75, which provides by sec. 126 that "in cases where separate school districts have been established, when property owned by a Protestant is occupied by a Roman Catholic, and vice versa, the tenant in such cases shall only be assessed for the amount of property he owns, whether real or personal, but the school taxes shall in all cases, whether or not the same has been or is stipulated to the contrary in any deed, contract or lease whatever, be paid to the school of which such owner is a ratepayer." Where, however, a purchaser has met the demands and fulfilled all the conditions to entitle him to a conveyance, but such conveyance has not been executed, the purchaser being in equity the owner is the "owner" of the land within the meaning of the section of the School Ordinance above cited.

Katrinsky v. Esterhazy Protestant Separate School District; Junic v. Esterhazy Roman Catholic Public School District, 7 Terr. L.R. 265.

(§ III B 1—116) — DESCRIPTION OF PROPERTY.

The failure to note on an assessment roll, as imperatively required by sec. 31 of the Municipal Assessment Act of Manitoba, the fact that land assessed was unpatented, will render the assessment invalid. [Haisley v. Somers, 13 O.R. 600, applied; see also Hall v. Farquharson, 15 A.R. 457.]

The Rural Municipality of Minto v. Morrice, 4 D.L.R. 435, 21 W.L.R. 255 and 617, 22 Man. L.R. 391.

Provincial lands held by one under an agreement for purchase thereof from the Crown are "unpatented" lands within the meaning of sec. 31 of the Municipal Assessment Act, which requires the fact that where lands assessed for taxes are unpatented, the fact is to be noted on the assessment rolls.

The Rural Municipality of Minto v. Morrice, 4 D.L.R. 435, 21 W.L.R. 255 and 617.

Under the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 22, whereby land "subdivisions" are to be assessed separately two or more lots or parcels on a plan should not be included in one assessment. (Dictum per Kelly, J.)

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

Upon the separate assessment of a part of a lot in a land subdivision such part should be designated in the assessment roll by its boundaries or other definite description, so as to indicate what part is intended. (Dictum per Kelly, J.) [Assessment Act (Ont.), 4 Edw. VII. ch. 23, sec. 22, considered.]

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

(§ III B 1—119)—NOTICE.

The omission of the word "limited" from the name of a company to whom a tax notice is mailed will not invalidate the notice where the notice conformed to the rolls in that respect and the officers of the company knew that the company was meant to be designated and they acted on that assumption.

McCutcheon Lumber Co., Ltd. v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729.

By the Local Improvement Ordinance, C.O. 1898, ch. 73, it was provided that upon the confirmation by a Judge of the return of unpaid taxes required by the Ordinance to be made annually by the overseer to the Attorney-General, the lands in respect of which the taxes were imposed should be vested in the Crown subject to redemption within a stated period, and in default of redemption the land became, on the order of a Judge, absolutely vested in the Crown. Under this provision application was made to confirm the overseer's return respecting land, the title to which was in the Crown but which was the subject of a homestead entry at the time the taxes were levied. It was held, that the proceeding was not a process of execution to enforce payment by the person liable to pay such taxes, but was a proceeding to enforce a lien against land, and as land held by the Crown was not liable to taxation, the overseer's return could not be confirmed.

Attorney-General v. Canada Settlers Loan and Trust Co., 7 Terr. L.R. 256.

A school district sold for arrears of taxes, land, the title to which was in the Crown, but which had been homesteaded by one B., who, however, had vacated the land prior to the year in which the taxes had been imposed. The Ordinance governing the same provided that all property held by Her Majesty should be exempt from taxation, but that when any such property was occupied by any person otherwise than in any official capacity the occupant should be assessed in respect thereof, but the property itself should not be liable. On application to confirm the sale by the district, it was held, that taxes could not be recovered by sale of

the land, and that the application to confirm must be refused.

Re Spring Creek School District, 7 Terr. L.R. 259.

(§ III B 2—125)—Valuation.

The want of the buyer, the site of the property, the price paid for identical land in the neighbourhood are the best things to consider in valuation of real estate.

Herbert v. Corporation du Village de Saint Michel, 18 Rev. de Jur. 228.

D. Review; correction; equalization; appeal.

(§ III D—136)—Correction.

The substitution, for the purpose of qualifying him as a voter, of the name of a land owner for that of a former owner of the same property upon the assessment roll upon his shewing to the officer charged with the custody of the roll his certificate of title, is not invalid merely on the ground that it was done prior to the decision of the Court of Revision upon the owner's application to that Court to have his name placed upon the voters' list under the Municipal Ordinance, Terr. C.O. 1898, ch. 70, in force in Alberta, if, in fact, the Court afterwards granted his application.

The King ex rel. Angus v. Knox, 1 D. L.R. 843, 19 W.L.R. 769.

Under a statute which permits any person otherwise duly qualified to vote whose name is not on the voters' list, to apply to have such list amended by the addition of his name, and which also declares qualified those persons who are named on the last revised assessment roll as occupants or owners of real estate of a stated amount held in their own right, the amendment of the voters' list on such application casts upon the officer in charge of the assessment roll the duty of amending the latter in the same way.

The King ex rel. Angus v. Knox, 1 D. L.R. 843, 19 W.L.R. 769.

Objections to the imposition of taxes by municipal assessors may be made at any time if the objects assessed are not taxable by law, as this would constitute an ultra vires assessment, radically null.

Nova Scotia Coal and Steel Co. v. City of Montreal, 3 D.L.R. 750.

(§ III D—137)—Board of review or equalization; Court of Revision.

An assessment roll prepared in accordance with the provisions of the city charter, if not attacked before the board of assessors within the legal delays, is absolutely binding on all the ratepayers taxed and the legality thereof cannot be enquired into once it has been duly homologated.

City of Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

(§ III D—138)—Appeal.

Appeal from assessment—Validity of—Excessive valuation—How value determined—Actual sales—Admissibility of evidence as to price received.

Burns v. City of Calgary; Ross v. City of Calgary, 7 D.L.R. 918, 21 W.L.R. 662.

On the appeal to the Circuit Court from the decisions of the council at the time of annual revision, the Court must establish the actual value of the contested real estate, at the time of the revision, not taking into consideration the value which may be given to it by future public works such as opening of a street.

Herbert v. Corporation du Village de Saint-Michel, 18 Rev. de Jur. 228.

Assessment—Salary of County Judge—Appeal from Court of Revision to County Judge—Prohibition—Disqualification by interest—Jurisdiction of Judge in Chambers—10 Edw. VII. ch. 26, sec. 16—Appointment under the Act.

Re Chisholm and City of Berlin, 4 O.W. N. 431, 23 O.W.R. 571.

Action to set aside tax sale—Evidence—Production of tax deed—Onus—Assessment Act, 4 Edw. VII. ch. 23, sec. 173—Meaning of "time of sale"—Conduct of sale—Sale without regard to value of land—Irregularities of assessment roll—Omission of affidavit and by sec. 172—Right to redeem—Construction of Act—Illegal assessment—Validating Act, 10 Edw. VII. ch. 124—Cancellation of tax deed—Repayment of taxes paid by purchaser.

Errikkila v. McGovern, 4 O.W.N. 195.

[Appeal was allowed by Divisional Court, Errikkila v. McGovern, 4 O.W.N. 518.]

Assessment and taxes—Sale of land for taxes—Action to set aside—Non-resident owner—Statutory notice of assessment—Statement and demand of taxes—Transmission of, to owner's address, "If known"—Provisions of Assessment Act as to—Unrevoked address disregarded—Duty of treasurer under sec. 165.

Gast v. Moore, 4 O.W.N. 525.

E. Personal obligation; action for collection.

(§ III E—140)—Personal obligation; action for cancellation; distraint.

Assessment — Enforcement — Action to recover—Meaning of "occupant" and "squatter"—R.S.S. 1909, ch. 88, sec. 2.

Rural Municipality of Spy Hill v. Bradshaw, 7 D.L.R. 941.

Where vacant lots are comprised between the homologated lines of a projected avenue, and destined therefor to fall into the civic domain, and an assessment roll prepared taxing these lots for the purpose of constructing a drain and the proprietor has not objected thereto in time, he cannot raise, by opposition to a seizure of these lots for overdue taxes, the illegality of such roll.

City of Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

(§ III E—142)—DISTRESS OF GOODS FOR; DISTRAINT.

A loan made under by-laws passed for the purpose of enabling a municipality to borrow money and providing that it may "hypothecate" all arrears of taxes, does not pass all proprietary interest of the municipality to the lender so as to deprive it of its right to distrain for taxes in arrears.

McCutcheon Lumber Co., Limited v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729.

A tax valuation statute may apply to a pending action calling in question the validity of the tax assessment; and where it declares that the assessment was valid and binding notwithstanding any defect or irregularity in the proceedings taken, and that the validity thereof shall not be questioned in any action on account of any defect or irregularity in said proceedings, or on account of non-compliance with any statutory provisions, the statute must be construed as retroactive and as including cases as to which litigation was pending at the time it was passed. [10 Edw. VII. (Man.) ch. 38, construed; McCutcheon Lumber Co. v. Minitonas, 2 D.L.R. 117, affirmed on different grounds.]

McCutcheon Lumber Co., Limited v. Minitonas (No. 2), 7 D.L.R. 664, 22 W.L.R. 500.

The word "taxes" in sec. 129 of the Municipal Assessment Act, R.S.M. 1902, ch. 117, giving a municipality the right to a distress of the goods and chattels of one neglecting "to pay taxes," includes taxes on personal property as well as those on real estate.

McCutcheon Lumber Co., Limited v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729.

(§ III E—143)—DEMAND OR NOTICE.

The necessity for any demand for arrears of taxes is met by following the requirement of sec. 129 of the Manitoba Municipal Assessment Act, R.S.M., ch. 117, which provides that if a person neglects to pay his taxes for thirty days after the mailing to such person or his agent of the notice required by sec. 123 of such Act, the municipality shall have a right to a distress and sale of his goods.

McCutcheon Lumber Co., Limited v. Minitonas, 2 D.L.R. 117, 20 W.L.R. 729.

F. Sale; deed; rights of purchasers.

(§ III F—145)—SALE; DEED; RIGHTS OF PURCHASERS.

In order that a sale of land for arrears of taxes may be openly and fairly conducted, within the meaning of sec. 172 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, something more is required than easy-going, unenquiring honesty on the part of the official who sells. The sale must be conducted as an ordinary business transaction is, where property is sold by auction with a view to obtain its fair market value, and fairness is required on the part of the vendee, as well as of the vendor. [Donovan v. Hogan, 15 A.R. 432, followed.]

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

A forced sale by municipal bodies of a property on which there are arrears of municipal taxes is subject to the rules generally applicable to the contract of sale, and hence a sale super non domino and non possidente is absolutely null.

City of Hull v. McConnell, 3 D.L.R. 37.

(§ III F—146)—DEEDS; CERTIFICATE.

Sale—Redemption—Confirmation of sale—Time to redeem—N.W.T. C.D. Alberta (1911), ch. 109—Lethbridge charter construction.

Re Lethbridge Charter, 7 D.L.R. 772.

The period of two years from the time of sale, on expiration of which a sale of land for arrears of taxes is validated by sec. 173 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, runs from the time of making the tax deed, and not from the time of the auction sale of the land. [Donovan v. Hogan, 15 A.R. 432, followed.]

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

After the expiration of two years from the time of a sale of land for arrears of taxes, sec. 173 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, validates not only the deed but also the sale of the land, and it is not necessary to shew that the sale was openly and fairly conducted. [Hall v. Farquharson, 15 A.R. 457, distinguished.]

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

The provisions of sec. 357 and sub-sec. 10 of sec. 2 of the Town Act, R.S.S., ch. 85, that a Judge of the District Court may confirm tax sales "unless the context otherwise requires" is controlled by statute R.S.S. 1909, ch. 49, which requires such confirmation to be made by a Judge of the Supreme Court.

Nicholson v. Drew, 3 D.L.R. 748, 21 W.L.R. 189.

(§ III F—146a)—NOTICE OF SALE.

The abbreviated notice permitted by sub-sec. 3 of sec. 143 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, in the case of a sale of land for arrears of taxes must be published for thirteen weeks. A single publication thereof is insufficient.

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

Plaintiff's land was sold for taxes by the municipality of South Vancouver in 1898, for arrears 1893 to 1897. The main grounds alleged against the validity of the sale were that the meetings of the council and of the Court of Revision (which is composed of the members of the council) dealing with the taxes were held in

another municipality, i.e., the City of Vancouver, and that notice of the tax sale was not posted up on the post office building within the municipality in which the lands affected were situate. It was in evidence that at the period in question there was no post office building, as such, within the municipality, the business of post office being carried on in a local house. The meetings of the council were held in Vancouver city to the plaintiff's knowledge, and he also had knowledge of the actions of the council as to the tax sale. Plaintiff brought action in 1909 to set aside the sale, and the action was dismissed for reasons given below. Plaintiff appealed. Macdonald, C.J.A., thought that the appeal from the trial Judge, Clement, J., should be dismissed substantially for the reasons given by him. Per Irving and Martin, JJ.A.:—The appeal should be allowed upon the grounds: (1) Plaintiff had not received notice of the sale; (2) he had not waived notice; (3) the meetings of the council and Court of Revision had not been validly held; and (4) no resolution could be shewn or inferred for a departure from the general rule. Per Galliher, J.A.:—The appeal should be dismissed on the ground that the plaintiff was disentitled by his laches and delay. The Court being evenly divided, the appeal was dismissed.

Anderson v. Municipality of South Vancouver, 16 B.C.R. 401.

A municipality which proceeds to the sale of a property for taxes without giving to the interested parties whose titles are duly registered the notices required by law is liable for its wrongful act in damages.

City of Hull v. McConnell, 3 D.L.R. 37.

(§ III F—147)—RIGHTS OF PURCHASERS.

The applicant H. was a purchaser at a sale for taxes of land against which was registered a lien executed by one G., a homesteader, prior to the issue of the grant. H. having refused to inform the lien-holder of the amount necessary to redeem, the lien-holder made a tender to H. which turned out to be insufficient. On application by H. to confirm the sale it was held, that as the insufficiency of the tender was due to the fault of H. in refusing to give information that he ought to have given, the lien-holder would be admitted to redeem upon paying as directed by the Judge the amount actually payable. Held, also, that the lien being merely a charge on the land and not an "assignment or transfer," within the meaning of sec. 42 of the Dominion Lands Act, was a valid encumbrance. [In re Harper, 3 Terr L.R. 257, approved.]

In re Hardaker, 7 Terr. L.R. 151.

(§ III F—148a)—SETTING ASIDE TAX DEED.

Where land is sold for arrears of taxes, and there is no local advertisement, except a bill posted at the court house, and a single insertion in two papers of the abbreviated advertisement authorized by sub-sec. 3 of sec. 143 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, and only three or four persons attend the sale, and only one bid was made which was of the exact amount of the arrears offered by the brother of the owner, who had been anxious, though not to the knowledge of the municipal officials, to get the land, the sale is not openly and fairly conducted within the meaning of sec. 172 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23.

Sutherland v. Sutherland, 4 D.L.R. 591, 3 O.W.N. 1368, 22 O.W.R. 296.

Action to set aside—Irregularities in sale—Plaintiff tenant of defendant.

Burrows v. Campbell, 6 D.L.R. 877, 4 O. W.N. 247.

G. Redemption; notice to redeem.

(§ III G—150)—NOTICE TO REDEEM.

Enforcement—Sale—Right to redeem—Time for redemption — Tender — Lethbridge city charter—Tax sale confirmation ordinance (1901), ch. 12.

Re Turner and Carosella, 7 D.L.R. 818, 22 W.L.R. 19.

I. Payment; tender; remedies as between individuals.

(§ III—I—164)—INSTALMENT PAYMENTS.

A ratepayer who pays without demur an instalment due under an assessment roll cannot subsequently evade payment of the other instalments on the ground that the assessment is illegal if the roll has become confirmed in default of statutory proceedings to vacate or set aside the same.

City of Montreal v. Allard, 3 D.L.R. 438, 18 Rev. de Jur. 326.

IV. Lien.

(§ IV—175)—LIEN.

Municipality claiming lien for taxes—Description of land to be sold too indefinite—Particulars ordered.

Town of Sturgeon Falls v. Imperial Land Co., 19 O.W.R. 757, 2 O.W.N. 1433.

The Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 89 in making land taxes due to the municipality a "special lien" on the lands confers no new right of realization by action at law which would accelerate the time for selling or shorten the time for redemption under the statutory mode of realizing under tax sale proceedings; the effect of the statute is to give to the municipality a security by way of lien for such taxes in priority to other claims and incumbrances, until payment is enforced.

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 4 O.W.N. 178, 23 O.W.R. 170.

V. Succession duties.

A. In general.

(§ V A—180)—Succession tax.

New Brunswick Succession Duty Act, 1896, sec. 1—Construction—Locality of simple contract debts—Lex loci and administration—Lex domicilii and distribution.

The King v. Lovitt, [1912] A.C. 212, 1911 C.A.D., col. 952.

(§ V A—181)—Nature and power to impose.

The succession duty imposed upon all property in Ontario devolving upon death by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, is the only inheritance tax in Ontario.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

(§ V A—184)—Contingent tax; annuities.

A gift for life of the income from the residue of an estate does not create an annuity within the meaning of the Succession Duty Act (Ont.). [Foley v. Fletcher (1858), 3 H. & N. 796; Winter v. Mouseley (1819), 2 B. & Ald. 802; Booth v. Ammerman (1856), 4 Bradford (N.Y. Surr.) 129, specially referred to.]

Bethune v. The King, 4 D.L.R. 229, 26 O.L.R. 117, 3 O.W.N. 941, 21 O.W.R. 559.

B. Exemptions; uniformity.

(§ V B—185)—Exemptions; uniformity.

A legacy is exonerated from the payment of the succession duty established by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, when it is expressly declared by the will to be "free of legacy duty" and the payment of the duty required falls upon the residuary estate.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

C. Persons, property, transfers and interests subject to tax.

(§ V C—190)—Persons, property, transfers and interests subject to tax.

A succession duty established by the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, is a tax which is to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

(§ V C—196)—Charitable gifts.

Under sub-sec. 2 of sec. 6 of the Ontario Succession Duty Act, 9 Edw. VII. ch. 12, providing that no duty shall be leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or a person resident in Ontario, it is essential in order that a legacy to a corporation organized in England may be free from any duty that the charitable purpose of the legacy should be carried out in Ontario and it is not sufficient for this purpose that the money might without breach of trust be expended within Ontario.

Re Gwynne, 5 D.L.R. 713, 3 O.W.N. 1428, 22 O.W.R. 405.

(§ V C—198)—Property out of province; situs.

Where transmissions of property owing to death are declared to be subject to succession tax in respect of movable and immovable property in the province and by another clause of the same statute [art. 1191 (c) enacted by 6 Edw. VII. (Que.), ch. 11] it is provided that the word "property" shall include (inter alia) all movables, wherever situate, of persons having their domicile or residing in the province at the time of their death, and the statute further provides that payment of the succession duty shall be a condition of the transfer of the properties in any estate or succession, then if the right or title of the executors to bonds and other movables locally situate in a foreign country as regards the claim of the executors to title thereto is dependent upon the provincial law, the legal transmission by death is subject to the provincial succession duty. (Per Fitzpatrick, C.J., Idington, Duff and Brodeur, JJ., reversing on this point the decision appealed from.) [Lambe v. Manuel, [1903] A.C. 68; Bank of Toronto v. Lambe, 12 A.C. 575; Blackwood v. Regina, 8 A.C. 82; Winans v. Attorney-General, [1904] A.C. 287; Woodruff v. Attorney-General, [1908] A.C. 508, and R. v. Lovitt, [1912] A.C. 212, 28 Times L.R. 41, specially referred to.]

The King v. Cotton, 1 D.L.R. 398, 45 Can. S.C.R. 469, 10 East. L.R. 461.

The words "movable and immovable property in the province" in a succession tax statute declaring subject to certain tax duties all transmissions thereof owing to death, are to be construed, when taken alone, as limiting the tax to the transmission of property having its situs within the province at the date of the death. (Per Fitzpatrick, C.J., Davies and Anglin, JJ., confirming on an equal division the opinion appealed from on this point.)

The King v. Cotton, 1 D.L.R. 398, 45 Can. S.C.R. 469, 10 East. L.R. 461.

TELEPHONES.

License for use of streets for telephone poles, see Municipal Corporations.

(§ I—2)—Compulsory service.

Notwithstanding the provisions of the Ontario Telephone Act, 1910, there is no jurisdiction in the Ontario Railway and Municipal Board to make an order directing "connection, inter-communication, joint operation, reciprocal use and transmission of business," involving the expenditure of money upon capital account,

by the subscribers to a telephone system, constructed and installed under the provisions of the Ontario Local Municipal Telephone Act, 1908.

Village of Brussels v. McKillop Telephone System; Village of Blyth v. McKillop Township, 2 D.L.R. 843, 3 O.W.N. 781, 21 O.W.R. 628, 26 O.L.R. 29.

(§ I—5)—INSTALLATION BY REASON OF ORDER OF RAILWAY COMMISSIONERS.

Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to compensation from the railway for the expense of moving and relocating the telephone line.

Bell Telephone Co. v. Canadian Pacific R. Co. and G. T. R. Co., 5 D.L.R. 297.

(§ I—7)—GOVERNMENTAL REGULATIONS.

The construction and installation of a telephone system under the provisions of the Ontario "Local Municipal Telephone Act, 1908" by an association of individual subscribers, even when operated under a certain name, does not constitute them a corporate body or legal entity, and their telephone system and equipment used in connection therewith become vested in the municipality in trust for the benefit of the subscribers. (Per Moss, C. J.O., and Garrow, J.A.)

Village of Brussels v. McKillop Telephone System; Village of Blyth v. McKillop Township, 2 D.L.R. 843, 3 O.W.N. 781, 21 O.W.R. 628, 26 O.L.R. 29.

While the Ontario Railway and Municipal Board may "review, rescind, change, alter or vary any rule, regulation, order or decision" made by it, it should not make an order having the effect of interfering with an agreement entered into between two telephone systems or companies to which the approval of the board had already been given, except on a properly framed application for the purpose, and upon due notice to the parties interested to appear and state their objections; the board has no power or jurisdiction to alter or vary such approved agreement except upon an application of which due notice has been given to the interested parties.

Village of Brussels v. McKillop Telephone System; Village of Blyth v. McKillop Township, 2 D.L.R. 843, 3 O.W.N. 781, 21 O.W.R. 628, 26 O.L.R. 29.

TENANCY IN COMMON.

See Co-tenancy.

TENANTS.

In general, see Landlord and Tenant.

TENDER.

(§ I—1)—TO WHOM MADE.

When a tender has to be deposited into Court it is immaterial that such deposit be made at the time of the issue of the writ or at the time of the return thereof into Court, as no prejudice results therefrom to the defendant.

Malo v. Roy, 3 D.L.R. 431, 18 La Rev. de Jur. 462.

(§ I—2)—SUFFICIENCY OF, GENERALLY.

Where the buyer, by letter, advises the seller of his refusal to accept merchandise bought, informing him, at the same time, that, unless the vendor sends shipping instructions, the car will be forwarded to him, and the vendor replies "we positively will refuse delivery if you should decide to return them," the buyer is not obliged to cart the goods to the railway station to make a formal tender; it is sufficient if, in his plea, he renews his declaration that the goods are at the vendor's disposal.

Lachute Shuttle Co. v. Frothingham & Workman, Limited, 8 D.L.R. 417.

Where a lease, not under seal, contains a clause giving to the lessee an option to purchase the premises for a certain sum of which part is to be paid in cash, and the remainder secured by mortgage, and a letter is written within the time prescribed, notifying the lessor of the exercise of the option by the lessee, but no tender is made of the cash payment, an action for specific performance will fail, because of the absence of any tender, and the plaintiff cannot rely upon a tender made on the day following the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Payment into Court by a mutual life insurance association of the amount claimed to be due on a certificate of membership, is insufficient as a tender if the costs of the action already begun for recovery of the amount were not offered therewith.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

Where a purchaser under an agreement of sale of lands refused to comply with an express provision for payment of a substantial down payment on the purchase price of lands of speculative value of which he does not receive possession, and after a long interval without taking any action until the property had greatly increased in value offers such down payment to the vendor, the latter will not be compelled to accept the same for the reason that it would, in effect, be constituting a fresh contract. Per Duff, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

(§ I—4)—NECESSITY OF KEEPING GOOD.

Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into Court a sum of money which the plaintiff accept-

ed and obtained payment out upon an ex parte order it was held, that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper, and, further, that the plaintiff's conduct having been oppressive throughout the transaction, and having made an unfounded charge of fraud, he should be deprived of his costs.

Wainwright v. Farmer and Lindsay, 16 B.C.R. 468.

(§ I—6)—EFFECT.

Where a vendor of land gives notice of cancellation of the agreement of sale on the ground of default in payment of an instalment of the purchase price, and the purchaser subsequently tenders the arrears, the vendor does not, by offering to re-instate the agreement upon an addition being made to the purchase price, treat the agreement as being still on foot, so as to entitle the purchaser to specific performance upon payment of the arrears.

Chadwick v. Stuckey, 6 D.L.R. 250, 21 W.L.R. 788.

The tender, at an election of company directors, of a cheque of arrears in payment of a call, does not remove the disqualification imposed by sec. 12, ch. 53, 52 Vict. (Manitoba), on a shareholder, so as to permit him to vote at such election.

Colonial Assurance Co. v. Smith, 4 D. L.R. 814, 21 W.L.R. 815, 22 Man. L.R. 441.

(§ I—7)—RELIEF FROM MAKING.

The payment or tender of the amount agreed to be paid down on a lease is dispensed with where the lessor informed the lessee that he did not intend to carry out the contract.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O. W.N. 986.

A declaration of the vendor upon inquiry by the vendee in a contract for the sale of land, as to the amount remaining unpaid thereon, that the agreement had been cancelled and terminated for nonpayment, relieves the vendee of the necessity of making a valid tender of the amount due before commencing suit for specific performance of the contract, or a return of the money paid thereon.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16.

(§ I—12)—CHEQUE ON BANK.

To constitute a valid tender of money there must, in the absence of some act or condition which amounts to a waiver, be something more than a mere readiness and willingness topay even though expressed; there must be an actual production of the money and not merely of a cheque therefor. [See also 28 Am. & Eng. Encycl., 2nd ed., p. 28; 38 Cyc., p. 131, and annotation to this case.]

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595.

A tender by means of an accepted cheque is not illegal and cannot be attacked subsequently as illegal when no objection to the form of such tender was made at the time, the tender having been declined on totally different grounds (e.g., the expiry of delays).

Malo v. Roy, 3 D.L.R. 431, 18 La Rev. de Jur. 462.

TESTAMENTARY CAPACITY.

See Wills, I.

THIRD PARTY.

See Parties, III.

THEFT.

I. In general.

(§ I—1)—WHAT SUBJECT OF.

One who induced a servant to steal for him a barrel of whisky owned by his master is guilty of an attempt to steal, where the servant, who informed his master of the plan, delivered a barrel of water instead of whisky to the defendant, as the master directed him to do.

The King v. Montgomery, 19 Can. Cr. Cas. 233.

Where the defendant, with intent to steal a barrel of whisky, induced the servant of the owner to consent to bring it to him, there cannot be a conviction for the theft of a barrel of liquid, where the master, upon being informed by his servant of such plan, directed the latter to deliver to the defendant a barrel of water instead, which was done, as the owner of the whisky deliberately substituted a different article for that which the defendant intended to steal.

The King v. Montgomery, 19 Can. Cr. Cas. 233.

A railway conductor who does not account to the railway company for a cash fare he received from a passenger, and who denies the receipt thereof, may, under such facts, be convicted of theft under sec. 355 of the Criminal Code (1906), where he omitted to issue a duplex ticket or to account for the money in the usual course.

Rex v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 21 W.L.R. 658.

The defendant deliberately took water, supplied by a city corporation, from the pipes of a neighbour after that neighbour had refused to permit him to do so, the defendant not being himself entitled to take water from the city pipes. It was held, that water may be the subject of a larceny at common law, and the defendant was found guilty of larceny. [The Queen v. White, 32 L.J.M.C. 123, and Ferens v. O'Brien, 11 Q.B.D. 21, followed.] In the charge, as framed, the property in the water was alleged to be in the city corporation. The water was supplied to

the defendant's neighbour at a flat rate, and not according to the quantity used as shewn by a meter, and that the water taken by the defendant was the property of the corporation.

Rex v. Hutton, 19 W.L.R. 907.

TIMBER.

Cutting and taking out timber, see Logs and Logging.

I. In general.

(§ I—1)—Deed of, as license.

One who makes application for a license to cut timber from a timber limit before it has been surveyed, is not required, in his application, to describe with mathematical accuracy the land he proposes to take up.

Lauresen v. McKinnon, 4 D.L.R. 718, 20 W.L.R. 384.

The existence of a commercial partnership cannot be proved by oral testimony. Rights acquired by grantees or purchasers of timber limits publicly sold at auction pursuant to the provisions of arts. 1623 et seq. R.S.Q. 1909, are immovable rights and cannot, therefore, be the object of a commercial contract. Oral evidence is not admissible to prove that a typewritten document, unsigned, emanates from a party against whom it is set up as a commencement of proof in writing.

Guerin v. Davis, 42 Que. S.C. 81 (Supt. Ct.).

(§ I—4)—Conditions precedent to right to cut.

1. Servitude is the right to the surface of the real estate which still subsists as to trees planted and existing at the time of execution of the deed. By the terms of this reservation the defendant, being in place and stead of the vendor, his father, may, as his father might have done, exercise the right to cut timber, in his spare time and whenever he thinks fit, in conformity with the said reservation, and consequently, the plaintiff, as representing his father, the vendee of the property, is badly founded in his demand to have a limit prescribed for exercising the right of the defendant. The fact that the defendant has cut the timber in different places on the said piece of land, contrary to the terms of the deed and the created reservations, with the knowledge of the plaintiff, will not affect the rights of the defendant and will not be taken into consideration in this case, since the plaintiff does not claim, of his own right, any damages. By the terms of the above reservation, the defendant has only the right to the timber planted and existing on the date of the aforesaid deed of sale, October 24, 1872, consequently, after the proof by which it was established that the defendant took and carried away new timber, which grew after that date, of the value of $100, he will be adjudged to pay such sum to the plaintiff with costs of the action for that amount.

Cournoyer v. Cournoyer, 18 Rev. de Jur. 196.

(§ I—6)—When title to passes.

A vendor who, under the provisions of a contract of sale of timber rights, was vested with the title to all property of the vendee found upon the land upon the vendor's re-entry for the vendee's default, cannot recover the value of property sold by the vendee before such re-entry from the person to whom the vendee turned over the proceeds of such sales, where the sales were made without fraud to bona fide purchasers.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

(§ I—7)—Forfeiture by non-removal.

Where a sub-licensee of rights to cut standing timber is notified by the first holder that the latter claims the timber as having reverted to him and that the license from himself has expired, when in fact a reasonable time has not elapsed for cutting the timber, and no time limit is specified in the license agreement, the sub-licensee is not entitled to treat such notification as an interference preventing him from performing his own contract with the intermediate licensee.

Dempster v. Russell, 2 D.L.R. 14, 3 O. W.N. 719, 21 O.W.R. 449.

(§ I—8)—Time for removal.

Where a license agreement for cutting standing timber contains no time limit, it will be presumed that the cutting must be completed within a reasonable time.

Dempster v. Russell, 2 D.L.R. 14, 3 O. W.N. 719, 21 O.W.R. 449.

(§ I—9)—Mode of estimating timber.

Where a sale of a block of shares in a lumber company is based upon the vendor's statement of the company's assets which included various timber licenses, some for twenty-one years, and others perpetual, issued by the Government as concessions, and such statement also contains an estimate of the quantity of uncut timber under such licenses or concessions, and a valuation thereof, and it is stipulated between the parties that the buyer of the shares shall be entitled to a pro rato abatement in price for any deficiency in the quantity of timber, to ascertain which he is to "cruise and verify the figures" in a limited period, a deficiency is not shewn by the buyer on whom the onus is cast where his only evidence is that of his timber cruisers who made no estimate of growing timber which, at the time of the contract was not merchantable in the sense that under the lumbering facilities then available it could not be profitably taken out at that time; the warranty being expressly limited to quantity

and not applying to the estimated value, the contract should not be interpreted as leaving it to timber cruisers to exclude timber trees actually on the locus in quo upon any opinion they might have, that, by reason of cost of transportation or of manufacture, the excluded timber could not presently be taken out at a profit, although it would, in the natural course and with improved methods and conditions, be valuable during the company's operations on the limits. [Swift v. David, 16 B.C.R. 275, affirmed.]

Swift v. David, 8 D.L.R. 739, 107 L.J. 71.

TIME.

For taking appeal, see Appeal, III.

For giving notice of injury to property transported, see Carriers, III.

For presenting cheque for payment, see Cheques.

As essence of option contract, see Contracts.

To furnish notice or proofs of loss, injury or death, see Insurance.

For filing Mechanics' Liens, see Mechanics' Liens.

To move for new trial, see New Trial.

I. In general.

(§ I—3)—"DAY."

An option for a certain number of days is an option for that number of consecutive periods of 24 hours, running from the hour at which the option is given, and expires at the corresponding hour of the last day, and not at midnight of that day. [Cornfoot v. Royal Exchange, [1904] 1 K. B. 40, applied.]

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

(§ I—7)—COMPUTATION.

In an action in ejectment accompanied by an attachment for rent, the service of the declaration within three days of the service of the writ has for effect the summoning of the defendant to answer the demand as if such service had been made at the time of the service of the writ.

Smith v. Shapiro, 14 Que. P.R. 160.

In the County Court Act, R.S.N.S. 1900, ch. 156, sec. 57, prescribing that a notice requiring issues to be tried by a jury must be given "at least fifteen days before the first day of the sittings," the words "at least" must be given the same construction as the words "clear days" and that a notice given on the 23rd October for the sittings beginning on November 7th is insufficient. [McQueen v. Jackson, [1903] 2 K.B. 163, referred to.]

Chambers Electric L. and P. Co. v. Crowe, 5 D.L.R. 545.

(§ I—9)—"FROM THIS DATE" IN NOTICE SERVED.

A written demand for payment within thirty days "from this date" is to be construed as a demand for payment within that period computed from the date which the notice itself bears where the same is formally dated and not from the day of service of the demand.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C. R. 16.

TOLLS AND TOLL ROADS.

I. In general.

(§ I—15)—FOR USE OF IMPROVEMENTS IN STREAM.

In the absence of the authority to exact tolls and in the absence of a contract express or implied on behalf of the users of improvements on a highway to pay tolls, the person erecting improvements has no right to exact tolls from the users thereof whether the highway be on water or on land. [Tanguay v. Price, 37 Can. S.C.R. 657, specially referred to.]

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

TORTS.

Survival of right of action for, see Abatement and Revival.

Assignability of right of action for, see Assignment.

Conspiracy to commit, see Conspiracy.

Contribution between wrongdoers, see Contribution.

Measure of damages for, generally, see Damages, III.

Liability of husband for wife's torts, see Husband and Wife.

Injunction against tortious acts, see Injunction, I.

Joint liability for, see Joint Creditors and Debtors.

TOWAGE.

(§ I—1)—DUTY AND LIABILITY OF TUG AS TO TOW.

The owner of a tug not engaged in the towage business, who, by a friendly arrangement with a person from whom he had requested the loan of certain implements for use in his business undertakes to move a boom for the latter, does not thereby enter into an ordinary contract of towage by which he is bound to use a tug of sufficient strength and equipment safely to do the work and to face unfavourable weather conditions, and he is not liable for the loss of the boom through the breaking of the tow line in a gale, when using to the best advantage the equipment he had. [Wattsburg Lumber Co. v. Cook Lumber Co., 16 B.C.R. 154, 17 W.L.R. 129, reversed.]

Wattsburg Lumber Co. v. Cook Lumber Co., 4 D.L.R. 8, 20 W.L.R. 833.

TRADE-MARK.

I. In general; right to.
II. What may be.
III. Transfer of.
IV. Infringement.
V. Defences.
VI. Registration.

I. In general; right to.

(§ I—1a)—Right of employee or trade union to adopt.

A label adopted by a trade union does not answer the description of an ordinary trade-mark, as it does not distinguish the goods of one person from those of another, and a member of the union has not a vendable interest in such label, but only a right to use it so long as he remains a member of the union. [Carson v. Ury, 39 Fed. Rep. 777, specially referred to.]

Rickart v. Britton Manufacturing Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

(§ I—2)—General or particular; class of goods.

There is no general right to a trade-mark or trade-name apart from its particular application, and other persons may legally use the identical name or mark in connection with a different class of goods or of business. [Eno v. Dunn (1890), 15 A.C. 252; Australian Wine Importers' Case, 41 Ch. D. 278; Eastman v. Griffiths, 15 R.P.C. 105; Collins v. Ames, 18 Fed. Rep. 561, distinguished.]

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

The right to a trade-mark or trade-name is merely a prior right to use such mark or name in connection with the particular goods or business to which it is applied and which it has come to indicate; but the right extends to other goods or business of the same general class as that in which it has been applied.

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

II. What may be.

(§ II—8)—In geographical name.

Where a geographical name has become identified with manufactured goods of a certain class manufactured by a particular manufacturer and has in that respect acquired a secondary meaning, it may be registered as a specific trade-mark to such goods under the Trade Marks Act, R.S.C. 1906, ch. 71. [Grand Hotel Co. v. Wilson, [1904] A.C. 103, and Montgomery v. Thompson, [1891] A.C. 217, considered.]

Bucyrus Co. v. Canada Foundry Co., 8 D.L.R. 920, 14 Can. Ex. 35.

(§ II—8a)—Surname.

A person who selects the name of a celebrated personage and fastens it upon his trade products must be held to take it with its disadvantages as well as its attractions; the word "Lister," however, has not so far become a mere word of description not susceptible of being appropriated as a trade-mark by long user.

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

(§ II—9)—Particular words.

The putting on the market of an article known as "listerated tooth powder" is not an infringement of a trade-mark duly registered covering a medicinal substance sold to physicians and chemists under the name of "Listerine" as the two articles are not similar and are not sold to the same class of people or clientèle, more especially when the people who buy or use "Listerine" buy it because of its good repute and not because the plaintiff is the manufacturer or compounder of it.

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

(§ II—9a)—Descriptive word.

The word "Fruitatives," considered as the essential feature of a specific trade-mark applied to the sale of a laxative medicine and used on two sides of a four part label with the words "or Fruit Liver Tablets" printed thereunder, is not a mere descriptive word, and a carton four part label is not invalid as a trade-mark under the Trade Marks Act, R.S.C. 1906, because of the combination of that word with other features of colour and design in the registered trade-mark. [The "Bovril" Trade-Mark, [1896] 2 Ch. D. 600; Re Hudson's Trade-Marks, L.R. 32 Ch. D. 311; Smith v. Fair, 14 O.R. 729, and Provident Chemical Works v. Canadian Chemical Co., 4 O.L.R. 549, referred to.]

Fruitatives, Limited v. La Compagnie Pharmaceutique de la Croix Rouge, 8 D.L.R. 917, 14 Can. Ex. 30.

Where a particular name (ex. gr. Bucyrus) has been applied to a special line of goods manufactured by a company for so long a time that the designation so given by the company, although originally a mere geographical name, had acquired a secondary meaning as identifying such goods although not registered as a trade-mark, a registration in opposition thereto of such name with the prefix of the word "Canadian" (ex. gr. Canadian Bucyrus) is not permissible under the Trade-Mark Act, R.S.C. 1906, ch. 71, and will be cancelled upon petition.

Bucyrus Co. v. Canada Foundry Co., 8 D.L.R. 920, 14 Can. Ex. 35.

No merely descriptive name should be interdicted as descriptive unless in circumstances involving fraud on the part of the user. [Cellular Clothing Co. v. Maxton, [1899] A.C. 326, applied.]

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 3 O.W.N. 729, 21 O.W.R. 540, 25 O.L.R. 561.

The claim of any person who seeks to adopt and use exclusively as his own a merely descriptive term will not be favoured by the Court, for if a person employing a word or term of well-known meaning and in ordinary use to describe his goods were entitled to appropriate it and prevent others from using it he would acquire a right of more value than either a patent or a registered trade-mark. [Cellular Clothing Co. v. Maxton, [1899] A.C. 326, specially referred to.]

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 3 O.W.N. 729, 21 O.W.R. 540, 25 O.L.R. 561.

III. Transfer of.

(§ III—10)—ASSIGNABILITY.

In March, 1894, the firm of G. S. deF. & S., consisting of the defendant, H. W. deF., and his brother C. W. deF., registered a trade-mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant. In May, 1901, C. W. deF. assigned his interest in the trade-mark to the defendant and shortly after seems to have retired from the business. In May, 1908, the business was put into a joint stock company in which the defendant was by far the largest stockholder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000. This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following, "and all personal property of whatsoever nature and description owned by the said H. W. deF. in connection with the business of the said H. W. deF., together with the good-will of the business of the said H. W. deF." There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property. The trade-mark itself was not specifically mentioned in the assignment. The defendant was elected president of this company and for two years this trade-mark was used and the business carried on, chiefly under his management. In May, 1910, the company, being insolvent, assigned to the plaintiff under ch. 141, Con. Stat. of N.B. (1903). On investigation the plaintiff found that there was no specific assignment of the trade-mark to the company which could be used for registry under the Trade-mark Act. It was held, that the words used in the assignment are amply comprehensive to pass the trade-mark, and that the defendant is bound to execute a specific assignment of it to the plaintiff as assignee of the company.

Tilley, assignee of deForest v. deForest et al., 4 N.B. Eq. 343.

IV. Infringement.

(§ IV—15)—INFRINGEMENT.

In ascertaining whether there has been a violation of a person's right in such mark the Court will be guided by all the circumstances of the trade and market and of the uses of the mark as well as any meaning or idea which may have been publicly attached to the word mark itself before its adoption as a mark.

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

(§ IV—17)—NAME OR PHRASE; "PASSING OFF."

Upon a claim to prevent the passing off of the goods of one manufacturer for those of another based upon the use by both of the same unregistered mark or brand, ex. gr. "Gold Medal," an alleged secondary meaning said to have been acquired in respect of the words of the brand for a particular class of goods, ex. gr. flour, must be supported by evidence that no other manufacturer in the country was making similar goods with the same mark or brand and the claim will not be supported even as to a single city or district by shewing that a customer at that place asking for that brand of goods would have been supplied with goods of the plaintiff's manufacture before the alleged interference and passing off complained of, if in fact the same mark was being used in other parts of the country by the defendants without any intention of passing off and with equal claim with the plaintiff to an independent right of user. [Leather Cloth Co. v. Am. Leather Cloth Co., 11 H. L.C. 523; Batty v. Hill (1863), 1 H. & M. 264; Tallerman v. Dowsing Co., [1900] 1 Ch. 1; and Taylor v. Gillies (1874), 59 N.Y. 331, specially referred to.]

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 3 O.W.N. 729, 21 O.W.R. 540, 25 O.L.R. 561.

(§ IV—20)—CRIMINAL PROCEEDINGS.

Section 655 of the Crim. Code 1906, does not make it obligatory upon the magistrate to hear witnesses before issuing a warrant or summons for an infraction of Crim. Code, sec. 490, as to the unlawful use of beverage trade-marks and tradenames, if, after having issued a search warrant, the return of the constable shews that a large quantity of bottles, bearing the trade-mark of an opposition company, had been seized in defendant's possession with his own label added.

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

Some offences require a criminal intent, mens rea, but that rule does not apply to all criminal offences and in particular does not apply to the offence under sec. 490 of the Crim. Code, of unlawfully using a beverage trade-mark on bottles. [R. v. Beckwith, 7 Can. Cr. Cas. 450, specially referred to.]

The King v. Coulombe, 6 O.L.R. 99, 20 Can. Cr. Cas. 31.

(§ IV—21)—Imitation of label.

A party who has acquired the right to make use of a certain name in connection with the sale of an article manufactured by him is entitled to recover against another who uses the same name upon his goods in a way calculated to deceive the public and represent his goods as the goods of the other, but where no actual damages are claimed or proved the recovery must be confined to nominal damages and costs.

Pearman v. Gray, 45 N.S.R. 489.

(§ IV—24)—Use calculated to deceive.

A trade-mark should distinguish the trader's goods and the essential of an infringement (where the essential particulars are not bodily appropriated) is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them when asking for the plaintiff's goods; failing such proof an action for infringement should be dismissed.

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

V. Defences.

(No cases.)

VI. Registration.

(§ VI—30)—Registration.

For a registered specific trade-mark the Trade-mark and Design Act gives the right of exclusive use of it only to designate a "class of merchandise of a particular description," and the scope of such title cannot be extended by construction, for all doubts are to be resolved in the direction of freedom and not of the exclusive right. [Apollinaris Co. v. Hersfeldt, 4 R. P.C. 478, distinguished.]

Lambert Pharmacal Co. v. Palmer & Son, Limited, 2 D.L.R. 358, 21 Que. K.B. 451.

TRADE MOLESTATION.

Conspiracy to prevent employment, see Conspiracy.

Trade unions and strikes, see Trade Unions.

TRADE NAME.

As to trade-mark, see Trade-Mark.

TRADE UNIONS.

Generally, see Labour Organization.

Conspiracy by, see Conspiracy.

TRANSFER OF ACTION.

For appeal, see Appeal, III.

For trial, see Removal of Causes.

TREATIES.

(§ I—10)—The Ashburton treaty.

A charter granted by the legislature of the State of Minnesota empowering a boom company to construct works in the Rainy river and granting permission to collect tolls from the users of the said works is ultra vires and null and void, as being contradictory to the provisions of the Ashburton Treaty, and this, notwithstanding that the boom company had secured a permit for the extension of their operations from the War Department of the United States Government.

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

TREES.

As to logs, see Logs and Logging.

Standing timber, see Timber.

TRESPASS.

I. Civil.
- A. What constitutes.
- B. Who may maintain the action.
- C. Remedy; defences; recovery.

II. Criminal.

By animals, see Animals; Fences.

Adverse possession by trespassers, see Adverse Possession.

Right of widow, prior to assignment of dower, to maintain trespass, quare clausum, see Parties, 9.

On railroad track, see Railroads.

By inclosing part of road, see Highway.

As to boundary, see Boundary, II.

Action between parties to option agreement for, see Ejectment.

I. Civil.

A. What constitutes.

(§ I A—5)—What constitutes.

The reckless running of a bicycle on a street resulting in collision with and injury to a foot-passenger crossing the street, may constitute trespass to the person of the injured party.

Woolman v. Cummer, 8 D.L.R. 835, 23 O.W.R. 504, 4 O.W.N. 371.

The buyer of a quantity of logs which were the proceeds of timber cut and removed by the seller in acts of trespass and encroachment upon the property of an adjoining owner, is not liable in damages for the acts of trespass, in addition to and apart from his liability for the value of the logs in conversion, unless he knew of the trespass.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

It is a trespass for one, the boundaries of whose land overlap that of a grantee named in a prior township Crown grant, to cut timber from the land described in the latter's allotment, since the person

who first enters into possession of land described in his grant is entitled to all of the land called for as against a subsequent Crown grantee the boundaries of whose grant overlap those of the prior grantee. [Boehner v. Hirtle, 9 E.L.R. 258, reversed on appeal.]

Boehner v. Hirtle, 6 D.L.R. 548, 11 East. L.R. 222.

A railway company cannot, in an action for a trespass in laying side-tracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land twelve feet wide from that owned by the plaintiff, for part of its right-of-way, which was not, at such place, of the width allowed by statute, and that therefore it became entitled to claim the full ninety-nine feet allowed by statute for a right-of-way, which would include the land on which the side-tracks were laid, since the Court cannot presume that the company, by taking possession of the twelve foot strip, also took possession of the entire ninety-nine feet which it was entitled to expropriate for a right-of-way.

Carr v. Canadian Pacific R. Co., 5 D.L. R. 208.

One who cuts and removes timber from the timber limits of another with knowledge of the latter's rights, is answerable for a wilful and deliberate trespass.

Laursen v. McKinnon, 4 D.L.R. 718, 20 W.L.R. 384.

The fact that the person injured was walking on the tracks itself and not alongside will not constitute him a trespasser if his walking on the track was incidental to a reasonable attempt on his part to cross the railway at a crossing regularly used by the public without objection or warning on the part of the railway company.

Grand Trunk R. Co. v. McSween, 2 D.L. R. 874.

The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with:—Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded.

Waddell v. Richardson, 17 B.C.R. 19.

Damages—Right to possession—Landlord and tenant.

Richards v. Carnegie, 1 D.L.R. 902.

A wilful trespass means a deliberate trespass by a person who commits it intentionally with a knowledge that he has no right whatever to do the act. In assessing damages for trespass the milder rule should be applied unless the contrary be shewn. [Judgment of Sifton, C.J., varied.]

Fleming v. McNeill, 7 Terr. L.R. 192.

The fact that part of patented land is covered with navigable water gives no right to third persons to hunt and fish thereon.

Rex v. Harran, 3 D.L.R. 753, 3 O.W.N. 1107, 21 O.W.R. 951, 20 Can. Cr. Cas. 72.

A claim of title, to oust the jurisdiction of the magistrate in a case of trespass, must be a claim of title in the party charged, and not a mere allegation of a jus tertii or of a defect in the complainant's title. [Cornwall v. Sanders, 3 B. & S. 206, followed.]

Rex v. Harran, 3 D.L.R. 753, 3 O.W.N. 1107, 21 O.W.R. 951, 20 Can. Cr. Cas. 72.

B. Who may maintain the action.

(§ I B—10)—Who may maintain.

In trespass for cutting logs on land claimed by plaintiff, plaintiff's title to the land in controversy depended upon a grant from the Crown to M. of land in the township of Chester, the descriptive part of which referred to the land granted as "beginning on the eastern bank of Middle river (so-called), at the north-west angle of lot No. 4, from thence to run east until it meets, etc., to a spruce tree; thence to run north along the rear line of lots Nos. 16, 17 and 18, 180 rods, etc." Plaintiff did not establish the location of the starting point in the grant and made no effort to locate the spruce tree referred to. It was held, per Russell, Drysdale and Laurence, JJ., Sir Charles Townshend, C.J., concurring with doubt, and Meagher, J., concurring in the conclusion, that the burden of locating the land was clearly upon plaintiff and not having done so he must fail. Also, that while the report and plans of a Crown land surveyor leading to a grant cannot be used to contradict the terms of the grant they can be used for the purpose of ascertaining where the surveyor started and where he established his marks. Also, that where a course is described as running from a fixed monument "north along the rear line of its 16, 17 and 18, 180 rods" the dimensions 180 rods conclusively determines the distance to be run and not the reference to "lot 18."

Millett v. Bezanson et al., 45 N.S.R. 152, 9 East. L.R. 16.

The occasional use of a strip of beach and land adjacent thereto (the property of the Crown) for the purpose of drying nets, etc., will be regarded as having occurred in the exercise of public right and will not confer any special right or interest in the locus. Such acts are not sufficient to enable the persons exercising them to maintain trespass against a person in possession claiming under colour of title.

Carr v. Ferguson, 45 N.S.R. 132, 9 East. L.R. 218.

The acceptance by the Crown of a survey of land made by an applicant for a

timber limit license and the noting on the official map that such land belongs to the applicant, and the issuance to him of such license, creates a right in the land which he may defend against trespassers.

Laursen v. McKinnon, 4 D.R.R. 718, 20 W.L.R. 384.

The patentee of mining lands in Ontario under the Mines Act (R.S.O. 1897, ch. 36; see now 8 Edw. VII. ch. 21, sec. 112), has such an interest in the pine timber, as well as in the other timber thereon, as entitles him to maintain an action of trespass against anyone wrongfully cutting and removing such timber. [Casselman v. Hersey, 32 U.C.R. 333, followed.]

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45.

Neither an applicant to purchase Crown lands nor his assignees has any legal or equitable interest therein which will amount to an answer to an action of trespass by a person having actual possession thereof with the concurrence of the Crown. [Wilson v. McClure, 16 B.C.R. 82, specially referred to.]

Brown v. Motherlode, 2 D.L.R. 277, 17 B.C.R. 248, 20 W.L.R. 778.

A lessee of land from the Crown under a mining lease, who was, under R.S.O. 1897, ch. 36, sec. 40, entitled to such trees, other than pine, as are required for building, fencing, or for any other purposes necessary for the working of the mine, or the clearing of the land, may maintain an action of trespass against one who cut and removed timber therefrom. [Compare Brown v. Motherlode, 2 D.L.R. 277, and National Trust v. Miller, 3 D.L.R. 69.]

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

In order to enable a landlord to maintain an action for trespass to lands, the acts complained of must be such as to injure the reversion.

Leadley v. Cruickshank, 7 Terr. L.R. 170.

A title by possession to woodland may be based upon occupation under colour of title and acts of constructive possession such as the building of a lumberman's sluice and operating as a lumberman over the lands, although not enclosed by fences, to support an action against a trespasser.

Swinehammer v. Hart, 5 D.L.R. 106, 11 E.L.R. 260.

C. Remedy; defences; recovery.

(§ I C—17)—Defences.

It is not a defence to an action for trespass upon land held by the plaintiff under a mining lease from the Crown, to shew that not enough mining work had been done thereon by the plaintiff to comply with the requirements of the Mining Act, since that was a matter exclusively between the lessee and the Crown.

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

A city cannot, as a defence to an action of trespass for laying a sidewalk that encroached upon lots owned by the plaintiff, shew that, as the result of a mistake in surveying the block in which the lots were located, the plan thereof, as filed in the land titles office, and to which the plaintiff's certificate of title referred, was incorrect, and that, therefore, he did not own the locus in quo. [Smith v. Millions, 16 A.R. (Ont.) 140, applied.]

Smith v. City of Saskatoon, 4 D.L.R. 521, 21 W.L.R. 868.

II. Criminal.

(No cases.)

TRIAL.

I. Conduct and disposal.
- A. In general.
- B. Election between counts.
- C. Reception of evidence.
- D. Statements and arguments of counsel.
- E. Withdrawal of juror.
- F. Objections and exceptions.
- G. Answering inquiry by jury; reading testimony of.
- H. Remarks of Court.

II. Submitting case or question to jury; reading testimony of.
- A. In general.
- B. Sufficiency of evidence to go to jury.
- C. Questions of law and fact.
- D. Taking case from jury.
- E. Special interrogatories.

III. Instructions.
- A. In general; form; time.
- B. Requests and answers generally.
- C. On what matters necessary or proper.
- D. On evidence and facts.
- E. Correctness of instruction.

IV. Findings by the Court.

V. Verdict or findings of jury.
- A. In general.
- B. Retirement; conduct of jury; coercion; poll.
- C. Sufficiency and correctness.
- D. Amendment or correction.
- E. Remittitur.

VI. Notice of trial; preliminary proceedings; expedition.

VII. Trial of preliminary issue.

VIII. Trial of several actions; different plaintiffs; common defendant.

IX. Preliminary law questions.

Postponement of, see Continuance and Adjournment.

Continuance, see Continuance and Adjournment.

I. Conduct and disposal.

A. In general.

(§ I A—4)—Official stenographer.

By analogy to the powers of superior Courts on the trials of indictments, the depositions taken on the trial before a magistrate of the indictable offences specified in Code sec. 773 may be taken in shorthand by a stenographer under the direction of the magistrate.

The King v. Bond, 19 Can. Cr. Cas. 96, 19 W.L.R. 348.

(§ I—4a)—When trial begins.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63.

C. Reception of evidence.

(§ I C—10)—Reception of evidence.

Where, in an action for calls on company shares, the question is not raised by defendants' pleading that a statutory meeting was not held and that consequently the statutory limitation under the Ontario Companies Act for avoiding the allotment of shares had not begun, evidence upon such an issue, which would open up an entirely new case as to which no question had been raised previous to the trial, is properly rejected, particularly where no application was made to amend the pleadings. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, 23 O.W.R. 313.

Leave granted to the plaintiff by the trial Judge to produce a written contract for sale of goods not set up in the pleadings and, therefore, inadmissible without an amendment of the pleading, is irregular, notwithstanding that such leave is given subject to the defendant's right to amend his plea.

Lemay v. Lefebvre, 4 D.L.R. 833, 41 Que. S.C. 541.

Where a witness is cross-examined by reference to his disposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the trial Judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression. (Per Irving, J.A.)

King Lumber Co. v. Canadian Pacific R. Co., 7 D.L.R. 733, 22 W.L.R. 553.

D. Statements and arguments of counsel.

(§ I D—16)—Right to open and close.

The party who obtains a preliminary hearing of a point of law has the right to begin, and, for the purposes of the argument, he is taken to admit all the facts in the opposition pleading, and the Court will take the whole record into consideration and give judgment to the party who, on the whole, appears entitled to it. [Stevens v. Chown, [1901] 1 Ch. 894, and Burrows v. Rhodes, [1899] 1 Q.B. 816, referred to. See also Odgers on Pleading, 7th ed., p. 169.]

Imperial Life Assurance Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372.

(§ I D—20)—Duty of Crown Prosecutor on opening case.

It is the duty of the Crown Prosecutor, on a trial for murder, in his opening, to state generally to the jury everything pertaining to which he intends to offer evidence, and if he does not do so, the prisoner may, when evidence is offered that has not been referred to in such opening statement, complain of being taken by surprise. (Per Trenholme, J.)

Trepanier v. The King, 19 Can. Cr. Cas. 290.

In his opening statement to the jury, the Crown Prosecutor, on a trial for murder, may state that he intends to offer evidence of a confession by the prisoner of the crime charged against him.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

(§ I D—23)—Reference to payment into Court.

Rule 22, order 22, of the Supreme Court Rules of British Columbia applies to actions for libel, and, therefore, in such an action no reference can be made before the jury to the fact that money has been paid into Court. [Williams v. Goose, [1897] 1 Q.B. 471, 66 L.J.Q.B. 345; Klamborowski v. Cooke, 14 T.L.R. 88, and Veale v. Reid, 117 L.T. Jo. 292, referred to.]

Dickinson v. "The World," 5 D.L.R. 148, 21 W.L.R. 529.

F. Objections and exceptions.

(§ I F—30)—Objections and exceptions.

Where counsel for the prisoner objects at the time, to evidence of a confession or admission by the accused being received on the ground that no proper foundation had been laid for such evidence, whereupon the Crown adduces evidence to disprove any threat or inducement and the prisoner's counsel cross-examines thereon but does not renew the objection when the examination is thereafter proceeded with, there is a waiver of further objection on that ground. (Per Wetmore, C.J.)

The King v. Hoo Sam, 1 D.L.R. 569, 20 W.L.R. 571, 19 Can. Cr. Cas. 259.

II. Submitting case or question to jury; reading testimony of.

A. In general.

(§ II A—40)—Submitting case or questions to jury; questions of law or fact.

Where, at a trial of a civil action with

a jury, the trial Judge under sec. 112 of the Judicature Act, R.S.O. 1897, ch. 51, submits questions to the jury to be answered, he may, if he sees fit, also submit a question inviting a general verdict (ex. gr., "do you find for the plaintiff or defendant") in addition to the answers to the questions submitted, and where the answers to the specific questions harmonize with the answer to the general question, a judgment entered in accordance with such findings is regular, provided the charge to the jury has been made sufficiently comprehensive to enable the jury to render a general verdict. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed; Furlong v. Carroll, 7 A.R. (Ont.) 145, applied, and Reid v. Barnes, 25 O.R. 223, distinguished, by Court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, 23 O.W.R. 313.

B. Sufficiency of evidence to go to jury.

(§ II B—45)—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

Evidence making a prima facie case for the Crown in a criminal prosecution, if unanswered, and believed by the jury, is sufficient to support a conviction of the person accused. [Judgment of the Supreme Court of Alberta, Rex v. Girvin, 18 W.L.R. 482, affirmed.]

Girvin v. The King, 20 W.L.R. 130.

(§ II B—46)—NEGLIGENCE; PERSONAL INJURIES.

Where the Court or jury look at the locus of an accident, or the machine which is said to have caused one, it is simply to enable the trial tribunal the better to follow the evidence, and the verdict is still to be given upon the evidence.

Corea v. McClary Manufacturing Co., 3 D.L.R. 323, 3 O.W.N. 1071, 21 O.W.R. 909.

C. Questions of law and fact.

(§ II C—50)—QUESTIONS OF LAW AND FACT.

Where at the trial a question which is in truth a question of law is, as a precautionary measure, submitted by the Judge as one of the questions of fact to the jury and the jury makes its finding thereon, the trial Judge may, upon a motion for judgment upon the verdict, ignore that portion of the jury's findings and assume control of the question as one of law alone.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

(§ II C 4—88)—CREDIBILITY OF WITNESSES.

The question involved in an action to set aside a voluntary conveyance is one of fact, and, therefore, much depends in such an action upon the impression made upon the mind of the trial Judge by the parties when in the witness box. [Fleming v. Edwards, 23 A.R. 718, distinguished.]

Ottawa Wine Vaults Co. v. McGuire, 8 D.L.R. 299, 4 O.W.N. 318.

(§ II C 7—105)—LIBEL AND SLANDER.

Special questions relevant and necessary to the complete determination of a matter can be submitted to the jury at the instance of the parties thereto, under the provisions of secs. 22 and 23 of the Judicature Act, 9 Edw. VII. (N.B.), 1909, ch. 5, only where the trial Judge shall, in his discretion, instead of having a general verdict returned, have himself submitted similar questions to the jury, for the purpose of entering a verdict on their answers thereto. [Toronto R. Co. v. Balfour, 32 Can. S.C.R. 239; Furlong v. Carroll, 7 A. R. (Ont.) 145, 154, specially referred to.]

Sonier v. Breau, 3 D.L.R. 184, 10 E.L.R. 391.

It is a question of fact for the Court whether, in an action for libel, a certain communication is privileged.

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

Whether an alleged libellous article is to such an extent excessive that it might be held by the jury to be in excess of the privilege is a question for the trial Court. [McQuire v. Western, [1903] 2 K.B. 100, referred to.]

Winnipeg Steel Granary and Culvert Co., Limited v. Canada Ingot Iron Culvert Co., Limited, 7 D.L.R. 707, 22 W.L.R. 387.

A count in a claim for slander which charges a person with misfeasance in office should not be submitted to the jury where the truth of the allegation is shewn.

Holland v. Hall, 3 D.L.R. 722, 22 O.W. R. 209, 3 O.W.N. 1304.

(§ II C 8—110)—NEGLIGENCE; ASSUMPTION OF RISK.

In an action for negligence, where the evidence for the plaintiff is equally consistent with the existence or non-existence of negligence, it is not competent for the Judge to leave the case to the jury. (Per Irving, J.A.)

Loffmark v. Adams, 7 D.L.R. 696, 22 W. L.R. 547.

(§ II C 8—137)—STREET RAILWAYS.

The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped

upon the parallel track. [Brill v. Toronto R. Co., 13 O.W.R. 114, distinguished.]

Cooper v. London Street R. Co., 5 D.L.R. 198, 3 O.W.N. 1277, 22 O.W.R. 87.

(§ II C 8—146)—Railroad employees.

Where the jury omitted to answer a direct question submitted to them on the trial of a railway employee's action against the railway for damages for negligence causing personal injury as to whether there was negligence on the part of the plaintiff or of the defendant company or of both, their negative answer to another question as to whether the car was reasonably safe for the employees, which latter question was not directly pointed at the alleged defects leading to the injury, is not alone a finding of negligence and is insufficient to support a verdict for plaintiff.

Stone v. Canadian Pacific R. Co., 4 D.L.R. 789, 3 O.W.N. 973, 21 O.W.R. 785, 26 O.L.R. 121.

In an action for negligence against a railway company the trial Judge should confine all questions of ultimate negligence to the time from which the defendants or their servants could have anticipated the danger.

McEachen v. Grand Trunk R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

In an action for personal injuries to the conductor of a construction train resulting from a wing of a gravel spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, a statement by a witness that the engineer must have been climbing up the machine, together with the evidence that the valve was from two and a half to three feet above the spot where the engineer was standing, would justify a suggestion in the trial Judge's charge that the engineer might have touched the valve with his knee while climbing up the machine to get a nearer view of the gauge.

Tobin v. Canadian Pacific R. Co., 2 D.L.R. 173, 20 W.L.R. 676.

(§ II C 8—164)—Physicians.

An action for malpractice against a surgeon or physician should be tried without a jury. [Town v. Archer (1902), 4 O.L.R. 383; Kempffer v. Conerty (1901), 2 O.L.R. 658; McNulty v. Morris (1901), 2 O.L.R. 656, referred to.]

Gerbracht v. Bingham, 7 D.L.R. 259, 4 O.W.N. 117, 23 O.W.R. 82.

(§ II C 9—168)—Insurance matters.

A motion to strike out a jury notice should be granted by a Judge in Chambers, under Con. Rules 1322, in an action on a policy of life insurance where the issues to be tried are, whether the action is barred, the insufficiency of the proof of death of the insured, the non-payment of premiums, and the violation by the insured of the rules of the company.

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

III. Instructions.

C. On what matters necessary or proper.

(§ III C—216)—As to negligence; personal injuries.

Where the answers of a jury to questions put to them are indefinite and inconclusive, it is a wise practice for the trial Judge to send the jury back, for the purpose of making their meaning plain.

Dart v. Toronto R. Co. (No. 2), 8 D.L.R. 121, 4 O.W.N. 315, 23 O.W.R. 380.

E. Correctness of instruction.

(§ III E 3—246)—Malicious prosecution.

Whether there was reasonable and probable cause for the arrest of the plaintiff must be decided, in an action for malicious prosecution, by the trial Judge, while the question of malice is to be determined by the jury.

Wood v. Newby, 5 D.L.R. 486, 21 W.L.R. 438.

(§ III E 4—253)—Street railways generally.

Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

Montreal Street R. Co. v. Conant, 7 D.L.R. 261.

(§ III E 5—260)—In criminal cases.

It is not misdirection for the trial Judge charging the jury to speak of an admission against his interest, made by the accused as a "confession" and to use the word "confession" synonymously for a statement against interest.

The King v. Hoo Sam, 1 D.L.R. 569, 20 W.L.R. 571, 19 Can. Cr. Cas. 259.

(§ III E 5—261)—Homicide.

Upon a trial of a murder charge the trial Judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding. [R. v. Eberts (No. 1), 7 D.L.R. 530, affirmed.]

Rex v. Eberts (No. 2), 7 D.L.R. 538.

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where there is no more than mere surmise or conjecture on which to rest such a finding.

Rex v. Eberts (No. 1), 7 D.L.R. 530.

(§ III E 5—263)—Shooting with intent to murder.

On the trial of an indictment for shooting with intent to murder, it is proper that the jury be directed that if the evidence warrants, a verdict may be rendered of shooting with intent to maim or to do grievous bodily harm.

Rex v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 21 W.L.R. 652, 22 Man. L.R. 353.

IV. Findings by the Court.

(§ IV—265)—Findings by the Court.

Motion to set aside judgment as against weight of evidence refused.

McIntyre v. White, 40 N.B.R. 591.

The Court will not reverse the findings of fact made by a trial Judge unless it clearly appears he was wrong. Appeal on the ground that judgment was against evidence dismissed (per McLeod, White, Barry and McKeown, JJ., Landry, J., dissenting.

Shaw et al. (plaintiffs, appellants) and Robinson et al. (defendants, respondents), 40 N.B.R. 473.

V. Verdict or findings of jury.

C. Sufficiency and correctness.

(§ V C—280)—Sufficiency and correctness.

Where questions are left to the jury in a negligence action and some of the questions are answered, but the jury disagree as to the answers to other material questions, and therefore omit to answer them, there must be a new trial as to the whole case in like manner as if the jury had not agreed upon any of the questions.

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

The verdict of a jury will not be disturbed if it was one that reasonable men might have found even though the trial Judge was of a different opinion. [Metropolitan R. Co. v. Wright, 11 A.C. 152, and Cox v. English S. and A. Bank, [1905] A.C. 168, applied.]

Waterous Engine Works v. Keller, 1 D.L.R. 880, 20 W.L.R. 82.

In an action by the administratrix of a railway section man for damages for his death through being struck by a train which was running on the left-hand track contrary to custom because of an accident on the right-hand track, the negligence found by the jury against the railway in not providing a headlight while running in a dense fog will, if supported by evidence, be sufficient to sustain the verdict, although joined in the finding with one not supported by the evidence that the railway company was negligent in not having switched the train to the right-hand track.

Graham v. Grand Trunk R. Co., 1 D.L.R. 554, 3 O.W.N. 538, 20 O.W.R. 965, 25 O.L.R. 429, 19 Can. Ry. Cas. 232.

(§ V C—281)—Specific finding on one ground of negligence only.

Where several grounds of negligence are alleged, and the jury make a finding on one only, the allegations in the other grounds are negatived by implication.

McEachen v. Grand Trunk R. Co., 2 D.L.R. 588, 3 O.W.N. 628, 21 O.W.R. 187.

(§ V C—285)—In civil cases.

Where an action has been twice tried with a jury, and upon the second trial the jury have found in favour of the same party, but have reduced the damages, a third trial will not be ordered merely because the findings of the jury at the second trial are contrary to what the appellate Court regards as the weight of evidence, if there is some evidence upon which the verdict can be sustained.

Zufelt v. Canadian Pacific R. Co., 7 D.L.R. 81, 4 O.W.N. 39.

(§ V C 2—290)—In criminal cases.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) That he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell." [R. v. Eberts (No. 1), 7 D.L.R. 530, affirmed; Crim. Code 1906, sec. 261, referred to.]

Rex v. Eberts (No. 2), 7 D.L.R. 538.

E. Remittitur.

(§ V E—300)—Remittitur.

After a judgment of the Court of Appeal has been perfected allowing an appeal and reversing a judgment of the trial Court in favour of the plaintiff, in an action for negligently causing the death of his son, based both upon Lord Campbell's Act and the Employers' Liability Act (B.C.), on the ground that no negligence on the part of the defendant had been shewn, the Court cannot remit it to the trial Court for assessment of compensation under the provisions of the Workmen's Compensation Act, notwithstanding it might have done so had leave been asked before the perfection of such judgment. (Per Irving, J.A.)

McCormick v. Kelliher, 4 D.L.R. 657, 21 W.L.R. 542.

(§ V E—301)—RE-ARGUMENT.

Upon an argument directed by the Court to be made upon a new question suggested after trial and pertaining to the defendant's counterclaim, the defendant's counsel cannot object that the Statute of Frauds which was relied on at the trial in the argument made there pertaining to the counterclaim, was not pleaded thereto but to another defence, where such counsel treated the plea of the statute as being raised on the counterclaim until he raised the objection on the new argument.

Frith v. Alliance Investment Co., 5 D. L.R. 491, 20 W.L.R. 551.

VI. Notice of trial; preliminary proceedings; expedition.

(§ VI—320)—NOTICE OF TRIAL.

A notice of trial is irregular unless the pleadings are closed as to all parties including a co-defendant not served with the statement of claim within the time prescribed for service. [Ambroise v. Evelyn, L.R. 11 C.D. 759, followed.]

Sellick v. Town of Selkirk, 1 D.L.R. 607, 22 Man. L.R. 323.

Motion to expedite — Jurisdiction of Master in Chambers—Plaintiffs not in default.

Campbell v. Sovereign Bank of Canada, 3 D.L.R. 865, 3 O.W.N. 1283, 22 O.W.R. 105.

Order to expedite—Plaintiff not in default—Rule 243.

McIntosh v. Grimshaw, 1 D.L.R. 923.

Postponement—Change of venue—Con. Rule 529 (d)—Convenience—Foreign commission—Costs.

Irwin v. Stephens, 1 D.L.R. 916.

VII. Trial of preliminary issue.

(No cases.)

VIII. Trial of several actions; different plaintiffs, common defendant.

(§ VII—340)—TRIAL OF SEVERAL ACTIONS; DIFFERENT PLAINTIFFS, DEFENDANT.

Where a settlement between the parties is pleaded in bar to the action and the remaining issues would involve the taking of depositions under commission in a distant country at very large expense, the Court will exercise its discretionary power to order a preliminary trial of the issue as to the agreement of settlement alleged.

Northern Crown Bank v. National Matzo and Biscuit Co., 1 D.L.R. 376, 3 O.W.N. 517, 20 O.W.R. 897.

Upon a motion by the common defendants in four actions, each brought by a different plaintiff, for an order consolidating the four actions, or for staying three of them until after the trial and the final disposition of one, where the actions involved distinct issues, though each was based upon the same cause, it was properly directed that the actions should all be set down together for hearing in order that the trial Judge could take steps to prevent the repetition of any evidence common to all four actions, if there were such.

Kuula v. Moose Mountain, Ltd. (No. 2), 5 D.L.R. 814, 3 O.W.N. 1203, 22 O.W.R. 64, 26 O.L.R. 332.

IX. Preliminary law questions.

(§ IX—350)—PRELIMINARY QUESTIONS OF LAW.

Leave to set a case down for a preliminary hearing upon points of law raised by the pleadings will not be granted where the decision on such points of law would in effect only settle the question of the onus of proof, in view of the avowal by the party who would be affected by an adverse decision that, in such event, he would apply to amend his pleading and take issue upon the facts which upon such preliminary hearing would have been taken as admitted. [National Trust Co. v. Dominion Copper Co., 14 B.C.R. 190, applied.]

Crosbie v. Prescott, 6 D.L.R. 529, 21 W. L.R. 269, 17 B.C.R. 199.

TROLLEY.

In general, see Street Railways.

TROVER.

I. RIGHT OF ACTION.
- A. In general.
- B. Conversion; what constitutes.
- C. Demand; tender.

II. LIABILITY; DEFENCES; EFFECT OF SUIT OR RECOVERY.

I. Right of action.

B. Conversion; what constitutes.

(§ I B—10)—WHAT CONSTITUTES.

The placing of a lock upon the door of a granary with the intent to exercise control over grain contained therein, inconsistent with the real owner's right of possession, amounts to a conversion of the grain sufficient to permit the latter to maintain an action of trover against the wrongdoer. [Burroughes v. Bayne, 5 H. & N. 296; Fouldes v. Willoughby, S.M. & W. 538, referred to.]

Delbridge v. Pickersgill, 3 D.L.R. 786, 21 W.L.R. 285.

One who took possession of the logs after notice of the claim of the true owner of the timber from which they were cut is liable to the latter for conversion although he had in good faith bought the logs from the trespasser who had cut down the timber. [Greer v. Faulkner (1908), 40 Can. S.C.R. 399, referred to.]

Phillips v. Conger Lumber Co., 5 D.L.R. 188, 3 O.W.N. 1436, 22 O.W.R. 436.

Actually dealing with another's goods as owner, for however short a time and

however limited a purpose, is a conversion, although such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled. [Hollins v. Fowler, L.R. 7 H.L. 757, applied.]

MacKenzie v. Scotia Lumber Co., 7 D. L.R. 409.

(§ I B 2—15)—Refusal to deliver.

Where a son turned his father out of his house and refused to let him remove personal property belonging to him, it was held that the father might maintain an action of conversion without having made any demand therefor.

Lowe v. Lowe, 10 East. L.R. 277.

Sale of goods—Bees and honey—Illegal detention—Damages.

Parks v. Simpson, Simpson v. Parks, 4 O.W.N. 422, 23 O.W.R. 837.

C. Demand; tender.

(§ I C—21)—Necessity of.

Where the defendant after ousting the plaintiff from work which the latter had contracted to do for the former, took possession of the plaintiff's tools and used them on the work, such use was sufficient evidence of the conversion of the tools though no demand for their return was shewn.

Neros v. Swanson, 1 D.L.R. 833, 20 W. L.R. 175.

II. Liability; defences; effect of suit or recovery.

(§ II—31)—Defences generally.

Denial of property in the goods—Alternative claim as bonâ fide purchaser for value from chattel mortgagee—Validity of chattel mortgage.

Jordan v. J. I. Case Thresher Machine Co., 7 D.L.R. 855.

(§ II—33)—Compensation for improving goods wrongfully in possession.

If a person wrongfully takes possession of chattel property belonging to another and, whilst in possession thereof, alters, improves or otherwise deals with it, he is not entitled to payment for such services. [Hiscox v. Greenwood (1803), 4 Esp. 174; Cheshire Railroad Co. v. Foster (1871), 51 N.H. 490; Purves v. Moltz (1867), 5 Robertson (N.Y.) 653; Silsbury v. McCoon (1844), 6 Hill (N.Y.) 425; Bryant v. Ware (1849), 30 Me. 295, specially referred to.]

Rainy Lake River Boom Corporation v. Rainy River Lumber Co., 6 D.L.R. 401, 4 O.W.N. 5, 22 O.W.R. 952, 27 O.L.R. 131.

TRUST DEED.

For benefit of creditors, see Assignment for Creditors.

TRUSTS.

I. Creation; validity; termination.
- A. In general.
- B. Express or declared trusts; precatory trusts.
- C. Parol trust; Statute of Frauds.
- D. Implied, constructive and resulting trusts.
- E. Revocation.
- F. Termination; release; discharge.

II. Trustees.
- A. Appointment; capacity; resignation; removal; number.
- B. Rights, powers, duties and liabilities.
- C. Suit for instructions.

III. Interest of cestui que trust; rights of creditors; spendthrift trust.
- A. In general.
- B. Rights of creditors; spendthrift trusts.

IV. Liability of trust estate generally.

V. Rights and liabilities of transferees; following trust property.

VI. Trust certificates.

I. Creation; validity; termination.

B. Express or declared trusts; precatory trusts.

(§ I B—5)—Express or declared trusts.

Where additional shares in a company in which plaintiff and defendant were both interested were allotted to the members, and defendant was unable to take up or pay for the shares allotted to her, plaintiff took up the shares and executed a declaration in writing that he held them in trust for defendant. This declaration was communicated to defendant, who acquiesced in the arrangement, and recognized the payment made by plaintiff as having been made on her account. It was held, that while defendant was not obliged to accept plaintiff's offer, having done so, she was obliged to accept it in the terms in which it was made, and that plaintiff was entitled to treat the advance made by him as a loan upon interest.

Chisholm et al. v. Kinney, 45 N.S.R. 484.

(§ I B—6)—Creation generally.

Where the plaintiff failed to furnish funds to make a large initial payment for property the defendant had an option to purchase, as the former had undertaken to do in consideration of an agreement for a one-half interest in the property, the defendant will not, upon himself furnishing such funds and purchasing the property, be declared a trustee for the benefit of the plaintiff as to an undivided one-half interest therein.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499.

(§ I B—10)—Construction.

Where the widow and children of the deceased owner by various deeds granted to one of the children for a nominal consideration, the lands which had devolved upon them, and the grant in terms stated

that the grantee was to support and maintain his mother and an invalid brother and that they should have certain rooms reserved in the dwelling-house for their use for life, such term is binding upon a subsequent encumbrancer from the grantee whether considered as an express condition or a trust, or as a charge on the land. [Ringrose v. Ringrose, 170 Pa. 593, approved; Cunningham v. Moore, 1 Trueman N.B. Eq. 116, and Duguay v. Lanteigne, 3 Trueman N.B. Eq. 132, specially referred to.]

Wolfe v. Croft, 6 D.L.R. 61.

D. Implied, constructive and resulting trusts.

(§ I D—21)—IMPLIED.

A power of sale will not be implied where a mortgagee holds by a deed absolute in form; the mortgagee's remedy is by foreclosure by judicial process where there is no express trust for sale of the lands. [Oland v. McNeil, 32 Can. S.C.R. 23, distinguished.]

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

(§ I D—23)—SECRET TRUST.

Where persons purchased land in partnership and had the conveyance made to one of their number who was afterwards judicially declared a trustee thereof for the partnership, a sale made by him of the land ostensibly to a stranger, who was an innocent purchaser, but in reality to the stranger, and to one of the other partners jointly, a non-assenting partner would still be entitled to claim out of the interest of the partner who so acquired title, the same share as such non-assenting partner would otherwise have held under the partnership agreement.

Gordon v. Holland, 2 D.L.R. 327, 20 W. L.R. 887.

(§ I D—24)—RESULTING TRUSTS.

Where the owner of several parcels of land conveys certain of them to a city corporation under a stipulation that the grantee shall "maintain," on the site so granted, its city hall, and where the deed of conveyance makes no provision that the city hall shall be maintained there "for all time" or to any such effect, and where it may reasonably be inferred that the grantor in executing the deed contemplated that a city hall so located near his remaining lots for a limited time would meet his purposes by enhancing the value of his adjacent property, there is no resulting trust in favour of the grantor, in the event of the grantee (owing to rapid city expansion) building a new city hall on a different site, approved by the ratepayers of the city. [Smith v. Cooke, [1891] A.C. 297, followed.]

Powell v. City of Vancouver, 8 D.L.R. 24.

II. Trustees.

A. Appointment; capacity; resignation; removal; number.

(§ II A—41)—APPOINTMENT.

A cestui que trust may be one of the trustees of an estate in whom the fee is vested, without his equitable estate necessarily being merged in the legal estate held by him qua trustee. [Lewin on Trusts, 12th ed., 936, referred to.]

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

(§ II A—43)—REMOVAL AND SUBSTITUTION.

The question of the removal of a trustee from his trust will not be considered in an appellate Court when not raised either by the pleadings or notice of appeal in an action brought against him by the cestuis que trustent where the charges of fraud and misrepresentation made against him are dismissed.

Bingham v. Shumate, 3 D.L.R. 121, 20 W.L.R. 812.

B. Rights, powers, duties and liabilities.

(§ II B—47)—MANAGEMENT AND DISPOSAL OF TRUST PROPERTY GENERALLY.

Where a debtor upon his creditor's demand permits the latter to take over as collateral security certain promissory notes due the debtor, and the creditor refuses to return them to the debtor, he is under obligation not to be dilatory or negligent in collecting them and not to allow them to become statute-barred by his failure to enforce payment and will be liable to his debtor for the amount of notes so barred which might have been collected had due diligence been exercised. [Am. & Eng. Enc. Law, 2nd ed., vol. 22, pp. 899, 900; Peacock v. Purssell, 14 C.B.N.S. 728, 32 L.J.C.P. 266, Williams v. Price, 1 Sim. & St. 581, 44 R.R. 238; Lewin on Trusts, 11th ed., 316-7; Synod v. De Blaquiere, 27 Gr. 536; Cassels Sup. Ct. Digest 539, referred to.]

Sawyer-Massey Co., Ltd. v. Weder, 6 D.L.R. 305, 22 W.L.R. 150.

(§ II B—48)—SALE, MORTGAGE OR PARTITION OF TRUST PROPERTY.

Where a mortgage to secure bonds provides that a fund for the redemption of the bonds shall be constituted, and that from the bonds from time to time offered for redemption, the trustee shall purchase those bonds which are offered at the lowest price, the trustee is not guilty of a breach of trust in purchasing a quantity of the bonds offered en bloc, merely because other bonds in small lots are offered at a lower price, if the acceptance of all the lower priced offers taken collectively would leave a large number of bonds to be redeemed at a higher rate which would make the average cost higher than the price of the single block of bonds purchased by the trustee for the money available for redemption purposes and which could not have been obtained otherwise than en bloc, at the price; the duty

of the trustee in such case is to select such offer to sell bonds as will enable him to redeem the largest number of bonds with the money at his disposal. [Whicher v. National Trust Co., 19 O.L.R. 605, 14 O.W.R. 888, restored; Whicher v. National Trust Co., 22 O.L.R. 460, 17 O.W.R. 788, 2 O.W.N. 383, reversed on appeal.]

National Trust Co. v. Whicher, 5 D.L.R. 32, [1912] A.C. 377.

Where, by will, executors or trustees were clothed with discretion to devote the residue of an estate to keeping up and maintaining the testator's residence, until sold or disposed of, as a family home for his son, his family and descendants, or for whomsoever the son might give it by will or otherwise, the bequest is void as a perpetuity, and cannot be saved on the theory that the trust was imperative, and, as the amount to be expended was left to the discretion of the trustees, they could at once appropriate the whole of the fund, regardless of the amount thereof or of the necessity for its expenditure, for the benefit of the present owner of the residence, as, like all trusts, it must be executed in good faith.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 3 O.W.N. 924, 21 O.W.R. 501.

Where a power expressly confers upon a trustee the right and privilege of selling upon certain terms the timber licenses held by him in trust without reference to the cestuis que trustent, the trustee, upon making a sale thereof within the terms of the power, can execute the necessary documents of sale without the cestuis que trustent joining as concurring parties.

Bingham v. Shumate, 3 D.L.R. 121, 20 W.L.R. 812.

Where an absolute power of sale and of transfer is formally conferred upon a trustee with a fixed limitation as to price and terms and the power is expressed to be exercisable without reference to the cestuis que trustent, the Court will not require the latter to join in the formal transfer of a sale by the trustee in terms of the power, where counterclaimed by him in an unsuccessful action brought against him by the cestuis que trustent charging him with fraud in connection with the trust agreement.

Bingham v. Shumate, 3 D.L.R. 121, 20 W.L.R. 812.

Settled Estates Act—Order authorizing sale of lands.

Re Milligan Settled Estates, 2 D.L.R. 883, 3 O.W.N. 895, 21 O.W.R. 701.

(§ II B—52)—Dealing with trust estate; individual interest of trustee.

Where one sold his interest in a partnership to his fellow-partners for a sum payable at a specified time and before that time died leaving a will by which he appointed as executors and trustees of his estate two of the remaining partners and the plaintiff, who was not connected with the firm, and payment of the debt was not enforced when due, though interest thereon was paid annually thereafter, the plaintiff as a beneficiary under the will is not entitled to an accounting of the profits earned by the loan after it became due and cannot claim such profits in lieu of interest. [Vyse v. Foster, L.R. 8 Ch. App. 309, L.R. 7 H.L. 318, followed.]

Carvell v. Aitken, 2 D.L.R. 709, 10 E. L.R. 432.

(§ II B—56)—Accounting.

If the statement of claim does not state a case entitling the plaintiff to any relief against one of two defendants, an order should not be made compelling him to answer, on his examination for discovery, questions which would be relevant if a good cause of action had been disclosed. The case alleged against the defendant McLaws was simply that the plaintiff company had assigned to him certain accounts and securities to be held by him as trustee for his co-defendant Bennetto as collateral security to a chattel mortgage which the plaintiff had given to Bennetto, and that Bennetto had collected through McLaws large sums of money upon such accounts and securities for which Bennetto had not accounted to the plaintiff. It was not alleged that McLaws had retained any of the moneys collected in his hands, or that the amount collected exceeded the amount necessary to discharge the mortgage. It was held, that, as the case was stated, McLaws was not a trustee for the plaintiff company and was not liable to account to it, and the company had no right to complain because he had not done so, and no right to any relief against McLaws was disclosed. If it had been alleged in the statement of claim that McLaws had collected more than enough to satisfy the chattel mortgage and that the surplus was in his hands and that he had refused to pay it over, even though he had collected it as trustee for Bennetto, he would be a proper party to the action and the plaintiff would be entitled to relief against him. [Cowper v. Stoneham, (1893) 68 L.T. 18.

Winnipeg Granite and Marble Co. v. Bennetto, 21 Man. R. 743.

(§ II B—57)—Compensation.

While the position of a surviving partner imposes certain obligations and duties which are in their nature fiduciary, he is not an express trustee and, therefore, has no statutory right to remuneration under and by virtue of the Trustee Act, R.S.O., ch. 129, sec. 40. [Knox v. Gye, L.R. 5 H.L. 656, and Re Lands Allotment Co., [1894] 1 Ch. 616, specially referred to.]

Livingston v. Livingston, 4 D.L.R. 345, 26 O.L.R. 246, 3 O.W.N. 1066, 21 O.W.R. 901.

III. Interest of cestui que trust; rights of creditors; spendthrift trust.
(No cases.)

IV. Liability of trust estate generally.
(No cases.)

V. Rights and liabilities of transferees; following trust property.
(No cases.)

VI. Trust certificates.
(No cases.)

UNCONSCIONABLE BARGAINS.

See Fraud and Deceit.

ULTRA VIRES.

Ultra vires acts of corporation, see Companies.
As to statutes, see Constitutional Law.

UNDUE INFLUENCE.

By duress, see Duress.
Evidence to shew, see Evidence.
As to question for jury, see Trial.
In execution of will, generally, see Wills, I.

UNLAWFUL COMBINATIONS.

See Conspiracy; Monopoly and Combinations.

USURY.

I. In general; what constitutes.
A. In general.
B. In loans by agent or broker.
C. Bank transactions.
II. Effect; remedies.

I. In general; what constitutes.

(No cases.)

II. Effect, remedies.

(§ II—22)—Bona fide holders.

The Money Lenders Act does not in any way forbid the negotiation of notes discounted at a forbidden rate, but on the contrary provides for the right of action to the bonâ fide holder for the face value of said notes, reserving only the privilege to the party discharging said notes to reclaim from the money lender any amount paid for interest illegally charged. (2) A petition for an injunction to restrain the transfer of said promissory notes will be dismissed.

Friedenberg v. Eaves, 13 Que. P.R. 329 (Sup. Ct.).

(§ II—24)—Remedies.

A party who signed promissory notes discounted at a rate of interest exceeding that allowed by the Money Lenders Act has no right to ask by a conservatory attachment that these notes be put under judicial custody for the purpose of reducing their amounts, especially if it is not alleged that the defendant is insolvent.

Friedenberg v. Bailey, 13 Que. P.R. 312 (Sup. Ct.).

(§ II—25)—Recovery of excess.

Any remedy provided for the relief of borrowers against usury by the Money Lenders Act, R.S.C. 1906, ch. 122, is comulative of and not in substitution for the common law right to recover the excess. [Money Lenders Act, R.S.C. 1906, ch. 122, considered.]

Watts v. Tolman, 6 D.L.R. 5, 22 W.L.R. 55, affirmed 7 D.L.R. 811.

A borrower who has paid interest in excess of the maximum rate for which a contract may legally be made under the provisions of the Money Lenders Act, R.S.C. 1906, ch. 122, has a right of action at common law to recover such excess. [Browning v. Morris, 2 Cowp. 790, 98 Eng. Rep. 1364, and Smith v. Bromley, 2 Doug. 696, 99 Eng. Rep. 441, applied; Barnhart v. Robertson, 6 Q.B.O.S. (Ont.) 542, specially referred to.]

Watts v. Tolman, 6 D.L.R. 5, 22 W.L.R. 55, affirmed 7 D.L.R. 811.

VAGRANCY.

I. Generally.
II. Trial.
III. Punishment.

(§ I A—5)—Being without visible means of maintenance.

A conviction for vagrancy in being without visible means of maintaining himself is justified in respect of a person who solicits alms for himself on the streets without the official certificate mentioned in Code sec. 238 (d) on a claim that he is unable to work and who had no way of maintaining himself without becoming a public burden or a nuisance on the public streets.

The King v. Munroe, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

The possession of a sum of money sufficient for the maintenance of the accused for several days will not bar his conviction as a vagrant if it appears that the money had been obtained for the most part by the defendant's begging in the public streets. [The King v. Sheehan (1908), 14 Can. Cr. Cas. 119, not followed; The Queen v. Riley, 2 Can. Cr. Cas. 129, 7 Que. Q.B. 198, referred to.]

The King v. Munroe, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

Where it appears on a charge of vagrancy under Code sec. 238 (l) that the accused had six months previously left off working at his trade and that his only means of livelihood since were the running a gambling resort and obtaining the rake-off on poker games, he may properly be

convicted under the statutory definition of vagrancy, although he had not failed to support his family or himself.

The King v. Kolotyla, 19 Can. Cr. Cas. 25, 17 W.L.R. 640, 21 Man. L.R. 197.

VENDOR AND PURCHASER.

I. Rights and liabilities of parties.
A. In general.
B. Payment of purchase money; deductions.
C. Defective or unmarketable title.
D. Deficiency in quantity; rescission.
E. Rescission of contract.
II. Vendors' lien.
III. Rights of parties as to third persons; bona fide purchasers.

Oral contracts as to sale of real property, see Contracts, I.

Construction of contract for transfer of land, see Contracts, II.

Covenants between, see Covenants and Conditions.

Damages for refusal of purchaser of land to perform agreement, see Damages.

Forfeiture clause on sale of lands, see Covenants and Conditions.

As to what constitutes fraud, see Fraud and Deceit.

Breach and enforcement of covenants and conditions, see Covenants and Conditions.

Rescission or forfeiture upon default under instalment contract, see Covenants and Conditions.

Pleading implied covenant to pay prior mortgage on taking land titles transfer, see Pleadings, II.

Specific performance of contracts, see Specific Performance.

As to stipulations for rescission of land purchase contracts generally, see Contracts, V.

I. Rights and liabilities of parties.

A. In general.

(§ I A—1)—Rights and liabilities of parties.

An act, by which, in consideration of a fixed price, one of the co-inheritors sells and transfers unto her other co-inheritors all her rights in the real and personal property of an inheritance, will not be considered as partial division, but, on the contrary, will constitute, a perfect and final sale of the part thus acquired by the others.

Chaput et vir v. Chaput, 18 Rev. de Jur. 62.

(§ I A—4)—Tender of deed.

Before a vendor of lands under Quebec law can put the purchaser in default, he must tender him the deed and a certificate of search from the registry office shewing what encumbrances exist on the property.

Poirier v. Archambault, 1 D.L.R. 358.

Where an agreement for the sale of land includes a right-of-way over other lands of the grantor, and contains a provision that he shall give a deed of the right-of-way "when and as soon as the same is surveyed," and it appears that the survey is necessary before a proper conveyance could be made, the grantee is relieved by the very nature of such a contract from tendering a conveyance for execution until the survey shall have been made by the grantor. [Deacon v. South-Eastern R. Co. (1889), 61 L.T.R. 377; Metropolitan R. Co. v. Great Western R. Co. (1900), 82 L.T.R. 451, referred to.]

Burney v. Moore, 7 D.L.R. 357, 4 O.W.N. 173, 23 O.W.R. 161.

A tender for execution of a deed of conveyance will be deemed to have been waived where it is clear from the circumstances existing at the date of the writ that the tender must have been refused if it had been made and for that reason would have been a mere useless formality, ex. gr., where the grantor had already sold to another person. [McDougall v. Hall (1887), 13 O.R. 166, followed; Knight v. Crockford (1794), 1 Esp. 190; Lovelock v. Franklyn (1864), 8 Q.B. 371, referred to.]

Burney v. Moore, 7 D.L.R. 357, 4 O.W.N. 173, 23 O.W.R. 161.

B. Payment of purchase money; deductions.

(§ I B—5)—Payment of purchase money.

Where a vendor, under a contract for the sale of land in which time is of the essence, and in which the purchase price was to be paid for in four instalments, two of which amounted to one-half of the entire purchase price, rescinds the agreement on default of the vendee to pay the last two instalments, though the rescission is justifiable, the vendor will not be allowed to retain the money paid on account of the property; such money will be treated as payment on account and not as deposit money, though it is called "deposit money" in the agreement.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O.W.N. 536, 23 O.W.R. 699.

The vendee in a contract for the sale of lands cannot, as a condition precedent to paying the stipulated instalments of the purchase money, require the vendor, who had only an equity in the lands, to shew that he had paid all instalments of the purchase money actually due from him to his vendor.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W. L.R. 180.

Where an agreement for the sale of land expressly requires a certain down payment contemporaneously with the execution of the agreement, the purchaser is not entitled (as against an outstanding mortgage of which he had prior notice amounting to less than the remaining pur-

chase instalments) to require the vendor to shew title to the land before making the down payment. (Per Anglin, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Where an agreement for the sale of lands expressly requires the payment of a fixed large instalment on the purchase price in "cash on the signing of this agreement," the consideration for this payment is the execution of the agreement itself, that is to say, the constitution of the relationship of vendor and purchaser between the parties and the promise or undertaking of the vendor to sell and convey. (Per Anglin, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Where, by the terms of an agreement to purchase a mine, part of the purchase price was to be in stock of a company to be formed by the purchaser to acquire and work a certain creek or such parts as he may consider advisable, a tender of stock in a company which is formed for another object, is not sufficient, and the vendor will not be compelled to accept such shares, unless he had knowledge of the formation of such company and had by his conduct so acquiesced that he would be precluded from objecting to the same.

Treadgold v. Rost, 7 D.L.R. 741, 22 W. L.R. 300.

Where, by the terms of an agreement, part of the purchase price of a mine was to be in stock of a company to be formed, a tender of that amount of stock computed at par does not necessarily fulfil the agreement, since the value of the stock depends on the state of the market at that time, and the vendor is entitled to so much of the stock as that part of the purchase price would then buy. [McIlquham v. Taylor, [1895] 1 Ch.D. 53, referred to.]

Treadgold v. Rost, 7 D.L.R. 741, 22 W. L.R. 300.

A stipulation in an agreement for the sale of land made by written offer and acceptance and negotiated through a real estate agent, that the agent's commission against the vendor be paid "out of and form part of the purchase money" permits the purchaser to pay such commission on closing the purchase and to deduct the amount so paid from the purchase money then payable to the vendor.

Robinson v. Reynolds, 4 D.L.R. 63, 3 O. W.N. 1262.

If a purchaser knows of an encumbrance, either before or after the execution of his conveyance, but before the payment of the whole purchase money, he will be liable to the extent of any purchase money which he subsequently, without the consent of the encumbrancer, pays to the vendor. [Rayne v. Baker, 65 Eng. Rep. 905, followed; Dart on Vendors and Purchasers, 7th ed., vol. 2, pp. 386 and 387, approved.]

Gillespie v. Wells, 2 D.L.R. 519, 21 W. L.R. 231, 22 Man. L.R. 355.

Where an agreement for the sale of land provides that, upon a re-sale of the land, the re-sale agreement may be assigned to the original vendor as security for the purchase price remaining due to him and, without any intention to mislead the original vendor, the re-sale agreement is so drawn that a larger sum appears thereby to be owing thereunder than is in fact so owing, the original vendor cannot, as assignee of the re-sale agreement, exact payment of such larger sum, but must take the re-sale agreement subject to the true state of the accounts between the parties thereto.

Great West Land Co. v. Stewart, 3 D. L.R. 805, 3 O.W.N. 1141.

(§ I B—7)—Deduction for deficiency in quantity.

Deduction from purchase money for deficiency in quantity—Description "more or less"—Absence of fraud.

Hunter v. Kerr, 7 D.L.R. 829, 21 W.L.R. 823.

Where a right of redemption in house property was sold under a deed of sale describing the property by its boundaries and as having a frontage of forty-five feet and further describing the property as being the same as is actually enclosed and possessed by the vendor, a deficiency of seven feet in the frontage will not give rise to a claim for diminution of price or annulment of the contract if the purchaser was not deceived or misled either as to the value or as to the extent of the property to which the right of redemption applied, in view of the fact that the property had been sold en bloc and that the entire frontage was taken up by the buildings thereon.

Martin v. Lussier, 2 D.L.R. 584, 41 Que S.C. 412.

C. Defective or unmarketable title.

(§ I C—10)—Defective or unmarketable title.

A vendee in a contract for the sale of lands who does not promptly repudiate the agreement because of the vendor's failure to deliver an abstract of title, or of the delivery of one that is unsatisfactory, will be deemed to have accepted such title as his vendor actually had.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W. L.R. 180.

A finding by a master or referee that a good title can be made to land upon certain things in the nature of mere conveyancing being done, is not a conditional finding or a finding against the title but a mere finding as to the conveyancing necessary to perfect the good title shewn to be in the vendor.

Leckie v. Marshall, 4 D.L.R. 94, 3 O. W.N. 1527.

Petition under statute—Title.

Re Heward and Steinberg, 6 D.L.R. 860, 4 O.W.N. 133.

Under an agreement for sale of Saskatchewan lands, providing for a transfer under the Real Property Act (Sask.) or for a deed without covenants other than as against encumbrances and further providing that the purchaser "accepts the title of the vendor," the purchaser is not entitled to compel the vendor to free the property from a caveat, for which the vendor was not responsible, filed against the lands by third parties, claiming to set aside the prior transfer to the party from whom the vendor had purchased.

Cole v. Cross, 1 D.L.R. 127, 19 W.L.R. 780, 48 C.L.J. 108, 22 Man. L.R. 1.

Where land is devised to the testator's widow for life, and then to the testator's sons living at the date of the death of the widow, but if during her life any sons shall die leaving children, the children are to take the share their parent would have taken if he had lived, the interest of such of the sons as may be alive at the death of their mother does not vest until such death, and the executors, widow and sons of the testator cannot make title to a purchaser during the lifetime of the widow.

Re Lane and Beacham, 7 D.L.R. 311, 4 O.W.N. 243, 23 O.W.R. 250.

(§ I C—13)—Incumbrances.

Where a contract of sale of real estate provided as terms of payment a specified sum "cash," and balance on deferred payments with privilege of paying the whole amount off at any time, the last of the deferred payments being intended to correspond with the maturity of an existing mortgage on the property, the fact that the mortgage was not subject to a like stipulation or privilege of advance payment and that in consequence the vendor could not fulfil his contract in respect of such privilege, constitutes a defect in title justifying the purchaser in withholding the payment not only of the intermediate deferred payments under the contract but of the portion stipulated as "cash," until the vendor shall provide an indemnity or equitable adjustment to protect the purchaser from having to pay more than his contract calls for because of the mortgagee's refusal to accept prepayment. [Gamble v. Gummerson, 9 Gr. 199; Cameron v. Carter, 9 O.R. 431; Armstrong v. Anger, 21 O.R. 100, followed; Graves v. Mason, 2 Alta. L.R. 179, specially referred to.]

Knight v. Cushing, 1 D.L.R. 331, 20 W. L.R. 28.

Under an agreement for the sale of land wherein the vendor covenants to transfer the fee simple upon payment of the purchase price, the purchaser is justified in refusing to pay the balance until the vendor can give satisfactory assurance as to title and as to arrears of taxes.

Auriol v. Alberta Land and Investment Co., 7 D.L.R. 306, 20 W.L.R. 185.

Where the parties are dealing at a distance from the registrar's office, the mere tender on the part of the vendor of an abstract from the land titles office, shewing him to be the registered owner, free from incumbrances, of the lots in question, is not sufficient. The purchaser is entitled to be protected against the risk of having to deal with incumbrances of any nature that might be recorded against the title between the time of delivery of the transfer to him and its recording at the registry office. He has the right to notify the vendor that he will appear at the registry office on the date of payment and will there tender the vendor the price on the vendor depositing with the registrar a proper transfer and the vendor's duplicate certificate of title under the Land Titles Act and on ascertaining from the records that the title is free of all incumbrances. [Mayberry v. Williams, 3 S.L.R. 350, referred to.]

Auriol v. Alberta Land and Investment Co., 7 D.L.R. 306, 20 W.L.R. 185.

(§ I C—13a)—Building restrictions.

One who agrees to purchase land is not obliged to accept a conveyance containing building restrictions, where none were mentioned by the vendor prior to the making of the agreement of sale, and no restrictions were contained in the documents evidencing the agreement.

Coaffee v. Thompson, 5 D.L.R. 9, 21 W. L.R. 905; affirmed 7 D.L.R. 806, 22 W.L.R. 386.

(§ I C—16)—Approval of attorney.

Where there is no stipulation, either express or implied, to the contrary, in an agreement for the sale of land held under Torrens title system of registration in British Columbia, upon a certificate of title which is for less than the absolute and indefeasible title, the English rule of law requiring the vendor to furnish a solicitor's abstract of title to the purchaser if demanded, will apply. (Dictum, per Duff, J.) [Brewer v. Broadword, 22 Ch. D. 105, followed.]

Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, 23 W.L.R. 93.

(§ I C—17)—Objections to title.

An outstanding incumbrance is a mere question of conveyance as distinguished from a question of title, and it is not ordinarily necessary for the purchaser to serve a formal objection to title in regard thereto. [Armour on Titles, 3rd ed., pp. 47, 150, 151, specially referred to; Townsend v. Champernowne, 1 Y. & J. 538, approved.]

Fuller v. Maynard, 5 D.L.R. 520, 3 O. W.N. 1602, 22 O.W.R. 809.

(§ I C—18)—Owners of undivided parcel.

Option to purchase land—Conditional on owner of undivided part confirming same—Absence of confirmation.

Mercer v. M., 7 D.L.R. 860.

D. Deficiency in quantity.

(§ I D—20)—Deficiency in quantity.

A vendor who acquires immovables under the cadastral system, i.e., where the land dealt with is described by its cadastral numbers, buys the cadastral lots as they appear on the official plan and book of reference, and, should the area indicated in the title deed not correspond with that on the official plan, it is the latter which must prevail: C.C. 2168.

Hamel v. Ross, 3 D.L.R. 860.

(§ I D—21)—Rescission for deficiency.

In cases of sales of immovables the purchaser may, in case he is evicted, repudiate the sale tainted with a cause of eviction, but, until judgment is rendered declaring the sale set aside, the vendor may prevent the setting aside by furnishing the purchaser with a good title or causing the eviction to cease, and the purchaser is presumed at law to consent to remain proprietor until the sale is annulled; so where, in an action in vacation of a sheriff's sale based upon defects in title, the vendor before judgment is granted obtains a good title to the property sold, the buyer must accept the same and the sale will not be set aside.

Swan v. Eastern Townships Bank, 8 D. L.R. 312.

Article 1502 of the Civil Code of Quebec, which provides for the abandonment of a sale of land by the purchaser and recovery from the vendor of the price, if paid, where there is a deficiency of quantity so great as to raise the presumption that the purchaser would not have bought if he had known of it, is applicable only for the protection of an actual purchaser of an immovable property and not for the protection of the transferee of a right of redemption conferred by a "contre-lettre" given by the transferee back to the transferor concurrently with the making by the latter of an absolute conveyance by the terms of which "contre-lettre" the transferor was given the privilege of redeeming the property within a fixed period at a certain price but was under no obligation to do so.

Martin v. Lussier, 2 D.L.R. 584, 41 Que. S.C. 412.

The remedy of the purchaser of a mere right of redemption which he has the option to exercise but without any obligation to redeem in respect of a deficiency in quantity in the land, is dependent upon art. 992 of the Civil Code of Quebec and upon proof being made of error, fraud, violence or fear under said statute.

Martin v. Lussier, 2 D.L.R. 584, 41 Que. S.C. 412.

Where a vendor properly rescinds an agreement for the sale of land, and thereafter the purchaser registers the agreement, and the vendor, without knowledge of such registration, agrees to sell the land to another, the first purchaser will be compelled to execute a release of the registered agreement.

Jewer v. Thompson, 3 D.L.R. 628, 22 O. W.R. 610, 3 O.W.N. 1122.

E. Rescission of contract.

(§ I E—25)—Rescission of contract.

Where time is expressly made of the essence of the contract in an agreement for the sale of land to be paid for in four instalments, and two of the instalments have been paid, and default is made in the payment of the other two, though one-half of the purchase price has been paid by the purchaser, the vendor is justified in rescinding the agreement where the default continues for about three years from the time the last instalment was due.

McGreevy v. Hodder, 8 D.L.R. 755, 4 O.W.N. 536, 23 O.W.R. 699.

Where a contract for the sale of real estate fixed the price at $1,350 and provided that the purchaser was to pay $200 in cash, to give two notes for a like sum each in ten days' time, and to arrange the payment of the balance later, this delay being permitted to give the purchaser an opportunity to hear as to an application that he had made for a loan on the property with the knowledge of the vendor for the purpose of arranging for the payment of the balance and the receipt given by the vendor for the cash payment described it as "money on a contract," and the purchaser went into possession and made extensive and costly improvements with the approval of the vendor, but was delayed beyond ten days in giving the notes and making a settlement of the balance of the purchase price by reason of not having heard as to his application for a loan, there being no attempt on his part to abandon or repudiate the contract, the cash payment was too large an amount in comparison with the total price to be paid to be deemed a mere deposit, but was payment on the contract which the purchaser was entitled to recover from the vendor's unjustifiable determination of the contract by entering into possession of the property and re-selling the same. [March v. Wells, 45 Can. S.C.R. 338, applied.]

Mitchell v. Wilson, 2 D.L.R. 714, 20 W.L.R. 671.

Where the purchaser in a contract for the sale of a block of land, before completing his payments and acquiring title, contracted to sell a lot from the same to a sub-purchaser and then defaulted in his payments, after which he directed the sub-

purchaser to pay instalments of purchase money to the owner, who refused to take payment from or to give title to the sub-purchaser unless the latter paid a bonus in addition to what he had contracted with the original purchaser, an agreement to pay such bonus will not be set aside on the ground that such circumstances constitute duress nor will a mortgage given therefor by the sub-purchaser to the owner be declared invalid.

Duggan v. Wadleigh and Rankin, 1 D. L.R. 871, 20 W.L.R. 102.

Where time was not expressedly or impliedly the essence of a contract for the sale of real estate and the vendor failed afterwards to give the purchaser such reasonable notice to complete the contract within a definite and specified period as would make time the essence thereof, and the delay in completing the contract on the part of the purchaser was due to his waiting to hear as to an application he had made with the knowledge of the vendor for a loan on the property for the purpose of completing payment therefor, a determination of the contract by the vendor was unjustifiable, and the purchaser would be entitled to recover any special damage he had suffered by reason of having entered into possession and made extensive and costly improvements with the knowledge and approval of the vendor.

Mitchell v. Wilson, 2 D.L.R. 714, 20 W. L.R. 671.

Sale of land—Default—Rescission—Forfeiture of sums paid—Judgment—Costs.

Young v. Plotymeki, 5 D.L.R. 887, 4 O. W.N. 94, 23 O.W.R. 56.

One who agrees to take a transfer of a half section of land free and clear of all encumbrances, is not obliged to accept one subject to a highway across the land, which was not shewn on the Government survey. [Vanderlip v. Peterson, 16 Man. L.R. 341; Paterson v. Houghton, 19 Man. L.R. 168, referred to.]

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

The hidden defects, in the sense of the law, in the matter of the sale of a house are not those which the vendee did not know, but those which he could not know either by his own or by an expert examination. The vendor will not be held responsible for defects the existence of which the vendee had the power to ascertain. By terms of the art. 1522 C.C. in order that the thing sold would give a cause of action, the effect of which is determined by art. 1526 of C.C., it must have hidden defects which will render it improper for the use for which it was designated, or which will so diminish its usefulness that the vendee would not have bought it or would not have given so high a price, if he had known of such defects, and this disposition must be understood in the sense that the hidden defects are so inherent to the thing and so irremediable by their nature, that the thing sold would be for ever improper, in whole or in part, for the use for which it was intended. When in the locality where the sale took place there is no usage relative to the reasonable diligence with which the action to set aside the sale in case of a house should be instituted, there is a reason to follow the ancient right by which this action had to be begun within the delay of six months, from the contract of sale. In an action of such nature the tribunal may take into consideration the very acts of the plaintiff to declare him not entitled to his demand, such as modifications to which he submitted the property bought by him; in default of deposit of previous arrears of the vendor; the payment by the plaintiff of the price of sale without reserve. Although the art. 1526 C.C. gives the vendee the right to demand on his own choice either the rescission of the sale or reduction of the sale price, nevertheless, as it is the best for the vendee to obtain the thing free from defects which depreciate it, if there is no defect in the strict text, the above article prohibits the vendee the right to demand from vendor to repair, if possible, the hidden defect or to rescind the sale by meaning of art. 1522 C.C. of the thing so impaired. By terms of arts. 1688 and 2259 C.C. the architects and contractors are not responsible when they were directed in the work of construction for the other man's account, and when the vendor had himself constructed on his own property and on his account, from that time he will be held guaranty against the hidden defects only as vendor. The possession of the buyer temporarily suspended, to make certain repairs required by the condition of the house, does not constitute an act which renders improper or diminishes for ever the use to which the sold house was intended.

Senegal v. Meunier, 18 Rev. de Jur. 264.

Where, under an agreement for the sale of land a purchaser by his refusal to comply with an express provision of the document requiring a certain down payment on the purchase price repudiates the agreement thereby entitling the vendor to rescind, and where the vendor thereupon gives reasonable notice of rescission, and at the expiry of the time given the purchaser still refuses to comply, the contract is at an end and the purchaser cannot later insist upon specific performance. (Per Idington, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

One C.B.W. died being entitled to an interest in two quarter sections of land, and left a will appointing his wife K.A.W. his executrix, and bequeathing the land to his son W.J.W. At this time patent had not been secured for the land, and no

title has issued in respect thereof. In 1893 a recommendation for patent to the land in question was issued under the Dominion Lands Act to W.J.W., but no patent in fact issued until 1903, and then issued to K.A.W. as personal representative of deceased. This patent was not registered, nor did a certificate of title issue until March, 1904. In 1902, W.J.W., for valuable consideration, transferred the land to plaintiff, who went into possession and continued therein until the trial of the action. This transfer was not registered. In July, 1903, K.A.W. executed a transfer of the land to defendant, the consideration being expressed as one dollar. This transfer was retained by defendant's solicitor for a number of years unregistered, and during that time defendant exercised none of the usual rights of ownership, nor did he pay any attention to the land, and, in fact, on one occasion prior to the registration of the transfer, his clerk, in answer to an inquiry, stated that he had no interest therein, but that the plaintiff was interested. By accident, and while searching for some other papers, the transfer to defendant was discovered, and registered. K.A.W. had died in the meantime, but W.J.W. swore that he never sold the land to defendant, that he was never paid therefor. Defendant could not give any clear account of how he came by the land, and was totally unable to state the consideration, the amount of the payments, or how made, other than that he had paid all the moneys required to be paid. On an action by plaintiff to set aside the transfer, the learned trial Judge found that the transfer was without consideration, but that there was no fraud. He found the defendant to be a trustee for the plaintiff, and ordered re-conveyance of the land. On appeal, it was held, where the consideration stated in a transfer is merely nominal, the onus is cast upon the transferee to prove that valuable consideration was given. (2) If the Court of Appeal is satisfied that the trial Judge erred in any of his conclusions on the facts, such Court may overrule such finding, and give judgment according to the facts as found by the Court of Appeal. (3) Upon the facts as established and as found by the trial Judge, the defendant was guilty of fraud in procuring the registration of the transfer in question. (4) At the time of the inception of the fraud no certificate of title had issued for the land in question, and the provisions of sec. 173 of the Land Titles Act did not apply to prevent the Court exercising its jurisdiction, the provisions thereof only applying where certificate of title has issued. (5) The registration of the transfer, therefore, being fraudulent, should be set aside, and the certificate of title issued to the defendant cancelled.

Coventry v. Annable, 4 S.L.R. 426.

An agreement for the sale of lands acknowledged receipt of $600 on account of the price, and provided, in the event of default in the payment of deferred instalments, that the vendor might, on giving a certain notice, declare the agreement null and void and retain the moneys paid by the purchaser. On default by the purchaser to make payments according to the terms of the agreement, the vendor served him with a notice for cancellation, which incorrectly recited that the contract contained a stipulation for its cancellation, in case of default, "without notice," and concluded by declaring the contract null and void "in accordance with the terms thereof as above recited." The vendor, subsequently, refused a tender of the unpaid balance of the price and re-entered into possession of the lands. In an action by the purchaser for specific performance or the return of the amount paid, rescission was not asked for. It was held, that, as the vendor had not given the notice required by the conditions of the agreement, he could not retain the money as forfeited on account of the purchaser's default; that, as the payment had not been made as earnest, but on account of the price, the purchaser was entitled to recover it back on the cancellation of the contract; and that, as the relief sought by the action could not be granted while the contract subsisted, a demand for rescission must necessarily be implied from the plaintiff's claim for the return of the money so paid.

March Bros. and Wells v. Banton, 20 W.L.R. 322.

Under an agreement for the sale of land, where the property is of a speculative character and time therefore of the essence of the agreement, where the purchaser has refused to comply with an express requirement of the contract for a large down payment on the purchase price, a four-day notice by the vendor for payment, or, in the alternative, for cancellation, is reasonable, and, on the purchaser continuing in default beyond the period so fixed by the notice, the vendor is entitled to treat the agreement as cancelled. (Per Anglin, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

The agreement of purchase by plaintiff from defendant of the land in question provided in one paragraph that, in case the purchaser should at any time be in default the vendor should be at liberty at any time after such default, with or without notice to the purchaser, to cancel the contract and declare the same void and forfeit any payments that might have been made on account thereof and retain all improvements, etc., and that the vendor should be entitled, immediately upon any default as aforesaid, without giving any notice or making any demand, to con-

sider and treat the purchaser as his tenant holding over without permission or any color of right, and might take immediate possession of the premises and remove the purchaser therefrom. Further on in the agreement, and separated from the above provision by other covenants, there were provisions for two other modes of cancellation in case of default, one by service of a notice personally on the purchaser of intention to exercise the power of cancellation after one month, to be followed at the end of the month by a notice similarly served declaring the cancellation to be complete and effective, and the other by notice, after the default had continued for three months, declaring the contract null and void, "addressed to the purchaser directed to the post office at * * * * * and deposited in the post office at * * * * * " It was held, that, upon plaintiff making default, the defendant had a right to select any one of the three modes of cancellation provided for, and that a notice pursuant to that first above quoted, personally served upon the defendant, was valid and effectual as a cancellation of the agreement, subject to the power of the Court to give equitable relief if the circumstances should warrant it. [Canadian Fairbanks v. Johnston (1909), 18 M.R. at 601, referred to.] The defendant having, in his statement of defence, submitted to redemption by the plaintiff upon payment of the arrears and certain expenses, judgment was given accordingly, allowing the plaintiff two months after the Master's report to pay the amount found due by him and costs, and in default that the agreement should be cancelled.

Perks v. Scott, 21 Man. R. 570.

A representation by an agent of a vendor of land, which is merely an expression of opinion, and not a misrepresentation of a material ascertainable fact, does not, in the absence of fraud, constitute ground for the cancellation of the agreement of sale.

Jackson v. People's Trust Co., Ltd., 7 D.L.R. 384, 22 W.L.R. 325.

A statement by the agent of a vendor that land adjoining that sold to the purchaser had been reserved by a railway for trackage and other purposes, when honestly made, is not, in the absence of fraud, such a material inducement to the formation of the contract as would justify cancellation of the agreement of sale, where it later appears that such was not the case. [Dunn v. Alexander, 2 D.L.R. 553, distinguished.]

Jackson v. People's Trust Co., Ltd., 7 D.L.R. 384, 22 W.L.R. 325.

(§ I E—27)—FRAUD.

Sale of land—Condition—Representations—Failure to prove truth of—Rescission—Evidence—Exclusion.

Walker v. Maxwell, 5 D.L.R. 888, 4 O.W.N. 95, 23 O.W.R. 57.

An executed conveyance of land will not, in the absence of evidence of positive fraud, be set aside on the ground that it was taken in the name of a person other than the real purchaser, where it does not appear that the vendor would have refused to sell had he been aware that the vendee named in the conveyance was not the real purchaser. [Bell v. Macklin, 15 Can. S.C.R. 576; and Brownlie v. Campbell, 5 A.C. 925, specially referred to.]

Kelly v. Enderton, 5 D.L.R. 613, 21 W.L.R. 337, 22 Man. L.R. 277.

A formal transfer of lands will be set aside where the transferee relied upon false representations of value of the transferor's property, made by the latter and his agents, and where deceptive maps and plans were shewn to the transferee, misrepresenting that the transferor's land was on a certain avenue, the transferee never having seen the land in question.

Toffey v. Sutherland, 7 D.L.R. 319, 20 W.L.R. 182.

Plaintiff, a man of eighty-two years of age, was brought to Canada by his daughter, the defendant, her husband, paying the passage. After coming here plaintiff took up a homestead, the entry fee for which was paid by defendant's husband, who also provided for the erection of a house, cleared and broke up the land, sowed and harvested the crops thereon. Defendant and her husband also provided plaintiff with board and lodging. For all these services charges were made against the plaintiff, and when his homestead duties were completed an account was taken and the balance due defendant and her husband ascertained. It was thereupon agreed that plaintiff should sell the land to defendant, receiving by way of consideration a release from the indebtedness aforesaid and $640 in cash, which made the whole consideration about $3,200, shewn to be the fair value of the land. In pursuance of this arrangement the plaintiff transferred the land to defendants. Subsequently the plaintiff apparently became dissatisfied with the sale, and brought this action, alleging undue influence and lack of independent advice. It did not appear that any duress or fraud had been used, that plaintiff's mental faculties were impaired, or that any steps had been taken to prevent the plaintiff securing independent advice. It was further found that he fully understood what he was doing. On the trial practically the only issue seriously urged was that by reason of the advanced years of the plaintiff and the relationship existing between the parties the plaintiff should have had independent advice:—Held, that in the absence of evidence of fraud or undue influence, a conveyance should not be set aside merely on the ground that the grantor was of advanced years and con-

veyed to one of his own family, without independent advice.

Grahn v. Litwin, 4 S.L.R. 270.

(§ I E—28)—Failure to pay purchase money.

In an action in dissolution of sale by reason of non-payment of price the buyer may pay the instalments due, with interest and costs, not only before judgment is rendered by the Superior Court, but, if the case be inscribed in review, at any time before judgment is pronounced by the Court of Review and thus avoid the cancellation of the sale. (C.C. 1538, C.P. 1203.)

Starke Cooperage Co. v. Migneault and Vallee, 2 D.L.R. 173.

Stipulation for rescission for non-production of deed—Action for instalment of purchase money—Waiver—Payment into Court.

Sutcliffe v. Smith, 7 D.L.R. 861, 21 W. L.R. 326.

Where the purchaser of land under a crop payment plan himself makes default in carrying out his agreement and such default is found to have been the cause of the vendor's default to a mortgagee of the property by reason whereof the property was sold under the mortgage, the original purchaser first mentioned has no right of action in damages against his vendor for allowing the property to be sold.

Dool v. Robinson, 7 D.L.R. 337, 22 W. L.R. 246.

An option to purchase for a certain sum, which provides for payment of part of such sum in cash, can be effectually accepted only by making the cash payment, and, until such payment, no contractual relationship arises. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed; see also Miller v. Allen, 7 D.L.R. 438, post.]

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342.

Where an option stipulates for payment of part of the purchase price in cash, acceptance of the option by letter is not sufficient, and no contractual relationship can exist until the cash payment has been made. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed; see also Beer v. Lea, 7 D.L.R. 434.]

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

Where an agreement for the sale of lands expressly requires payment of $10,000 on the purchase price contemporaneously with the execution of the agreement and the purchaser refuses to comply with this requirement, the vendor's obligation to sell did not become absolute. (Per Duff, J.) [Ridgway v. Wharton, 6 H.L. Cas. 238, followed.]

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

Where, under a written agreement, lands are sold, the purchase price being payable one-fourth in cash and the balance in three equal consecutive annual instalments, with a stipulation that upon default in the payment of principal, interest, taxes or premiums of insurance, or any part thereof, the whole purchase money shall become due and payable; and where the purchaser punctually made the cash payment upon the execution of the agreement, but upon the maturity of the first annual instalment makes default in its payment; and an action is brought by the vendor, under such acceleration clause the vendor is entitled to have a time fixed within which the purchaser must pay the full amount of the purchase money and interest, and, in default of payment within the time limited to a declaration that the agreement has been forfeited, and is null and void, and at an end, and that all payments made thereunder and the improvements on the land are the property of the vendor in terms of a forfeiture clause contained in the contract. [Vosper v. Aubert, 18 Man. R. 17; Wallingford v. Mutual, 5 A.C. 685, 705; McFadden v. Brandon, 8 O.L.R. 610, referred to.]

Houghton v. Nicoll, 6 D.L.R. 108, 22 W.L.R. 59.

Where lands are sold under an agreement for payment by annual instalments with an acceleration clause making the entire purchase money due and payable upon default in the payment of any of the instalments, such clause is to be construed literally and cannot be relieved against. [McFadden v. Brandon, 8 O.L.R. 610, referred to.]

Houghton v. Nicoll, 6 D.L.R. 108, 22 W.L.R. 59.

(§ I E—29)—Defective title.

Sale of land—Objections to title—Right of way—Admission by vendor of validity of objections—Termination of contract—Registration—Discharge.

Jewer v. Thompson, 3 D.L.R. 886, 3 O. W.N. 1450, 22 O.W.R. 610.

II. Vendors' lien.

(No cases.)

III. Rights of parties as to third persons; bona fide purchasers.

(§ III—35)—Rights of parties as to third persons; bona fide purchasers.

Where a purchaser under an agreement to purchase lands with prior notice of an outstanding mortgage has paid certain instalments and the amount of the unpaid instalments is approximately the amount of the outstanding mortgage, and where he is electing, pursuant to the agreement to pay up the entire balance of purchase money he is thereby entitled to force the vendor to redeem the mortgage so outstanding, no matter how unexpectedly onerous that may

prove to the vendor. (Dictum per Idington, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

A purchaser of land which is not fully paid for by the owner and subject to a clause providing that no assignment of the owner's interest therein should be valid or effectual unless or until approved by the party from whom he claims title fails to obtain such approval, acquires in point of time, a prior equity thereto as against a third party to whom such lands were subsequently assigned, and the approval to such assignment was procured by fraud.

MacLeod v. The Sawyer & Massey Co., 46 Can. S.C.R. 622, reversing Sawyer & Massey Co. v. Bennett, 2 S.L.R. 516.

Where by the terms of a land contract it is provided that the land cannot be conveyed without the approval of the owner unless it is fully paid for, an assignee of such land who procures such approval by fraud stands in equity in no better position than as if no consent had been obtained, and cannot defeat the equity of a prior purchaser for value who purchased the land in fee and to whom approval for transfer had been refused.

MacLeod v. The Sawyer & Massey Co., 46 Can. S.C.R. 622, reversing Sawyer & Massey Co. v. Bennett, 2 S.L.R. 516.

It is not necessary, under sec. 91 of the Real Property Act (Man.), for one who contracts with the registered owner of land for its purchase, to make inquiry as to the latter's title, and the former will be protected as an innocent purchaser, notwithstanding he acquired notice of another's equity in the property, before the completion of the contract of purchase.

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

A contract for the purchase of land is within sec. 91 of the Real Property Act (Man.), notwithstanding such Act deals specifically with actual transfers, mortgages, encumbrances and leases, since the words "contracting or dealing with, or proposing to take an instrument from a registered owner," which are used in such section, clearly comprehend contracts of purchase.

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

(§ III—38)—NOTICE OF FACTS PUTTING ON INQUIRY.

Sale of land—Agreement—Assignment—Default—Notice of cancellation.

Prudhomme v. Labelle, 4 O.W.N. 388, 23 O.W.R. 388.

Where a purchaser enters into and signs an agreement for the purchase of land with prior notice of an outstanding mortgage, he ordinarily will be presumed to know that the mortgage may be in terms which do not permit of prepayment of the mortgage money before maturity. (Per Idington, J.)

Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555.

A purchaser of land is bound by notice of an adverse claim at any time before he has completed his purchase by actual payment, and, if part payment only has been made, his right to hold as a bonâ fide purchaser without notice will be limited to payments made before notice of the adverse claim. [Rose v. Peterkin, 13 Can. S.C.R. 677, applied; and see Godefroi on Trusts, 2nd ed., p. 694.]

Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

(§ III—39)—ASSIGNEE OF PURCHASER.

The assignee of a purchaser under a contract for the sale of land is not personally liable for the unpaid instalments of the purchase-price provided for in the contract, either to his assignor or to the original vendor, in the absence of a promise on his part to pay the same, though he took the assignment with knowledge that the purchase-price had not been paid.

Coté v. Olson, 2 D.L.R. 392, 20 W.L.R. 690.

Where an agreement for the sale of land provides for the payment of the purchase price by instalments, with interest on the unpaid portion thereof at a specified rate, which is also the rate payable by the vendor under a mortgage of the land made by him, and the land is re-sold by the purchaser under a similar agreement calling for the same rate of interest, which is then assigned by him to the original vendor as security for the purchase price remaining unpaid upon the original agreement of sale, the fact that the original vendor is subsequently compelled to pay a higher rate of interest to his mortgagee does not enable him to exact such higher rate from the ultimate purchaser whose agreement has been assigned to him.

Great West Land Co. v. Stewart, 3 D.L.R. 805, 3 O.W.N. 1141.

If, upon the failure of the vendee to pay the amount due on a contract for the sale of land, within the time limited by the Court therefor, payment is made by one to whom the vendee assigned his interest in the contract, and who paid to the vendee or his agent all payments under the contract as they came due, the assignee will be given judgment against the vendee therefor, together with interest thereon, and the costs he is compelled to pay.

Southwell v. Williams and Schank, 4 D.L.R. 1, 21 W.L.R. 771, 17 B.C.R. 209.

Where the defendant, who owned two hundred city lots, sold one hundred and nineteen of them, together with others, subject to the payment of the remainder of the purchase money due on all the two hundred lots, it being understood that those retained by the defendant should be deemed

fully paid for, and the purchaser sold a number of his lots to persons who made payments to him thereon, and afterwards, upon the defendant's default, under the agreement by which he acquired title, his vendor foreclosed, and, after his claim had been satisfied from the proceeds of the sale of nearly all of the lots, the surplus was paid into Court, the defendant is entitled to priority in payment therefrom, if the amount due him from the purchaser should exceed such surplus, and, in that event, neither the purchaser nor those who made payments on the lots purchased by them, are entitled to any part of the surplus.

Magrath v. Ranney, 4 D.L.R. 457, 20 W.L.R. 329.

Where a purchaser purchased from the vendor the larger proportion of city lots owned by the latter, subject to the payment of the purchase money that remained due on all the lots, and both of them sold a number of lots to persons who made part payments thereon, and afterwards, upon the vendor's default under the agreement by which he acquired title, his vendor foreclosed, and, after the claim of the latter had been satisfied from the proceeds of the sale of nearly all of the lots, the surplus was paid into Court, those who purchased lots from the vendor are entitled, in priority to all other claims, to reimbursement from such fund for the amount of their several payments to him.

Magrath v. Ranney, 4 D.L.R. 457, 20 W.L.R. 329.

P., by agreement in writing under seal, agreed to sell certain lands and the buildings thereon to R., who agreed to pay therefor in instalments. By a separate agreement bearing even date P. also agreed to sell to R. the business carried on upon said land, the stock and other articles contained thereon, the purchase price including the price to be paid for the land as set out in the first agreement. Subsequently R., by memorandum endorsed on the last mentioned agreement, assigned his entire interest therein to the plaintiff. No reference was made in this assignment to the separate agreement for the sale of land. Later the plaintiff, by memorandum similar to the terms of the assignment to him by R., and endorsed in the same manner, assigned his interest to the defendant. The only difference between the two assignments was that in the latter R. delivered to defendant his copy of the separate agreement for sale of the land, and it was found that it was the intention that the memorandum of assignment should convey the land as well as the equity in the agreement for sale of the business. At a later date the plaintiff, apparently being under the impression that he was under some liability to P., made an arrangement with him whereby he procured an assignment of P.'s interest in the land and the agreements for sale. Defendant, having made default in payment of an instalment under the agreement for sale, plaintiff sued for the amount thereof, or alternatively specific performance:—Held, that apart from any rights acquired under the assignment from P., plaintiff had no right of action against defendant, because he was not himself after he went out of possession liable on the original covenant either to P. or R., and so could not claim to be indemnified by defendant. (2) That in equity under the terms of the assignment and the understanding between the parties, the defendant while in possession was liable to P., and so to the plaintiff, as P.'s assignee, for the payments due under the original contract. (3) That the defendant ,being in possession, could not set up the Statute of Frauds. The opinion was expressed that under circumstances such as this the original contract by the purchaser to pay was a covenant running with the land, and could be enforced as against the assignee in possession by the original vendor or his assignee.

Coté v. Olson, 4 S.L.R. 219.

Where the assignee of a lessee's interest in a lease with option to purchase, exercises such option at a price per foot frontage agreed upon in lieu of being arbitrated, it will be presumed that, in fixing the price, regard was had to the circumstance that a "private lane" forming a part of the demised premises was subject to easements of right-of-way in favour of leaseholders of adjoining property in pursuance of a scheme of sub-division made by the original lessee and referred to in the lease; and such assignee is not entitled to call for a release of such easements nor to an abatement of price as compensation in lieu of a release.

Re Boulton and Garfunkel, 6 D.L.R. 373, 4 O.W.N. 25, 23 O.W.R. 1.

VENUE.

I. In general.

II. Change.

A. In civil cases.

B. In criminal cases.

I. In general.

(§ I—1)—In general.

When an order in writing by an intending buyer requires an answer from the seller to complete the contract it is such reply, or consent, which makes the contract complete, and the action based upon it can be brought in the Province or the district in which such reply was given.

Mechanical Equipment Co. v. Butter, 13 Que. P.R. 410 (Sup. Ct.).

(§ I—6)—Criminal cases.

An accused person cannot be deprived of his primâ facie right to be tried in the district where an offence is supposed to have occurred, unless it plainly appears that a fair and impartial trial cannot there be

obtained. [Mallett v. The Queen, 1 B.C.R. Pt. II. 212; Regina v. Ponton (1898), 2 Can. Cr. Cas. 192, and The King v. Lynn, 4 Sask. L.R. 324 (No. 2), 19 Can. Cr. Cas. 129, ante, referred to.]

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

(§ I—7)—NEGLIGENCE ACTIONS.

An action for injuries alleged to have been received by reason of the negligence of a civilian rifle association, acting in pursuance of the Militia Act, must be laid and tried in the judicial district where the act complained of was committed.

Webster v. Leard, 7 D.L.R. 429, 11 E.L.R. 203.

II. Change.

A. In civil cases.

(§ II A—15)—IN CIVIL CASES.

An order changing the venue will not be set aside on appeal on the ground that the affidavit on which it was made was upon information and belief only without disclosing the grounds for the belief, if the Court considers that the circumstances of the case justify the order, as notwithstanding the Judicature rules (N.S.), order 36, it is not essential upon such application to disclose the source of information which the practice prior to the Judicature Act (N.S.) did not require. (Per Meagher and Drysdale, J.J., and on equal division of the Court.) [Young v. Young Manufacturing Co., [1900] 2 Ch. 753; Lumley v. Osborne, [1901] 1 K.B. 532, referred to; and see Chitty's K.B. Forms, 13th ed., 349.]

Buckley v. Fillmore, 8 D.L.R. 526.

Where it appears from the affidavits read that a strong feeling exists in the county in which the venue is laid which will make it difficult to obtain a jury with no interest in the matters involved, the Court will order the venue to be changed to a county in respect to which no such difficulty exists.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641.

The venue of an action will be changed to the locality where the cause of action arose, if the defendant shews that the number of witnesses there far exceed in number those who would be convenienced by the venue stated in the plaintiff's process. [Macdonald v. Park, 2 O.W.R. 972, followed.]

On an application for an order changing venue by a defendant as against a non-resident plaintiff, under sec. 48 of the County Court Act, C.S. 1903, ch. 116, it is necessary to satisfy the Judge that the cause can be more conveniently or fairly tried in another county and also to prove by affidavit that the defendant has a good ground of defence, under sec. 47. The Court refused to interfere with the discretion of the County Court Judge in ordering a change of venue upon such an application, though the affidavit before the Judge contained no direct statement that the defendant had a good defence and the grounds of the defence were not set out. Semble, that no appeal lies from the order of a County Court Judge changing venue.

Canadian Fairbanks Co., Ltd. (plaintiff, appellant) v. Edgett (defendant, respondent), 40 N.B.R. 411.

Motion to change—Affidavits—Witnesses—Convenience.

Harrison v. Knowles, 1 D.L.R. 926.

Change—County Court action—Witnesses—Convenience.

Keenan Woodware Co. v. Foster, 3 D.L.R. 886, 3 O.W.N. 1451, 22 O.W.R. 545.

While there may be jurisdiction to change the place of trial, after notice of trial has been given, although irregularly, a plaintiff may not correct his own mistake in failing to give notice of trial in due time by a motion to change the venue to another trial sittings for which the time for service had not yet expired.

Taylor v. Toronto Construction Co., 1 D.L.R. 644, 3 O.W.N. 930, 21 O.W.R. 508.

County Court action—Witnesses—Convenience.

Lloyd v. Stronach, 3 D.L.R. 880, 3 O.W.N. 1349, 22 O.W.R. 619.

County Court action—Issues for trial—Evidence—Convenience—Expense.

Conkle v. Flanagan, 2 D.L.R. 915, 3 O.W.N. 1242.

Convenience—Place where property in question situate — Expense — Witnesses — Bringing case from outer county to Toronto.

Rice v. Marine Construction Co., 2 D.L.R. 896, 3 O.W.N. 1080.

Change of venue—Recovery of land—Con. Rule 529 (c)—Title to land involved.

Niagara Navigation Co. v. Town of Niagara-on-the-Lake, 4 O.W.N. 459. Renewed motion, see 4 O.W.N. 554.

Change of venue—Influence of plaintiff's counsel—Fair trial.

Fumerton v. Richardson, 4 O.W.N. 393, 23 O.W.R. 423.

(§ II A—16)—CONDITIONS ON GRANTING.

Where the defendant seeking a change of venue was a railway company the order granting the change should be made conditional upon the defendant affording free transportation for the plaintiff and his witnesses upon their line of railway to and from the place to which the venue was changed.

Starratt v. Dominion Atlantic R. Co., 5 D.L.R. 641.

B. In criminal cases.

(§ II B—20)—IN CRIMINAL CASES.

The Court of Sessions at Montreal has jurisdiction to try a charge for which the accused was arrested in Montreal and committed for trial there, although upon an information laid in another judicial district

of the same Province; it is not essential that the accused shall, on his arrest, be sent for trial to the local venue at which the information was laid.

Rex v. McKeown, 8 D.L.R. 611.

(§ II B—22)—GROUNDS FOR.

A change of venue will not be ordered in a criminal case on the ground that comments upon the crime made in the local press are likely to prejudice the accused persons in their trial, notwithstanding that such comments, in the opinion of the Court, are such as ought not to have been made, unless something more than the possibility of prejudice is disclosed, the rights of peremptory challenge and challenge for cause being regarded as a sufficient protection in such cases.

The King v. Graves, 5 D.L.R. 474.

Under sec. 884, Criminal Code, 1906, giving to the Court before which any accused is, or is liable to be, indicted, or to any Judge thereof, authority to make an order to hold the trial in some other place than that in which the offence was supposed to have been committed or would otherwise be tried, whenever it appears to the satisfaction of the Court or Judge that it is expedient to the end of justice to make such order, it is sufficient reason for changing the venue where the public officer charged by ch. 52 of N.S. Laws, 1912, with the custody of the lists of jurors drawn from time to time when the lists not required by the purposes of this Act, permitted a newspaper reporter to copy for publication the names of the jurors on a list drawn by him and other officers, in violation of another requirement of such statute that the public officers upon whom devolved the duty of drawing the lists of jurors must keep secret the names on the list except as otherwise directed by the Court until four days before the opening of the term of Court at which the jurors on such list are summoned to attend.

The King v. Graves, 5 D.L.R. 474.

The place of trial of an accused will not be changed upon unsupported assertions to the effect that the Crown cannot, on account of the favourable sentiment prevailing in favour of the accused, obtain a fair and impartial jury, where all of the facts tend to shew that an impartial jury can be obtained with no more difficulty than is experienced in any criminal trial.

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

An application of the Crown to have the place of trial changed, on the ground that it would be difficult, on account of the favourable sentiment prevailing in favour of the accused, to obtain an impartial jury, will be denied, where, on empanelling a jury which disagreed in a criminal case, the Crown did not make any challenges for cause, nor exhaust the jury panel, and made no attempt to obtain further jurors than those on the panel returned.

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

The accused was arraigned before the Supreme Court of Saskatchewan at a regular sittings thereof, for the judicial district of Regina, and a charge preferred against him in respect of certain offences alleged to have been committed in the judicial district of Moose Jaw. The charge was preferred by the express direction of the Attorney-General. Counsel for the accused, before pleading, objected that the accused could not, without a change of venue being ordered, be tried elsewhere than in the judicial district of Moose Jaw, and this objection the learned trial Judge sustained, whereupon counsel for the Crown applied for a reserved case upon the point, which was granted. On the argument of the case, it was objected that the case was one which could not properly be reserved. It was held, the word "trial," as used in sub-sec. 2 of sec. 1014, should receive a liberal construction so as to prevent a miscarriage of justice, and to secure to a person convicted of an offence upon indictment or otherwise where such section is applicable a fair trial according to law. (2) Applying such construction to this case, it should be held that proceedings of the character of those questioned were proceedings in respect of which a case could be reserved. (3) The Criminal Code in sec. 884 evidently contemplated that the rule of the common law should apply, and that the accused should primâ facie have the right to be tried in the district, county or place where the offence is alleged to have been committed. (4) That the words "district, county or place," as used in sub-sec. 10 of sec. 2 of the Code, apply to judicial districts in this Province. (5) While the accused has a right as above set forth, that right may be taken away by statute. (6) That such right is restricted by sec. 577 of the Code, and the effect of that section is to give jurisdiction to the Court in any district in which the accused is in custody. (7) The accused in this case, being in custody within the judicial district of Regina, was properly arraigned at the sittings in that judicial district.

The King v. Lynn, 4 S.L.R. 324.

Infringement of patent of invention—R.S.C. 1906, ch. 69, sec. 31—"May."

Alsip Process Co. v. Cullen (No. 1), 6 D.L.R. 859, 4 O.W.N. 114, 23 O.W.R. 81.

Change—Failure to set case down at proper time—Avoidance of delay.

Brown v. Grand Trunk R. Co., 6 D.L.R. 854, 4 O.W.N. 113, 23 O.W.R. 74.

VERDICT.

Review of on appeal, see Appeal, VII.
In general, see Trial, V.

VOTERS.

See Elections.

(§ I B—12)—VOTERS' LIST.

The addition to the voters' list by a Court of Revision of the name of a registered owner of the necessary amount of land to make him a qualified voter is valid though no notice was given to the former owner as a person interested, it appearing that the latter was on the voters' list in respect to other property and was not opposed to the action taken.

The King ex rel. Angus v. Knox, 1 D.L.R. 843, 19 W.L.R. 769.

WAGES.

Of employees generally, see Master and Servant, I.

Combination for purpose of fixing, see Monopoly and Combinations.

WAIVER.

(§ I—1)—ESTOPPEL AS BASIS OF WAIVER.

An agreement between the parties to an action on a mortgage that the referee should consider and determine all matters in difference between them, and the production of evidence in relation thereto, constitutes a waiver of an objection that, because some of the collateral notes were not due when the writ was issued, the action was prematurely begun.

Union Bank v. Crate, 3 D.L.R. 686, 21 O.W.R. 871, 3 O.W.N. 1018.

WALL.

Party wall, see Party Wall.

WARD.

See Guardian and Ward.

WAREHOUSEMEN.

I. IN GENERAL.

II. RIGHTS AND LIABILITIES GENERALLY.

III. WAREHOUSE RECEIPTS.

Warehouseman as bailor, see Bailment, I.

Liability of carrier as, see Carriers, III.

I. In general.

(No cases.)

II. Rights and liabilities generally.

(§ II—6)—INTEREST IN, AND TITLE TO, PROPERTY STORED.

R. had purchased a quantity of furniture from plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid. Grant, Co. J., at the trial, was of opinion that defendant had a lien on the goods at common law for his charges, and, in the absence of any tender by plaintiffs for same, dismissed the action. Plaintiffs appealed. It was held, on appeal, that defendant was not entitled to retain the goods until his charges were paid. Irving, J.A., dissenting.

D. A. Smith, Limited v. Campbell, 16 B.C.R. 505.

III. Warehouse receipts.

(No cases.)

WARRANT.

For arrest, see Arrest.

Inquiry into sufficiency of, on application for habeas corpus, see Habeas Corpus.

Search warrants, see Search and Seizure.

WARRANTY.

See Guaranty.

See Parties, III.

WATERS.

I. PUBLIC RIGHTS; RIGHTS BETWEEN PUBLIC AND INDIVIDUAL.
- A. What are public or navigable.
- B. Relative rights as between Province and Dominion.
- C. Relative rights of public and individuals.

II. WATER RIGHTS AND EASEMENTS AS BETWEEN INDIVIDUALS.
- A. Riparian or littoral rights in general; what are water courses.
- B. Accretions; alluvion; islands; flats.
- C. Use of water; interference with flow.
- D. Obstructions; overflow; raising dams.
- E. Pollution.
- F. Prior appropriation.
- G. Surface and seepage water.
- H. Subterranean waters; springs; wells.
- I. Irrigation; ditches; water rights.
- J. Contract or grant.
- K. Adverse use; prescription.

III. WATER SUPPLY.
- A. In general; exclusive privilege.
- B. Operation and regulation of water works.

As to drain and sewers, see Drains and Sewers.

Admiralty jurisdiction over, see Admiralty.

As to negligence on, see Negligence, I.

Right to fish in, see Fisheries.

As to collisions of ships, see Collisions.

As to shipping generally, see Shipping.

I. Public rights; rights between public and individual.

C. Relative rights of public and individuals.

(§ I C I—18) — MUNICIPAL DRAINAGE DITCHES.

Where a public body is intrusted with the construction of dyking works to prevent damage from the overflow of a river when in flood, it is its duty to avoid causing unnecessary inconvenience to individuals affected by the works; and where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its compliance de facto with the description of works authorized, the public body is entitled to make such adjustments and variations if they diminish the interference with private rights or property and so lessen the amount of compensation to be paid in respect thereof. [Municipality of Delta v. Wilson, 17 W.L.R. 680, affirmed on different grounds.]

Wilson v. Municipality of Delta, 8 D.L.R. 881, 22 W.L.R. 931.

Where water courses have lost their natural condition and have become part of an artificial drainage system created under the drainage laws, the part of the system which was once a natural water course is entitled to no particular immunity under the law, over the parts which are purely artificial, but the whole must operate so as to discharge the waters which it gathers at a proper and sufficient outlet. [Re Township of Elma and Township of Wallace, 2 O.W.R. 198; and McGillivray v. Township of Lochiel, 8 O.L.R. 446, distinguished.]

Re Township of Orford and Township of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

A municipality that constructs a drainage ditch and carries the water therefrom into a ravine on the land of the plaintiff, which was not a natural water course, is answerable in damages therefor.

Lamontagne v. Woodlands, 5 D.L.R. 524, 21 W.L.R. 881.

(§ I C 4—47)—EXTENT OF GRANTEE'S RIGHTS.

A grant by the Crown of land described as bounded by a river, which river is navigable and floatable, though it contains no special reservations in regard to the bed of the river, conveys no title to the bed of the river. [Attorney-General of Quebec v. MacLaren, 21 Que. K.B. 42, affirmed by an equally divided Court; leave to appeal to Privy Council granted.]

MacLaren v. The Attorney-General of Quebec and Hanson Bros., 8 D.L.R. 800, 46 Can. S.C.R. 656.

(§ I C 5—52)—OBSTRUCTIONS.

A telephone company is liable for injuries resulting from the removal of an obstructive telephone wire strung across a navigable basin or outlet by one who had to proceed out with his sailing vessel to the river.

La cie De Telephone Nationale v. Dion, 18 Rev. de Jur. 421.

II. Water rights and easements as between individuals.

A. Riparian or littoral rights in general; what are water courses.

(§ II A—66)—ACCESS TO WATER.

One whose land is separated from navigable water by marshy ground is not a riparian proprietor in respect of the navigable water. [Ross v. Village of Portsmouth, 17 U.C.C.P. 195; and Niles v. Cedar Point Club, 175 U.S. 300, referred to; Merritt v. City of Toronto, 23 O.L.R. 365, affirmed on appeal.]

Merritt v. City of Toronto, 6 D.L.R. 152, 3 O.W.N. 1550, 27 O.L.R. 1, 22 O.W.R. 710, 48 C.L.J. 705.

(§ II A—69)—OPPOSITE PROPRIETORS.

The owner of farm lands, adjoining a river, is within his legal rights in protecting his lands against the inroads of the river, by the construction of wing-dams, or bank-lining, so far as necessary for that purpose, but is not justified in erecting or maintaining such structures, so as to injure the lands of proprietors on the opposite bank of the river, nor so as to alter the channel of the river to the detriment of the lands of his opposite neighbours. [Orr, Ewing v. Colquhoun, 2 A.C. 839; Bickett v. Morris, L.R. 1 H.L. Sc. 47, referred to.]

Lorraine v. Norrie, 6 D.L.R. 122.

(§ II A—70)—EMINENT DOMAIN PROCEEDINGS; RIGHTS OF RIPARIAN OWNERS.

A riparian owner, ex jure naturæ, is entitled not only to the use of the water for domestic purposes, but to the right of access to and from the river from his property or wharves erected thereon, and if piers are erected on or about his property and his riparian rights are abridged or taken away, he is entitled to compensation for the injury. [Fishmongers' Case, 1 App. Cas. 662; Merritt v. City of Toronto, 6 D.L.R. 152, 27 O.L.R. 1, referred to.]

Pickels v. The King, 7 D.L.R. 698.

B. Accretions; alluvion; islands; flats.

(§ II B—75)—ACCRETION; ALLUVION; ISLANDS; FLATS.

The proprietor of land carried away by reason of a landslip through natural causes of it be considerable and distinguishable, may reclaim it within a year. If it be inconsiderable and indistinguishable, or if it is not reclaimed within a year, it becomes, by right of accession, the property of the owner of the land to which it is united.

Bells' Asbestos Mines (plaintiffs, appellants) v. The Kings' Asbestos Mines (defendants, respondents), 21 Que. K.B. 234.

(§ II B—76)—ACCRETIONS.

Land formed by alluvion or gained by the recession of water belongs to the owner of the contiguous land, to which the addition is made, and, conversely, land encroached upon by navigable waters ceases to belong to the former owner, on the principle that one who derives an advantage should also bear the burden, but, when the boundary of the land along the shore is clearly and rigidly fixed by deed, survey, or otherwise, the principle does not apply, and the owner thereof, who cannot gain by alluvion or recession, does not lose by encroachment. [Re Hull and Selby Railway, 5 M. & W. 327, discussed and followed; Foster v. Wright, 4 C.P.D. 438, distinguished; Widdecombe v. Chiles, 73 S.W. 444, not followed; see also Gould on Waters, 3rd ed., par. 155, p. 306; and Theobald's Law of Land, p. 37.]

Volcanic Oil and Gas Co. v. Chaplin, 6 D.L.R. 284, 22 O.W.R. 800, 27 O.L.R. 34, 3 O.W.N. 1597, affirmed 4 O.W.N. 517.

C. Use of water; interference with flow.

(§ II C—80)—USE OF WATER; INTERFERENCE WITH FLOW.

Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under provincial statutes on lands within the railway belt. The records themselves did not shew under what statues they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown as far back as 1876. Held, that the presumption was that the water records were obtained under the provisions of the laws in force at the time they were granted, viz.: 1875 and 1884. Held, further, on the evidence, that plaintiff had not proved any damage by reason of the use made by defendants of the water claimed by her; that her alleged riparian rights had not been established by the evidence; that if she had any such rights, the defendants had similar, and probably superior rights, and that she was not in a position to prove that her rights had been interfered with.

George v. Mitchell, George v. Humphrey Brothers, 16 B.C.R. 510, 17 W.L.R. 305.

(§ II C—83)—DIVERSIONS GENERALLY.

Construction of road ditch—Surface water—Flooding lands—Absence of negligence.

Baldwin v. Township of Widdifield, 3 D.L.R. 880, 3 O.W.N. 1348, 22 O.W.R. 267.

(§ II C—87)—BUILDING DAM; RAISING DAM AS TO RIGHTS BELOW.

In the absence of consent of the owner, or in the absence of compliance with the requirements of arts. 7295, 7298 and 7299 of the R.S.Q. a person has no right in driving piles in the bed of a navigable river owned by another, for the erection of a boom.

McLean v. Doutre & Lavigner, 18 Rev. de Jur. 473.

Where the proprietors of land on opposite banks of a river enter into an arrangement with respect to the ownership of a dam erected for the purpose of obtaining power, touching both banks and extending across the stream, it is competent for them to do so, and owners further down the stream have nothing to say as to the terms of the arrangement where the quantity of water passing down is not diminished. Where the owners below by means of a dam erected by them cause the water to flow back and to obstruct the operation of a mill above them they will be liable in damages for the obstruction so caused. In the action claiming damages for such obstruction and an injunction to restrain the continuance of the injury, both the owner of the fee and the tenant operating the mill are properly joined although the former will only be entitled to recover nominal damages. And where the amount of damages awarded by the trial Judge is found to be excessive in view of the evidence and a reduction is ordered and the judgment varied in other respects no order will be made as to costs.

Crosby et al. v. The Yarmouth Street Railway Co., Limited, et al., 45 N.S.R. 330.

A municipal corporation may not place a dam at the outlet of a lake for the purpose of raising the level thereof when such action diminishes the enjoyment of the mill owners having rights to the waters flowing from such lake by depriving them of their usual quantity of water at certain seasons.

Village of Marbleton v. Ruel, 1 D.L.R. 624, 21 Que. K.B. 434.

D. Obstructions; overflow; by raising dams as to rights above.

(§ II D—95)—OBSTRUCTIONS; OVERFLOW.

A water power company's rights in a lease to it by the Crown of a water power location on a certain river made pursuant to 61 Vict. ch. 8, which lease also conferred the right to flood any Crown lands along the river and its expansions, do not relate back to the time of making its original application so as to make its rights superior to those of the owner of certain mining claims located after the making of the application but before the granting of the lease, and therefore the water power company has no right to flood such mining claims by the raising of the waters of a river by a dam constructed by it under the alleged authority of the lease.

Bucknall v. British Canadian Power Co., 5 D.L.R. 574, 3 O.W.N. 1138.

Dam—Flooding lands—Damages—Injunction.

Weber v. Bowman, 1 D.L.R. 902.

When the work incidental to the building of a bridge over a creek where it is crossed by the highway narrowed its banks so as to cause the plaintiff's lands to be periodically flooded, the cause of action is not the building of the bridge but the damage caused by the floods, and after he has parted with the land he has no right to restrain the municipality from maintaining the bridge, nor can he recover damages from the municipality on the basis of any depreciation in the selling price of the land because of its liability to be flooded. [West Leigh Colliery Co. v. Tunnicliffe and Hampson, Limited, [1908] A.C. 27, at p. 29, followed; McClure v. Township of Brooke (1902), 5 O. L.R. 59 (C.A.), distinguished.]

Wigle v. Township of Gosfield South. 2 D.L.R. 619, 3 O.W.N. 708, 21 O.W.R. 483, 25 O.L.R. 646.

Injury to mill by flooding—Unprecedented spring freshets—Failure to shew fault on part of defendants—Damages.

Seaman v. Sauble Falls Light and Power Co., 6 D.L.R. 857, 4 O.W.N. 217, 23 O.W. R. 201.

Where a power company builds a dam across a river and thereby causes a rise in the level of the river, resulting in the rapid erosion or eating away of the banks of the river, such company should protect such banks, along which highways run, by means of revetment walls and guard-rails, so as to ensure the safety of pedestrians and vehicles using the highway.

Village of Richelieu v. Montreal and St. Lawrence Light and Power Co., 3 D.L.R. 145.

E. Pollution.

(§ II E—100)—Pollution.

No prescriptive rights and no presumption of lost grant can arise in contravention of express statutory law prohibiting the acts in question; therefore, a saw-mill owner can acquire no such right to foul a stream by depositing sawdust and mill refuse therein contrary to the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, sec. 19.

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

In the absence of any easement a person may not pollute the water of a natural water course to the prejudice of other persons entitled to the use of the water. [Wood v. Waud, 3 Exch. 748, 18 L.J. Ex. 305, followed; see also Goddard's Law of Easements, 7th ed., p. 106, and Halsbury's Laws of England, vol. XI., pages 317, 318.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 3 O.W.N. 1432, 22 O.W.R. 408.

(§ II E—101)—By sewage.

If a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, he becomes liable to the latter in an action for damages and an injunction to restrain further pollution of the stream. [See Garrett on Nuisances, 3rd ed., 1908, page 127.]

Crowther v. Town of Cobourg, 1 D.L.R. 40, 3 O.W.N. 490, 20 O.W.R. 844.

G. Surface and seepage water.

(§ II G—128)—Surface and seepage water.

Diversion of surface water by adjoining owner — Trespass — Injunction — Damages—Costs.

Walker v. Westington, 6 D.L.R. 858, 4 O.W.N. 136, 23 O.W.R. 110.

III. Water supply.

B. Operation and regulation of water works.

(§ III B 2—185)—Duties and liabilities of water company.

Where a municipal corporation is the owner of a water system connected with other systems, whose owner has agreed to supply the municipal system with the necessary water, the corporation is not responsible for damages resulting from a break in its system, which diminishes the pressure in the remaining systems, when it has used reasonable diligence to find and repair the break.

Warren v. Village of Malbaie, 5 D.L.R. 89, 41 Que. S.C. 487.

Where the owner of a private water works system under a contract to furnish water to the municipal system, controls the supply of water and during the time of a break voluntarily furnishes more water to the municipal system than he is required to do under his contract, and the supply and pressure of water in his own system is diminished in consequence, he cannot recover from the corporation the damages he has suffered thereby, nor can he recover the value of the additional water so furnished.

Warren v. Village of Malbaie, 5 D.L.R. 89, 41 Que. S.C. 487.

(§ III B 2b—190)—Quantity and quality.

A company or other person obtaining a franchise from a municipality to supply it with electric lighting and all the water "necessary for the needs of the town," undertakes a supply of what is necessary for the ordinary needs of the ratepapers, and not the water required to put out any fire breaking out in the municipality; and hence is not liable in damages for fire losses occurring as the result of an insufficient water supply.

Quesnel v. Emard and City of Montreal; Cote v. Emard and City of Montreal, 8 D.L.R. 537.

(§ III B 2—197)—ACTION FOR DAMAGES.

Where a water company contracted with a municipality to furnish a supply of water of a particular pressure for fire purposes, and some pressure existed but not enough to put out the fire, the water company is not liable to a property owner in the municipality for the loss occasioned by the fire. Belanger v. Town of St. Louis, 8 D.L.R. 601.

Where a contract is entered into between a water company and a municipality to the effect that the water company is to furnish water of a particular pressure for fire purposes, the water company is no insurer against a ratepayer's loss by a fire through lack of sufficient pressure to extinguish the fire. [Allan & Curry Manufacturing Co. v. Shrieveport Water Works Co., 68 L.R.A. 650, 113 La. R. 1091, followed; Planters' Oil Mill Co. v. Munro, 52 La. Ann. 1248.] Belanger v. Town of St. Louis, 8 D.L.R. 601.

(§ III B 3—206)—ENFORCING PAYMENT.

Municipal corporations—Water works—Board of Water Commissioners—Action against—Arrears of water rates before constitution of board—Parties—Leave to add—Terms—Costs.

Norfolk v. Roberts, 4 O.W.N. 419, 23 O. W.R. 538.

(§ III B 4—210)—METERS.

Where the consumer continued to use water through a concealed pipe knowing that the supply so obtained was not going through the meter after a change made from a flat rate to a meter rate and the placing of a meter on another and visible supply pipe, he is liable to pay on the basis of the capacity of such concealed pipe for the entire time for the water so wrongfully taken through it unless he can prove the quantity actually used, and he must pay at the general fixed rate without regard to any reduced rate applicable to the metered service. [Lamb v. Kincaid, 38 Can. S.C.R. 516, and Armory v. Delamirie, 1 Strange 505, applied.] Brandon Electric Light Co. v. City of Brandon, 1 D.L.R. 793, 20 W.L.R. 658.

WATER WORKS.

Operation and regulation of, see Waters, III.

WAY.

Private way, generally, see Easements.

WILLS.

I. THE INSTRUMENT; FORM; REQUISITES; VALIDITY.
A. In general.
B. Execution; attestation.
C. Revocation; reviving.
D. Who may make; capacity; undue influence.
DD. What may be disposed of.
E. Probate; contest; foreign wills.
F. Codicil.
II. NONCUPATIVE; HOLOGRAPHIC.
III. DEVISE AND LEGACY.
A. Construction generally; implied gift.
B. Description of beneficiaries; who may take.
C. Children not mentioned or disinherited.
D. Restrictions on charitable bequest or devise.
E. What property passes.
F. Partial intestacy.
G. Nature of estate or interest created.
H. Enjoyment; payment.
I. Election; acceptance.
J. Equitable conversion.
K. Charge upon donee or land devised.
L. Lapsing; ademption; deduction; revocation, renunciation.
M. Division of residue; inconsistent clauses.
IV. SUIT TO CONSTRUE OR REFORM.

Powers and duties of executors under, see Executors and Administrators, II.
Tax on gifts, see Taxes, V.

I. The instrument; form; requisites; validity.

A. In general.

(§ I A 1—7)—EFFECT OF PARTIAL INVALIDITY.

A clause in a will is invalid which forfeits altogether a beneficiary's interest in the testator's estate if he should alienate any benefit to which he may be entitled under the will. [McFarlane v. Henderson, 16 O.L.R. 172, followed; Blackburn v. McCallum, 33 Can. S.C.R. 65, specially referred to.]

Re McKinnon, 3 D.L.R. 124, 3 O.W.N. 890.

(§ I A 2—10)—TESTAMENTARY CHARACTER.

Where a document purporting to be an appointment of a beneficiary by the assured under a life insurance policy declares that the policy shall continue payable to the assured, his executors, administrators and assigns, and shall continue to be subject to his disposal as he may see fit in his lifetime and further declares that if the insurance is subsisting at his death, and has not been sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife if she survives him the effect is to make it a testamentary document and not a statutory appointment under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83, sec. 7 (similar to R.S.O. 1897, ch. 203, sec. 159). (Per Howell, C.J.

M., Richards and Perdue, JJ.A.) [Foundling Hospital v. Crane, [1911] 2 K.B. 367, 80 L.J.K.B. 853, applied.]

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

B. Execution; attestation.

(§ I B—20)—EXECUTION; ATTESTATION.

A will in authentic form before two notaries under Quebec law is not invalid because, by inadvertence, it was certified on its face to have been executed in the afternoon of a certain day, while in fact it was executed in the forenoon of that day.

Riley v. McGrory, 8 D.L.R. 784.

(§ I B—21)—SIGNATURE OF TESTATOR.

Under a statute (Wills Act, R.S.B.C. 1911, ch. 241, sec. 6), which provides that "no will shall be valid unless it is signed by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two witnesses," the will, although signed by one holding testator's hand, and acknowledged by two witnesses in the testator's presence, but when the testator was in such physical condition that he could neither object, consent, nor even see the witnesses, such will was not executed according to the provisions of the statute. [Reeves v. Grainger (1908), 52 Sol. J. 355; Carter v. Seaton (1901), 85 L.T.N.S. 76.]

Peden v. Abraham, 8 D.L.R. 403.

(§ I B—26)—PRESENCE OF PARTIES.

Where a will was drawn according to the suggestions of a testator, who was mentally competent and not unduly influenced in making it, and was signed by him in the presence of two witnesses, and by them signed in the presence of the testator, and in the presence of each other, it was legally executed under Ontario law.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

C. Revocation; reviving.

(§ I C—31)—SUBSEQUENT WILL.

A testator may dispose of part of his estate by a will and of the remainder by one or more other wills. When in an action for a legacy a third party intervenes and asks that the will on which the action is based be set aside he cannot, by the same intervention, demand the setting aside of a prior will which has not been revoked; he should proceed for that purpose by action.

Pascal v. Bank of Montreal, 14 Que. P. R. 54 (Sup. Ct.).

Where a will which gave a woman all of the property of a testator, was executed in consideration of her agreement to keep house for him during his lifetime, was, without her knowledge, subsequently revoked, she may, upon the death of the testator, recover from his estate the total value thereof, less the amount of his debts and the expense of administration.

Legeas v. Trusts and Guarantee Co., 5 D.L.R. 389, 20 W.L.R. 172.

(§ I C—32)—ERASURE; INTERLINEATION; DESTRUCTION; MUTILATION.

A will made under Quebec law in authentic form before two notaries must certify the number and nullity of words erased, otherwise the erasure will not be effective and the words through which a line had been drawn will be read in the will. [Notarial Code, R.S.Q. 1909, sec. 4618, considered.]

Riley v. McGrory, 8 D.L.R. 784.

Where the decedent is proved to have had his will in his own custody but after due search it cannot be found or otherwise accounted for at his death, it will be presumed that the decedent destroyed the will with the intention of revoking it. [Sugden v. St. Leonards, L.R. 1 P.D. 154, applied. See also Theobald on Wills, 7th ed., page 91.]

Re Nan Sing, 1 D.L.R. 45, 19 W.L.R. 858.

D. Who may make; capacity; undue influence.

(§ I D—36)—DEGREE OF MENTAL CAPACITY.

A greater scope of general mental capacity is requisite where a testator by will disposes of all his property, than where he deals with a single or separate part thereof.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

In order that a testamentary disposition of property may be sustained the testator must be of reasonably sound mind, memory and understanding.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

Soundness of intellect required of a person making a will at the time of the making thereof consists in having sufficient understanding to appreciate the character and the effects of the document to be made and in having sufficient will power to manifest such understanding. [Harwood v. Baker, 3 Moore P.C. 282; Banks v. Goodfellow, L.R. 5 Q.B. 549, and Russell v. Lafrancois, 2 Dorion C.A. (Que.) 245, specially referred to.]

Madore v. Martin, 3 D.L.R. 731, 18 La Rev. de Jur. 480.

One who knew and appreciated that he was making a will, the effect thereof, the property possessed by him, and how he disposed of it, as well as those who had claims upon him, was competent to make a testamentary disposition thereof.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.N. 127.

Where the evidence does not shew that the testator when making his will was under any insane delusion nor that he had such weakness of intellect and mental decay as to destroy testamentary capac-

ity, the will should not be refused probate on the ground of incapacity, because it appears that the testator was a feeble old man, 79 years of age who was found a few months later to be suffering from senile dementia and was declared incompetent in lunacy proceedings taken for the purpose of placing some one in authority to provide necessary care and nursing for him.

Forman v. Ryan, 4 D.L.R. 27, 20 W.L.R. 797, 17 B.C.R. 130.

(§ I D—37)—DELUSIONS.

Whether the general faculties of a person's mind are so affected by insane delusions as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect to which a delusion exists, is a question of fact to be determined from all the evidence. [Jenkins v. Morris (1880), 14 Ch. D. 674, and Re Walker, [1905] 1 Ch. 172, specially referred to.]

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

A testator has sufficient capacity to make a will whose mind and memory are sufficiently sound to enable him to understand its nature and effect, who has a comprehension of the extent of the property he was possessed of and the objects of his proposed bounty, and this notwithstanding that he periodically suffered from melancholia and incidental delusions, brought about by the deaths of relatives or by domestic trouble and that on the date of the execution of the will he was about to go voluntarily for treatment to an institution for mentally weak persons at the request of a friend. [Banks v. Goodfellow, L.R. 5 Q.B. 549, and Skinner v. Farquharson, 32 Can. S.C.R. 58, applied.]

McInnes v. McInnes, 1 D.L.R. 522, 10 East. L.R. 399.

(§ I D—38a)—REPRESENTATION OF LEGAL REQUISITES.

Where a will, which a person had previously refused to sign, is finally signed by such person on the representation that another will signed by her is invalid owing to the illegibility of her signature, such will will be set aside and annulled as having been subscribed in error.

Lamoureux v. Craig, 2 D.L.R. 148.

DD. What may be disposed of.

(§ I D D—39z)—WHAT MAY BE DISPOSED OF.

Universal legatees under Quebec law take and may transmit a fisheries right which their testator acquired under ch. 62 of the Consolidated Statutes of Canada (1859), by sec. 35 of which certain persons were to be "deemed the owners" of fishing stations held in peaceable possession by them in the public waters of Canada.

Robertson v. Grant, 3 D.L.R. 201.

E. Probate; contest; foreign wills.

(§ I E 2—51)—ISSUES.

Where, in an action to set aside the probate of a will, the defendant does not plead as res judicata an order of the Surrogate Court admitting the will to probate as "proved in solemn form of law" after hearing evidence in support of a caveat filed on the ground of the testator's mental incompetency, nor has he asked that the action be stayed on that ground, the High Court may treat the question of mental capacity as if it were before it in the first instance.

Mosier v. Rigney, 4 D.L.R. 621, 3 O.W.N. 1564, 22 O.W.R. 857.

F. Codicil.

(§ I F—60)—CODICIL.

Where a testator leaves a will and several codicils it is the net result of the testamentary writings that is to be construed as his last will. [Douglas-Menzies v. Umphelby, [1908] A.C. 224, followed.]

Re Hunter, 1 D.L.R. 456, 3 O.W.N. 529, 21 O.W.R. 5, 25 O.L.R. 400.

Where a codicil directs that a stated pecuniary legacy is bequeathed in the "place and stead" of a stated pecuniary legacy in the will, the effect is as if the amount specified in the codicil were inserted in the will for all purposes, even to the change of the mode of division of the residuary estate which by the original will was to be divided amongst the testator's children "in proportion to the personal property herein bequeathed to my said children." [See also Theobald on Wills, 7th ed., p. 668, and annotation to this case.]

Re Hunter, 1 D.L.R. 456, 3 O.W.N. 529, 21 O.W.R. 5, 25 O.L.R. 400.

As a general principle a codicil to a will forms part of the will or testamentary instrument, but not necessarily to all intents and purpose. [Fuller v. Hooper, 2 Ves. Sr. 242, followed.]

Adams v. Gourlay, 4 D.L.R. 731, 3 O.W.N. 909, 21 O.W.R. 772, 26 O.L.R. 87.

II. Noncupative; holographic.

(No cases.)

III. Devise and legacy.

(§ III—70)—DEVISE AND LEGACY.

Where a testator bequeaths $10,000 to the "Old People's Home" as a charitable institution at or near Winnipeg, and where there is no such institution bearing that identical name but there is "The Old Folks' Home" and until recently there was "La Maison des Vieux" (Roman Catholic) now called "Hospice Youville"; upon the question as to which, if either, of these is the legatee, a test of of the probabilities may properly be based upon such facts as the following:—(a) It is not shewn that the testator had ever

contributed or intended to contribute anything to "La Maison des Vieux," nor that he even knew of it; (b) it is shewn that he was well acquainted with "The Old Folks' Home," that previously he had contributed to its finances and indicated an intention to bequeath something to it; (c) that the board of "The Old Folks' Home" was largely composed of members of the same Presbyterian church which the testator attended, and (d) that "The Old Folks' Home" was commonly called "The Old People's Home." [British Home v. Royal Hospital, 90 L.T.N.S. 601, considered; see also Daggers v. Van Dyck, 37 N.J. Eq. 130; Moore on Facts 1296, and annotation to this case.]

Re Thomas Douglas Smith, 8 D.L.R. 93.

A. Construction generally; implied gift.

(§ III A—75)—CONSTRUCTION GENERALLY; IMPLIED GIFT.

Where a will provided that certain bank stocks and bank deposits should be held by the executors in trust for the widow of testator with power, if she should request it, to transfer same to her absolutely for her own use, a written request is not essential, and the widow's election or request may be shewn by proof of the transfer to her of the shares and bank deposits. [See also Theobald on Wills, 7th ed., p. 469i.]

Fulton v. Dauphinee, 1 D.L.R. 63.

Specific devises of property to a son, in one clause of a will are not modified by a subsequent clause, which, following the provision for the distribution of the residue of the estate declares the intention of the testator in the distribution of his property to be that his children should receive equal shares.

Re Jones, 3 D.L.R. 261, 3 O.W.N. 672, 21 O.W.R. 272.

The direction in a will as to the disposition of the interest of any of the testator's children in his estate, upon the death of any of them or upon the termination of the interest of any therein, occurring in a clause declaring the terms and conditions in the several devises and bequests given in trust, applies only to the property covered by that clause.

Re Jones, 3 D.L.R. 261, 3 O.W.N. 672, 21 O.W.R. 272.

Where there are inconsistent gifts in a will, the last gift will ordinarily prevail and will operate as a revocation of the first, but it must be reasonably clear that the testator so intends.

Re Farrell, 4 D.L.R. 760, 3 O.W.N. 1099.

The effect of a confirmatory clause in a codicil not specifically referring to the original will by date or otherwise, but purporting to be a codicil to the testator's last will, is to bring the will down to the date of the codicil and to effect the same disposal of the property as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced not only by the last codicil, but by the intermediate codicils, if any, so far as they remain unrevoked. [Re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726, and Re Champion, Dudley v. Champion, [1893] 1 Ch. 101, followed.]

Re Hunter, 1 D.L.R. 456, 3 O.W.N. 529, 21 O.W.R. 5, 25 O.L.R. 400.

(§ III A—76)—IMPLIED GIFT.

An absolute gift by bequest of the proceeds of an investment will constitute a gift by implication of the corpus, where the will clearly shews that such was the testator's intention.

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

B. Description of beneficiaries; who may take.

(§ III B—80)—DESCRIPTION OF BENEFITIARIES; WHO MAY TAKE.

Where a legacy is left by will to persons not named but who are so described by reference to some extrinsic fact that they could be ascertained by extrinsic evidence at the time when the legacy is to take effect, the bequest will be sustained; hence, a bequest in the following words:—"to the party at whose house I die" is not void on the ground of uncertainty. [See Theobald on Wills, 7th ed., with Canadian notes, pages 69, 273, 274.]

Re Woeffle, 1 D.L.R. 105, 3 O.W.N. 518, 20 O.W.R. 896.

A misnomer of a church society will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain. [Tyrrell v. Senior, 20 O.R. 156; and see Theobald on Wills, 7th ed., page 268.]

Re Swayzie, 3 D.L.R. 631, 21 O.W.R. 95, 3 O.W.N. 621.

A bequest to an incorporated religious body is not void for uncertainty as to the devisee or legatee, if the persons intended to be benefited can be ascertained with reasonable certainty. [Adams v. Jones, 9 Hare 485, and Jones v. St. Stephen's Church, 4 N.B. Eq. 316, followed. See also Re Swayzie, 3 D.L.R. 631.]

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

The words "the recipients of this will" may be construed as "the beneficiaries under the will."

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

For the purpose of ascertaining the persons intended to be benefited by a will, evidence of the names by which the testator habitually called certain persons is admissible. [See annotations, 8 D.L.R. 96, on the subject of inaccurate description of beneficiaries.]

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

Where a will provided that on a given event the legatees under "this my will" should share a certain fund proportion-

ately, legatees under a codicil to that will do not share with the legatees named by the will in that fund, where the codical is not, by its terms, made part of the will. [Henwood v. Overend (1815), 1 Mer. 23; Hall v. Severne (1839), 9 Sim. 515, followed.]

Adams v. Gourlay, 4 D.L.R. 731, 3 O. W.N. 909, 21 O.W.R. 772, 26 O.L.R. 87.

(§ III B—81)—HEIRS.

In a devise of the use of real property to the testator's husband for life, with remainder to his heirs, with the exception of an interest of the value of $6,000 therein, which, at the death of the husband, was devised to a daughter for life, with remainder to her children, the word "heirs" means general heirs, and the husband under the devise took a life estate only in the $6,000 interest, while he took in remainder an estate in fee simple in the property, and the daughter took an estate tail expectant in such $6,000 interest.

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

Where land is devised to sons of the testators after a prior life estate with the provisions that "should any of the boys marry and have heirs, and should die before this property is divided"—i.e., at the determination of the life estate—the word "heirs" means "children."

Re Lane and Beacham, 7 D.L.R. 311, 4 O.W.N. 243, 23 O.W.R. 250.

Will — Construction — Children "As heirs"—Estate tail.

Re Priester, 4 O.W.N. 456, 23 O.W.R. 652.

(§ III B—88)—DECEASED LEGATEE.

Under a will directing the testator's estate to be sold upon the death of his wife, certain legacies paid out of the proceeds and the remainder divided equally among all the testator's brothers and sisters, and providing further that, if any such brothers or sisters died before the final division of the estate, leaving lawful issue the share which the deceased brother or sister would have been entitled to, if living, should be equally divided among the children of such brother or sisters so that such child or children should take the portion which his or her, or their parent would have been entitled to, if living, the share of a sister who died after the execution of the will, but before the testor, belongs to her children surviving at the time of the final distribution. [Re Denton, 25 O.L.R. 505, reversed; Lamphier v. Buck (1865), 34 L.J. Ch. 650 at p. 656, applied; Christopherson v. Naylor (1816), 1 Mer. 320, and Gray v. Garman (1843), 2 Hare 268, specially referred to; Ive v. King (1852), 16 Beav. 46, at p. 53, per Romilly, M.R., disapproved.]

Re Denton, 4 D.L.R. 626, 26 O.L.R. 294, 3 O.W.N. 1109, 21 O.W.R. 954.

(§ III B—89)—TIME OF DETERMINATION.

Where a testator fixes the date of expiry of executorship of his will as "at the age of majority of the eldest of my said children up to which date my property will remain in the hands and under the administration of my testamentary executor," this clause cannot be interpreted as extending the word "child" to the grandchildren in case the eldest child should be dead. [Amyot v. Dwarris, [1904] A.C. 268, followed.]

Trahan v. Cardinal, 8 D.L.R. 533.

(§ III B—90)—TWO PERSONS "JOINTLY."

A devise of a parcel of land to two persons "jointly" with a direction that they are to pay a sum of money to a third person creates a joint tenancy.

Re Anne Campbell, 7 D.L.R. 452, 4 O. W.N. 221, 23 O.W.R. 233.

(§ III B—91)—WHO MAY TAKE.

A bequest to the "Free Baptist General Conference of New Brunswick" for the use of home and foreign missions of Queen's county, is not rendered void by the fact that there were many churches of that name in the county, since, by 6 Edw. VII. 1906, ch. 77, such churches were united as "The United Baptist Church of New Brunswick" in which was vested the property of the several churches, as well as all bequests of money or land made before or after the passing of such Act, and which carried on the missionary work of the church in such county.

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

A bequest to the "Methodist Denomination of Queen's County" is a good gift to the Methodist church incorporated by the Canadian Parliament.

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

A devise of property to the wife of an attesting witness to a will, is void under sec. 12 of the Wills Act (ch. 120, R.S. N.S.).

Re De Blois Trusts, 6 D.L.R. 119, 11 East. L.R. 141.

Where there was no deaf and dumb society in New Brunswick when a will was executed and, at the death of the testator, the only organization of the kind in that province was on incorporated as the New Brunswick School for the Deaf, such school was entitled to a legacy in the will to the "Deaf and Dumb Society of New Brunswick."

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

A bequest to the "Episcopal Denomination of Queen's County" is a good gift to the Diocesan Synod of Frederiction of the Church of England, where the term "Episcopal Denomination" is commonly applied to designate the Church of England.

Van Wart v. The Synod of Fredericton, 5 D.L.R. 776.

(§ III B—92)—"ELDEST CHILD."

The word "eldest child," as used in a devise of land, is not restricted to male child, and the eldest child of a family, although a female, will take thereunder to the exclusion of the oldest male who is her junior.

Greece v. Greece, 3 D.L.R. 841.

D. Restrictions on charitable bequest or devise.

(§ III D—100)—RESTRICTION ON CHARITABLE BEQUEST OR DEVISE.

Re McKay, Cameron v. McKay, 6 D.L.R. 911, 4 O.W.N. 304.

Catherine Murdoch died October 26th, 1909, leaving a will dated November 27th, 1905. The following legacy is found in the will:—"I give and bequeath the sum of one thousand dollars to be paid by my said executor to the Aged and Infirm Ministers' Fund in connection with Saint Stephen's Presbyterian Church in the City of Saint John." The defendant, the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, is a corporation created for the purpose of taking in trust any property which may be conveyed or bequeathed or intended for the use of the said church or any scheme or trust, not incorporated, in connection therewith. The Presbyterian church in Canada maintains a fund which is not incorporated, known as the Aged and Infirm Ministers' Fund, in connection with the Presbyterian church in Canada, and in this fund the ministers of Saint Stephen's church are entitled to participate. There is no separate fund in connection with Saint Stephen's church. It was held, that the bequest does not fail for uncertainty, as the intention of the testator is easily ascertained; and that it should be paid to the defendant, the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, for the Aged and Infirm Ministers' Fund in connection with the Presbyterian church in Canada.

Jones, executor of Catherine Murdoch v. Saint Stephen's Church et al., 4 N.B.Eq. 316.

The fact that a devise to a charity need not be pro forma conveyed to a charity within the period fixed by the rule against perpetuities, does not operate to void the devise.

Re Mountain, 4 D.L.R. 737, 3 O.W.N. 1011, 21 O.W.R. 866, 26 O.L.R. 163.

E. What property passes.

(§ III E—106)—REAL PROPERTY, GENERALLY.

Land that a person had, in his lifetime, contracted to sell to one who, without paying all of the purchase money or receiving a conveyance, had entered into possession, does not pass under a devise of "real estate," while the agreement remained in force, since the only interest the testator had, after the execution of such agreement, was to receive the unpaid portion of the purchase money.

Re Snetsinger, 4 D.L.R. 114, 3 O.W.N. 1569, 22 O.W.R. 738.

Real property generally—Taxes accruing prior to testator's death—Counterclaim.

McKay v. McKay, 6 D.L.R. 898, 4 O.W.N. 300.

(§ III E—108)—MISTAKE IN DESCRIPTION.

Where a testator, at the time of his will, and at his death owns the north half and no part of the south half of a certain township lot, and in his will devises to his son the south half of the north half and to his wife the "north half of the south half," the devise to the wife will be read as the "north half of the north half," where the will shews an intention to dispose of all his lands, and such a reformation of the will fits the testator's exact ownership. [Re Clement, 22 O.L.R. 121; Smith v. Smith, 22 O.L.R. 127; Re Harkin, 7 O.W.R. 840, referred to.]

Re Coutts and LeBeouf, 7 D.L.R. 237, 3 O.W.N. 1352, 22 O.W.R. 294.

(§ III E—109)—AFTER ACQUIRED PROPERTY.

Lands acquired by a testator after the date of his will pass to the residuary legatees under a devise to his nephew and niece of all his residuary estate following which devise in the will is a particular description of the real estate, notwithstanding that the parcel particularly described was subsequently sold and other lands purchased.

Re Thornton, 5 D.L.R. 192, 3 O.W.N. 1371, 22 O.W.R. 619.

(§ III E—111)—RESIDUARY CLAUSE.

Under a will making provision for the wife and sister of the testator to be secured on the estate and giving the residue both real and personal to his three children in equal shares, the executors have no power to sell the real estate without the consent of the residuary legatees, there being no express power to sell conferred and no debts necessitating a sale. Such power in the executors should not be inferred from a direction in the will that "no division of the said residue or payment of their respective shares to my said children shall be made by my executors until five years after the date of my death," or from the further direction that the executors should have power to delay and postpone the payment of the share or shares of the children until such time as in their judgment and opinion it would be advisable to pay such share or shares, as these directions must be read in connection with the clause in the will requiring the executors, during the said five years, to "annually pay to my said children their respective shares of the income arising from the said residue of my estate," and the further clause providing

that "if during the said five years, my executors should have on hand any surplus funds from the residue of my estate, such surplus shall be invested in safe and legal securities," and it should be held that the "payment" mentioned in those directions referred merely to such surplus funds. The intention of the testator can be further arrived at by his direction that the annuities provided for his wife and sister are to be a charge upon his entire estate and, in the event of the period of division arriving before their deaths, the executors are directed to set aside from such division sufficient of his estate to secure such annuities. If it was his intention to confer a power of sale upon his executors, he would have made a provision for the security of such annuities in the event of a sale and, had he done so, the power of sale would be readily implied.

Carruthers v. Carruthers, 21 Man. R. 781.

The residue of an estate, except such as is honestly necessary in the discretion of the executors or trustees, for the upkeep and maintenance of the testator's residence, until sold or disposed of, as a family home for his son, his son's family and descendants, or for whomsoever the son should give it by will or otherwise, is so tied up as to create a perpetuity where neither the trustees nor the owner of the residence had the right to dispose of the fund for any other purpose under the terms of the will.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 3 O.W.N. 924, 21 O.W.R. 501.

The title to a strip of a testator's land which had been used for many years by him as a private road and which was reserved by him in his will for a public road by words which standing alone were insufficient to amount by themselves to a dedication of the strip for such purpose, passes to the devisees of the testator's residuary estate, and any one of such devisees is, therefore, entitled to defend such strip of land from trespass.

Canadian Northern R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

Where a legatee to whom is bequeathed a portion of the insurance upon a testator's life dies before the latter, such bequest will be divided, under R.S.O. 1897, ch. 203, sec. 159, sub-sec. 8, equally among such designated class of legatees.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

The surplus income of an estate which is not required for the payment of annuities or arrearages thereof charged thereon will fall into the residue of the estate for distribution.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ III E—113)—LIFE INSURANCE; BEQUEST OF.

A present gift is created by a bequest to a grandson of a portion of the insurance upon the life of a testator.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

A bequest of an income from a portion of the insurance upon the life of a testator to his daughters for their lives, and at their deaths of the corpus to their children, constitutes a good declaration under the Insurance Act.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

A bequest in the will of the assured of all his life insurance is a "disposal" of insurance moneys within the terms of a condition contained in a document by which the assured purported to declare his surviving wife the beneficiary if the policy were not sold, surrendered, assigned, or "otherwise disposed of" by him. (Per Howell, C.J.M., and Richards, J.A.)

Green v. Standard Trusts Co., 1 D.L.R. 609, 20 W.L.R. 488, 22 Man. L.R. 397.

F. Partial intestacy.

(§ III F—115)—PARTIAL INTESTACY.

When a testator purports to dispose of the proceeds of a life insurance policy by specific legacies to named persons, and the legacies do not exhaust the face value of the policy, the legacies are not increased, and there is an intestacy as to the balance undisposed of.

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

A legacy bequeathed to ——— of Perrotte, not being identified in any way in the will, is void for uncertainty, and in respect thereof a partial intestacy results.

Re De Blois Trusts, 6 D.L.R. 119, 11 East. L.R. 141.

A partial intestacy results where a testator devised and bequeathed the residue of his estate to a daughter whose husband was one of the attesting witnesses to the execution of the will.

Re De Blois Trusts, 6 D.L.R. 119, 11 East. L.R. 141.

On a motion to construe a will the Court cannot speculate on the testator's intention, and no presumption arises that the testator intended to dispose of his whole estate, therefore, where a portion of a general bequest lapses, such lapsed share does not pass as residue but is undisposed of and must be distributed as upon an intestacy and the executors hold the same as trustees for the next of kin. [In re Fraser, [1904] 1 Ch. 726; and Blight v. Hartnoll, 23 Ch. D. 218, specially referred to.]

Re Piper, 2 D.L.R. 132, 3 O.W.N. 1243.

Where a perpetuity is created in the residue of an estate bequeathed for other than charitable purposes, an intestacy as to such portion results.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 3 O.W.N. 924, 21 O.W.R. 501.

G. Nature of estate or interest created.

(§ III G 1—120)—In general.

An absolute gift is not created by a bequest of money to a legatee with restrictions added whereby the money is to be invested by the executor and the interest only paid to the legatee during her lifetime, with power to the executor if he thought more was required by the legatee because of sickness or distress to make advances out of capital, where the will provides that the remaining part of the principal sum should go to the legatee's children at her death; she has no power to assign the corpus of the fund under such bequest.

Re Mitchell, 8 D.L.R. 346, 4 O.W.N. 465, 23 O.W.R. 616.

A gift by will of the "right to remain in a dwelling house free from rent" made in favour of a person named and of his family, is to be construed as a restriction upon a prior devise of a life estate in these and other lands to another; it does not confer any estate in reversion but a continuing right of possession during the life of the life-tenant and possibly until the closing of the estate by the division directed to take place after the death of the life-tenant.

Farquharson v. Farquharson, 6 D.L.R. 818, 11 East. L.R. 201.

A devise of the testator's "real estate at 62 Muir avenue" has a wider meaning than a devise of "his house at, etc.," and will include a shop built on part of a garden adjoining and formerly used with the house known as No. 62, the shop being erected close against the house and requiring the house for its support.

Re Seaton, 8 D.L.R. 204, 4 O.W.N. 266.

(§ III G 2—125)—Life or fee.

Where property is devised to the widow for life, with remainder to the only son of the testator, subject to the condition that in the event of the widow re-marrying the property shall go absolutely to the son on his attaining the age of twenty-one years, and with a further proviso that should the son die during his minority the property should go over as directed by the will, and where the widow never re-marries and the son predeceased her without having made a will but after attaining the age of twenty-one, then on the death intestate of the widow who became the sole heir of the son her heirs and not the heirs of the testator are entitled to the property. [Cusack v. Rodd, 24 W.R. 391; Re Branton, 20 O.L.R. 642, referred to.]

Re Crowe, 2 D.L.R. 103, 3 O.W.N. 906.

Where a devise gave the use of real estate to the husband of the testator for life, and at his death the income from a $6,000 interest to a daughter, and further provided that upon the death of the latter the property should be sold and the proceeds divided among her children, the devisees or heirs of the husband, upon his death, will take a fee simple estate in his interest in the property, which by the death of the daughter will be divested in favour of her children.

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

Title to land—Application under Vendors and Purchasers Act—Doubtful question of construction of will.

Re Cameron and Hull, 1 D.L.R. 917.

A life estate only, and not an absolute gift of the corpus, in money, notes and mortgages, was created by a bequest to a widow in her deceased husband's will, of all of his money, notes and mortgages, and real and personal property, for the term of her natural life, or widowhood, with remainder to his children in the event of her death or re-marriage. [Re Thomson's Estate, Herring v. Barrow, 13 Ch. D. 144, and 14 Ch. D. 263, referred to.]

Re Johnson, 7 D.L.R. 375, 4 O.W.N. 153, 23 O.W.R. 132.

(§ III G 2—126)—Power of disposal.

It is of the very essence of a power of appointment by will that it is revocable and to become operative only upon the death of the donee of the power.

Re Newton, 2 D.L.R. 576, 3 O.W.N. 948.

Where a bequest of moneys and shares was made to the executors in trust for the widow of the testator, with a power containing the words "notwithstanding anything hereinbefore contained" to withdraw the moneys and shares and transfer to her absolutely for her own use, the transfer made under such direction has the effect of vesting the property in the widow as upon an absolute gift and her right thereto is not limited to such part of it as she may actually use, or give away.

Fulton v. Dauphinee, 1 D.L.R. 63.

The words "I leave my property to my wife, to share with the children as she sees fit" in a devise of lands, passes to the widow merely a life estate with a power of appointment among the children; such devise imposes an obligation on the devisee to divide or share the property among the children at her death. [Burrell v. Burrell (1768), 1 Ambl. 660, followed; and see Theobald on Wills, 7th ed., 327, 482.]

Re Wolfe and Holland, 1 D.L.R. 568, 3 O.W.N. 900.

Under a will devising all the testator's property to his wife "to be disposed of by her as she may deem just and prudent in the interest of my family," the widow takes the property in fee simple unfettered by a trust, and, therefore, an objection to the title of a vendor to whose predecessor the widow had sold the property, based upon the contention that the words quoted above from the will were not sufficient to give the widow a fee simple in the lands

nor any power to convey them in fee, is not well taken. [McIsaac v. Beaton, 37 Can. S.C.R. 143; Lambe v. Eames, L.R. 6 Ch. 597, followed; Countess of Bridgewater v. Duke of Bolton, 6 Mod. 106, specially referred to.]

Re Smith and Patterson, 4 D.L.R. 89, 3 O.W.N. 1324, 22 O.W.R. 224.

An equitable estate only is vested in a husband by a devise to him for life of the use of real property of which he, and others, were made trustees, clothed with power to sell it at discretion, and directed to invest the proceeds, particularly where, in the event of the property being sold during the lifetime of the husband, there was a direction to pay the income therefrom to him for life, and after his death to a daughter for her life, with remainder to her children, and the trustees were further directed, in the event of the property not being sold during the lifetime of the husband, to sell it at his death and to invest the proceeds and pay the income therefrom to designated legatees, since the powers and duties imposed upon the trustees made it convenient, if not necessary, that they should hold the legal estate. [Richardson v. Harrison, 16 Q.B. D. 85, referred to.]

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

(§ III G 2—127)—Enlarging or reducing, by other provisions.

Where, by the terms of a will, all of the testator's real and personal property went to his widow for life and after her death it was to go to one of the testator's daughters and legacies were then to be paid to various sons "if there is sufficient to pay the same, if not, then a corresponding deduction shall be made in every case," the residue to be divided among the daughters, and it appears in evidence that the widow is old, infirm and blind, and the life estate which consists of a house and personal property mostly in mortgages and notes yields a sum insufficient to properly support the widow, and these facts were known to the testator at the time of his death, the widow is entitled not only to a life estate and interest in all the property, but she has an implied contingent power to encroach on the capital for the purpose of maintenance. [Re Johnson, 7 D.L.R. 375, 4 O.W.N. 153, varied; Re Dixon, Dixon v. Dixon (1912), 56 Sol. J. 445, doubted; Re Holden, Holden v. Smith, 57 L.J. Ch. 648, doubted; Re Willatts, Willatts v. Astley, [1905] 1 Ch. 378, [1905] 2 Ch. 135, and Re Thompson's Trusts (1880), 14 Ch. D. 263, referred to; Re McDonald (1903), 35 N.S.R. 500, applied; Jarman on Wills, 6th ed., 464, referred to.]

Re Johnson, 8 D.L.R. 746, 4 O.W.N. 510.

(§ III G 4—135)—Estate or gift upon condition.

Where a testator directs his executor to set aside or invest a certain sum out of his estate, and out of the income therefrom to make an appropriation for the maintenance of his sisters, in continuation of a yearly provision which he and his brothers jointly had made for them during his lifetime, and expresses his desire, in the will, that his brothers shall, after his decease, continue to contribute to the maintenance of his sisters, the provision for the sisters is not thereby made conditional upon the testator's brothers continuing to contribute towards their maintenance.

Re K., 5 D.L.R. 311, 3 O.W.N. 883.

(§ III G 4—136)—Condition precedent.

Ignorance by the beneficiary of a condition annexed to a gift does not protect the devisee from the consequences of not complying with it, but where compliance with the condition is contra bonos mores, the devisee might well be absolved from compulsory compliance with the condition. [Brown v. Peck (1758), 1 Eden. 140; and Astley v. Earl of Essex, L.R. 18 Eq. 290, specially referred to.]

Adams v. Gourlay, 4 D.L.R. 731, 3 O.W N. 909, 21 O.W.R. 772, 26 O.L.R. 87.

(§ III G 4—136a)—Cy-pres doctrine.

Where literal compliance with a secret condition attached to a gift becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called cy-pres.

Adams v. Gourlay, 4 D.L.R. 731, 3 O.W. N. 909, 21 O.W.R. 772, 26 O.L.R. 87.

The use of the word "I wish" by a testator may carry an obligatory import and suffice to create a trust. [Re Bunting, [1909] W.N. 283; Liddard v. Liddard, 28 Beav. 266; Parker v. Bolton, 5 L.J.N.S. Ch. 98, referred to.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

(§ III G 4—137)—Condition subsequent, generally.

Where a sum is bequeathed to trustees to invest, paying the interest to a granddaughter "so long as she lives and is unmarried, and if she dies without having married or if married without issue" then the principal is specifically bequeathed over to another "at the granddaughter's death" and if the granddaughter "marries and has a child or children then the principal shall be paid to the granddaughter at such time thereafter as the trustees shall deem best in the interests of the granddaughter and her child or children," but the testator has not otherwise (either specifically or by residuary bequest or necessary implication) disposed of the corpus or its income during the childless period of the granddaughter's married life, the interest of the fund will be paid to the granddaughter during that period. [Bird v. Hunsdon (1818), 2 Swans. 343, 1 Wils.

Ch. 456, followed; Humphreys v. Humphreys (1867), L.R. 4 Eq. 457; Roe d. Bendale v. Summerset (1770), 5 Burr. 2608; Ralph v. Carrick (1877), 5 Ch. D. 984 (1879), 11 Ch. D. 873; In re Springfield, [1894] 3 Ch. 603, referred to.]

Re Steele, 7 D.L.R. 169, 4 O.W.N. 80, 23 O.W.R. 52.

(§ III G—138)—CONDITION IN RESTRAINT OF MARRIAGE.

A bequest to a married woman for her separate use absolutely with a clause restraining her from anticipation during coverture, does not depend upon whether it is a lump sum in cash or an income-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay only the income to the beneficiary; and in construing such a clause it is material whether the money is to be "paid to her" or "settled upon her." [Re Bown, O'Halloran v. King, 27 Ch. D. 411, referred to.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

Where the testator provides by a clause of his will for a vested legacy to his daughter, which would entitle her to payment over of the corpus notwithstanding certain trustees' discretion to defer such payment, and where by a later clause of the same will there is a restraint on the enjoyment of the corpus during coverture, the later clause will prevail, the words of the will being satisfied if the restraint is limited to the contemplated coverture, so that when discovered she may dispose of the corpus as she pleases. [Tullett v. Armstrong, 1 Beav. 1, 4 M. & Cr. 377.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

Under a will giving certain property to the testator's wife during life and widowhood and upon her death to such one or more of the testator's children as she may appoint by will and if she re-marry, to such one or more of the children as the executors may appoint, a child's share of the proceeds of the land when sold under the Ontario Settled Estates Act cannot be paid out of Court to him on his attaining his majority even with the consent of the widow and of such of the other children as are of age.

Re Newton, 2 D.L.R. 576, 3 O.W.N. 948.

A devise and bequest of all the testator's real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry, gives her the absolute right to dispose of the personalty. [Compare Re Johnson, 7 D.L.R. 375.]

Re Allen, 7 D.L.R. 494.

Under a devise of all the testator's real estate to his widow for her life or durante viduitate, the widow is put to her election between the devise and her rights under the Devolution of Estates Act (Ont.) or as doweress.

Re Allen, 7 D.L.R. 494.

(§ III G 4—139a)—RESTRAINT UPON ALIENATION.

Upon an absolute bequest to a married woman creating a trust to restrain anticipation during coverture, the property should be so dealt with that the income of the corpus should for the joint lives of wife and husband be paid to her for life without power of anticipation; that if she should die in the lifetime of her husband, then the corpus should go as she should by will appoint, and in default of appointment to her next-of-kin exclusively of her husband, and that if she should survive her husband, then the corpus should belong to her absolutely; and to practically carry this out the Court may appoint a trustee of the settlement and direct that proper conveyances be made as settled by the Court or a conveyancing counsel. [Loch v. Bagley, L.R. 4 Eq. 122, applied.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

Where a testator's lands are to be equally divided amongst his children after the death or re-marriage of his widow but the lands are not to be sold "only to the testator's own heirs—they may buy or sell to each other," the restraint does not apply where all the parties entitled are desirous of selling to a stranger.

Re Lane and Beacham, 7 D.L.R. 311, 4 O.W.N. 243, 23 O.W.R. 250.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used and employed by them in their discretion in maintaining and keeping up, until sold and disposed of, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise.

Kennedy v. Kennedy, 3 D.L.R. 536, 3 O.W.N. 924, 21 O.W.R. 501, 26 O.L.R. 105.

Where the terms of a will creating substitution prohibits the usufructuary legatees or the institutes from alienating, such prohibition will not be extended by inference to the substitutes themselves.

Laurier v. Nelson, 7 D.L.R. 303.

(§ III G 5—140)—REMAINDERS.

Where, upon the death of a life tenant, the income of a fund was payable to a child of a testator for life, with remainder of the corpus to her children, the latter take as purchasers. [Shelley's Case, 1 Rep. 88, specially referred to.]

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

Where following a gift by will of all the testator's property absolutely to his wife with a direction that their children should be suitably maintained and educated by her, the will provided that should the wife die leaving any of said property or rights,

"in her possession or not disposed of" then upon her decease the same should be divided "among our said children" in a specified manner, such provision does not empower the wife to dispose of the residue at the time of her death by will but has the effect of creating a substitution de residuo in favour of the children. [Shearer v. Forman, 40 Que. S.C. 139, affirmed on appeal.]

Shearer v. Hogg, 6 D.L.R. 255, 46 Can. S.C.R. 492.

(§ III G 5—141)—SUBSTITUTION; QUE. LAW.

By his will, in 1845, M. devised his estate to trustees charging them with its administration in a manner intended to secure the enjoyment of the revenues by his surviving children and their descendants so long as the law would permit; he provided for the division of his estate into as many equal parts as he should leave children him surviving:—"pour chacune de ces parts ou portions de mes biens representer les biens mobiliers et immobiliers dont chacun de mes dits enfants aura seulement la moitié des revenus de chacune de ces parts ou portions de mes biens être réversibles après le décès de chacun de mes dits enfants aux enfants nés en légitimes mariages d'eux, mes dits enfants, respectivement, et être substitué de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi, en observant que je veux et entends que lors de chaque succession ou transmission de mes biens il en soit fait partage, autant que possible, entre chacun de mes descendants de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus sa vie durante."—At the time of his death, in 1847, eight of his children survived the testator and his estate was, accordingly, apportioned so far as then possible, the residue, not then conveniently divisible, being held in suspense as a ninth share to be subsequently divided from time to time as it became possible to do so. Of the eight shares, that attributable to L. M., one of the children, was enjoyed by him up to the time of his death, in 1887, intestate as to the share in question and without issue. It was held, Brodeur, J., dissenting.—That, as the will did not give the children and grandchildren of the testator any rights as proprietors in his estate, there was no substitution created by its provisions. Also, Davies and Brodeur, JJ., dissenting.—That, on the death of L. M. without issue, the share allotted to him remained vested in the trustees subject to distribution among the children of the testator and their descendants in the same manner and upon the same conditions as if L. M. had predeceased the testator and the estate had been originally apportioned into seven instead of into eight parts. Per Davies, J.—As there was no provision in the will in respect to children dying without issue, and as there was no collateral substitution, there was intestacy resulting, on the death of L. M. without issue, in regard to the share allotted to him; consequently, it remained vested in the trustees for the benefit of and to be distributed amongst the heirs of the testator living at that date. Per Brodeur, J., dissenting.—The will had the effect of creating a direct and collateral substitution. At the death of L. M. his brothers and sisters became substitutes and their descendants are appelés. [Judgment appealed from 20 Que. K.B. 1, reversed.]

Masson et al. v. Masson et al., and De Lotbinière Harwood, mis-en-cause, 47 Can. S.C.R. 42.

(§ III G 6—145)—EXECUTORY DEVISES; CONDITIONAL LIMITATIONS.

The devise to testator's housekeeper of the right to occupy his house and use the furniture therein common with his natural son to whom this property was bequeathed on condition that she takes care of the child and looks after his maintenance until he becomes of age is valid, and if the house and furniture are destroyed by fire she has a right of action against the executors to procure from the estate a dwelling with the requisite furnishing for herself and the child.

Hart v. Plante, 21 Que. K.B. 72.

A provision of a will that a designated sum which had been received by a son from the testator in his lifetime was to be deducted from the former's share of his father's estate, will be controlled by a further provision that the amount of all advancement, as well as that represented by notes of his children held by him, or charged against them on the testator's "family book," should be deducted from their respective shares in such estate, so that from the share of such son, in addition to the amount stated in the foregoing provision of the will, there will be deducted the amount shewn by such "family book" to have been paid or advanced him by his father in his lifetime.

Re Boehmer, 3 D.L.R. 857, 22 O.W.R. 287, 3 O.W.N. 1353.

Where by will securities were bequeathed to an executor with an absolute discretion to apply as he thought fit for the benefit of a named beneficiary, there is no power of disposition by will in such beneficiary of what remains in the hands of the executor on the death of the beneficiary; but it passes to the next of kin of the testator as at the time of his death. [Bain v. Mearns, 25 Gr. 450; Lewis v. Lewis, 1 Cox Eq. 162; Re Eddowes, 1 Dr. & Sm. 395, and Re Johnston [1894] 3 Ch. 204, specially referred to; Gude v. Worthington (1849), 3 De G. & Sm. 389, distinguished.]

Re Rispin, 2 D.L.R. 644, 3 O.W.N. 706, 21 O.W.R. 380, 25 O.L.R. 633, affirmed 8 D.L.R. 756, 46 Can. S.C.R. 649.

A condition in a will that should the devisee refuse to comply with provisions of the will to provide maintenance for certain other beneficiaries during minority, then the property shall vest in and belong to another person subject to the same stipulations constitutes a conditional limitation of the estate of the first named devisee so as to immediately vest the subsequent estate in the second named devisee without any claim, entry or act to be done by the latter. [See Theobald on Wills, 7th ed., 652.]

Durant v. Huestis, 1 D.L.R. 786, 10 E.L. R. 423.

Executory devises—Devise with discretion—Death of beneficiary.

Re Collins, 6 D.L.R. 893, 4 O.W.N. 206, 23 O.W.R. 225.

A Court of equity has jurisdiction to determine whether the contingency of a conditional limitation of lands has happened and, in the event of forfeiture, to declare to whom the property has passed. [Craven v. Brady, L.R. 4 Eq. 209, applied.]

Durant v. Huestis, 1 D.L.R. 786, 10 E.L. R. 423.

Executory devises—Conditional limitations—Devise to executors to sell—Fictitious sale at undervalue—Attacking parties, joining in conveyance—Undue influence—Breach of trust—Onus—Discharge of mortgage.

Blaisdell v. Raycroft; Raycroft v. Cook, 6 D.L.R. 907, 4 O.W.N. 297.

(§ III G 7—150)—Income or support; education.

Where a testator directed that upon the sale of land by his testamentary trustees they should invest the proceeds, and that the "proceeds" of the investment should be paid to designated persons, the word "proceeds" will be construed as meaning income, since such was obviously the intent of the testator

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

Where from a will the testator's intention appears to be that annuities thereby created should be a charge only upon the income of his estate, the corpus cannot be charged therewith. [Carmichael v. Gee, 5 App. Cas. 588, distinguished; Baker v. Baker, 6 H.L.C. 615; Re Boden, [1907] 1 Ch. 132; Re Howarth, [1909] 2 Ch. 19 and Re Watkins, [1911] 1 Ch. 1, specially referred to.]

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

An Act which gives to the executors and administrators of a succession power to make advances to certain heirs for their maintenance to be taken from the surplus of the revenues and payable as an annuity in quarterly payments the amount of which is increased by two other Acts, does not oblige them to pay these instalments in advance and even when, under the terms of the original Act and its first amendment, they have done so they are not obliged to continue it pursuant to the provisions of the third Act for an increase as above stated.

Pratt v. Gravel, 41 Que. S.C. 324 (Ct. Rev.).

Where a testator directs his executor to set aside or invest a certain sum out of his estate, and out of the income therefrom to make an appropriation for the maintenance of a certain person in continuation of a similar appropriation to him made by the testator while alive, the beneficiary is entitled to the income from such sum from the date of the testator's death, and it is competent to the executor to hold for this fund interest-bearing securities which came into his hands, and to pay the income therefrom for the maintenance of the beneficiary. [Cook v. Meeker, 36 N.Y. 15, followed; Re Crane, [1908] 1 Ch. 379, distinguished.]

Re K., 5 D.L.R. 311, 3 O.W.N. 883.

(§ III G 7—151)—Postponement of income after beneficiary's majority.

A direction in a will that a bequest of the income from a sum of money to the sons of the testator shall be paid to them when they attain the age of 27, is ineffective to prevent payment to them of the accrued income at their respective majorities.

Re McKay, 6 D.L.R. 787, 3 O.W.N. 1555, 22 O.W.R. 666.

(§ III G 8—156)—Per stirpes or per capita.

The grandchildren of a testator take per capita under a testamentary provision that, after the expiration of the period fixed for the payment of certain charges upon a designated amount of money, such sum should become the residue of the testator's estate and be divided among his surviving grandchildren.

Re McKay, 6 D.L.R. 787, 3 O.W.N. 1555, 22 O.W.R. 666.

Grandchildren of a testator will take per stirpes under a will directing that a certain portion of the testator's estate should be divided into as many parts as he had children surviving him, which were to be invested by his trustees and the interest paid to his children, which sums so set apart to them were given to the issue, if any, of such surviving children, and in the event of any child dying without issue, that the amount of the portion that would have gone to such issue, if any, should be divided among the other children of the testator, share and share alike.

Re McKay, 6 D.L.R. 787, 3 O.W.N. 1555, 22 O.W.R. 666.

(§ III G 8—157)—Survivorship.

A devise of property to the mother and sister of a testator, "or the survivor of them," makes them tenants in common,

since the survivorship mentioned was referable to the death of the testator, and not to that of the devisees. [Theobald on Wills, 4th ed., p. 554, specially referred to; Peebles v. Kyle, 4 Gr. 334, and Smith v. Coleman, 22 Gr. 507, distinguished.]

Re Johnson, 5 D.L.R. 314, 3 O.W.N. 1571, 22 O.W.R. 741.

(§ III G 8—158)—EQUAL IN VALUE.

Where a will provided that if, at the time when a division was being made of the residue of the testator's estate directed by another clause of the will to be equally divided among the testator's children, the executors under the will should be of the opinion that the fees simple of certain parcels of land specifically devised respectively to his several children for life with remainder over, were not then of equal value, the executors should before dividing the residue, apportion to each except the one having the most valuable parcel of land, a sum equal to the estimated difference in each case, which provision was supplemented by another clause directing that if the residue was not sufficient for the purpose of equalization, then the person whose estate was more valuable should pay to the other or others such amount as might be necessary to bring about equalization and giving the executors authority to charge the fee simple of the more valuable parcels of land, the powers thus created are not appurtenant to the office of executor but are personal to the executors named in the will and if they are all dead at the time when the power comes to be exercised, no one can be clothed with authority to act in their place in exercising such powers, and this duty will fall upon the Court through its proper officers.

Re Drummond, 5 D.L.R. 516, 3 O.W.N. 1459, 22 O.W.R. 554.

(§ III G 9—160)—VESTED OR CONTINGENT INTERESTS.

Where there is an immediate gift to charitable uses, delayed as to actual conveyance till the secured debts are paid out of income from the security, the gift vests at the testator's death, and it makes no difference that a twenty-five year period is allowed a specific charity to effectuate the object of the gift, in default of which the gift is to pass ipso facto to another charity named in the will. [Chamberlayne v. Brockett (1872), L.R. 8 Ch. 206; Re Swain, [1905] 1 Ch. 669; Christ's Hospital v. Grainger (1848-49), 16 Sim. 83, affirmed, 1 Macn. & G. 460, followed; Re Lord Stratheden and Campbell, [1894] 3 Ch. 265, distinguished.]

Re Mountain, 4 D.L.R. 737, 3 O.W.N. 1011, 21 O.W.R. 866, 26 O.L.R. 163.

To free the personal estate of a testator from the charge of legacies given by his will, there must be clearly expressed an intention not only to burden the realty but to exonerate the personalty.

Re Craig, 3 D.L.R. 59, 3 O.W.N. 870.

A clause in a will making certain bequests which began with the words: "I give, devise and bequeath all real and personal estate," charges the legacies upon the personalty as well as upon the realty, where followed by a direction that such bequests shall be made a charge upon lands therein specifically described.

Re Craig, 3 D.L.R. 59, 3 O.W.N. 870.

(§ III G 9—162)—FUND SET APART.

Where a testator directed his trustee to "set apart" a sum of money, and the investments representing the same, and to "pay over" the same to the testator's son a portion thereof within two years, and the remainder within four years after the testator's death, and in the meantime to pay to the son, quarterly, the net profits on the unpaid portion of the legacy, a gift accompanied by a direction is created in the son's favour and the vesting of the legacy is not dependent upon the son surviving either the two or four year periods, after the death of the testator. [Hanson v. Graham, 6 Ves. 239, applied.]

Re Hay, 2 D.L.R. 152, 3 O.W.N. 735, 21 O.W.R. 546.

(§ III G 9b—165)—REMAINDERS.

Under a devise in a will in the following terms—"I give to my wife all my real and personal estate as long as she remains my widow. In case of my wife's death or marrying again, I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons"—the sons took an interest which became vested on the death of the testator, and consequently the interest of one son who died in the lifetime of the widow passed by his will to his executors. [Packham v. Gregory, 4 Hare 396; Town v. Borden, 1 O.R. 327; Webster v. Leys, 28 Gr. 475, followed; Baird v. Baird, 26 Gr. 367, distinguished.]

Re Shattuck, 1 D.L.R. 258, 3 O.W.N. 593, 21 O.W.R. 90.

H. Enjoyment; payment.

(§ III H—170)—ENJOYMENT; PAYMENT.

Where a will contains a provision to pay the gifts in futuro, such provision will merely postpone the possession and will not defer the vesting of the gift, if the payment is postponed merely for the convenience of the fund.

Re Wishart, 8 D.L.R. 255, 4 O.W.N. 519.

Where a testator by his will gives a share of his estate to his daughter on attaining twenty-one, with the proviso that if the trustees should think it undesirable for any reason that such share should be paid they may defer the payment of the whole or any part to such time or times as they may think best, and in the meantime pay only the annual income arising there-

from to the child; the daughter has a present right on attaining twenty-one to payment in full of the corpus, ignoring the discretionary power granted to the trustees; the law being settled that a sum cannot be given absolutely, coupled with a direction that a trustee of the money is to exercise a discretion as to the time and manner of payment, but such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary. [Re Johnston, [1894] 3 Ch. 204; Re Rispin, 2 D.L.R. 644, 25 O.L.R. 633, 46 Can. S.C.R. 649, referred to.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549.

Substitutes may, before the opening of the substitution to which they will be called, dispose of the property of which they will eventually become absolute owners, subject only to such alienation lapsing should the substitution itself lapse.

Laurier v. Nelson, 7 D.L.R. 403.

(§ III H—172)—PAYMENT OF MEDICAL EXPENSES OF BENEFICIARIES.

Where trustees are empowered by a will to pay such medical expenses of a beneficiary as they "deem proper" they are the final authority and the Court will not order recoupment in favour of such beneficiary of a claim for medical expenses for which only the beneficiary or her husband is directly liable, and which the trustees have rejected in good faith.

Re McKay, 6 D.L.R. 787, 3 O.W.N. 1555, 22 O.W.R. 666.

I. Election; acceptance.

(§ III I—176)—ELECTION; ACCEPTANCE; BY WIDOW.

Will — Codicils — Absolute gift — Restrictions as to mode of enjoyment—"Reliance on sense of justice and kindliness of heart"—Precatory trust—Dower—Election.

Re Stanton, 4 O.W.N. 504, 23 O.W.R. 849.

J. Equitable conversion.

(§ III J—180)—EQUITABLE CONVERSION.

Sale of land—Order authorizing terms—Disposition of purchase money—Payment into Court—Maintenance of beneficiary.

Re Krueger, 3 D.L.R. 865, 3 O.W.N. 1285.

K. Charge upon donee or land devised.

(§ III K—187)—CHARGE UPON REALTY.

Where wide powers as to the disposal of property are vested in trustees they may make a title free from a charge of an annuity, but the proceeds of the sale will be charged with the payment thereof.

Kennedy v. Kennedy, 3 D.L.R. 536, 26 O.L.R. 105, 3 O.W.N. 924, 21 O.W.R. 501.

Where land, subject to an annual charge for maintenance created by will is sold in partition proceedings, the Court will set apart a sufficient sum to answer the annuity claim as it falls due from time to time, and will retain the whole purchase money in Court for that purpose where the capitalization of the annuity would amount to more than the purchase money. [Harbin v. Masterman, [1896] 1 Ch. 351, followed.]

Lee v. Chipman, 3 D.L.R. 297, 3 O.W.N. 1043, 21 O.W.R. 895.

Where land subject to a charge for maintenance created by will is sold, the Court has no power to order the commutation of the charge for a lump sum, without the consent of all who are entitled to the purchase money. [Hicks v. Ross (1891), 3 Ch. 499, specially referred to.]

Lee v. Chipman, 3 D.L.R. 297, 3 O.W.N. 1043, 21 O.W.R. 895.

Where it was not known whether a legatee was living at the time of the sale of land upon which the payment of his legacy was charged, and the sale was made subject thereto, upon the amount of the legacy, together with interest thereon to the date of the sale, being paid into Court for the benefit of the legatee, a decree will pass discharging the land from such charge.

Re Gallagher, 3 D.L.R. 729, 3 O.W.N. 1302, 22 O.W.R. 226.

One to whom land encumbered with a mortgage was devised, is primarily liable for the payment thereof. [In re Carley, 18 W.L.R. 695, specially referred to.]

Re Materi Estate, 4 D.L.R. 6, 21 W. L.R. 283.

L. Lapsing; ademption; deduction; revocation; renunciation.

(§ III L—192)—ADEMPTION.

The doctrine of ademption by subsequent portion will not be applied in favour of a stranger against a child taking a share of residue as well as legacy. [Re Heather, [1906] 2 Ch. 230.]

O'Callaghan v. Coady, 8 D.L.R. 316, 11 East. L.R. 63.

Where a testatrix being in loco parentis to her legatee makes provision by will by way of "portion," either by legacy or by share in residue to such legatee, and afterwards makes an advance in the nature of a portion to such legatee, it will be presumed that the subsequent advance by the testatrix in her lifetime is meant to satisfy the legacy in whole or in part, and will be held an ademption of it. [Pym v. Lockyer, 5 My. & C. 29; Montefiore v. Guedalla, 1 D.F. & J. 93; Meinertzhagen v. Walters, L.R. Ch. 670; Fowkes v. Pascoe, L.R. 10 Ch. 343, referred to.]

O'Callaghan v. Coady, 8 D.L.R. 316, 11 East. L.R. 63.

(§ III L—193)—DEDUCTION.

Where a will declares that annuities thereby created shall be paid, some as a

first charge, others as a second charge, etc., on the income of an estate, any abatement incident to a deficiency of income must be borne in the order of priority stated in the will and not pro rata as between the various annuitants.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

Where the income of an estate varies from year to year, each year is to be considered separately; and annuities will be paid therefore in the order of priority established by will; and an annuitant who does not in any one year receive the full amount of his annuity cannot charge the arrearage upon the income of subsequent years in priority to those annuities payable in that year.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

Motion by executors for advice—Deduction of amount due by legatee to testator —Pending action.

Baechler v. Baechler, 6 D.L.R. 894, 4 O.W.N. 226, 23 O.W.R. 235.

(§ III L—194)—Revocation.

Gifts by will given in plain and explicit language are not to be held revoked by uncertain language of a codicil, particularly where the same testamentary writings contained as to other bequests revocations clearly expressed. [Re Farrell, 4 D.L.R. 760, affirmed on appeal.]

Re Farrell, 7 D.L.R. 419, 4 O.W.N. 335.

(§ III L—196)—General or specific legacies.

Where a will contained (1) a clause devising land to a son wherein nothing was stated as to the devise being in trust, (2) other clauses following the one just mentioned and giving other property to trustees in trust for other children, and (3) a general clause following these and commencing with the following words: "The terms and conditions and limitations in the several devises and bequests to my executors and trustees in trust for my children are as follows" in which general clause the trustees were authorized to rent the real estate willed to each child, and apply the income as they might think fit for the maintenance of the children, and then providing for the disposition of the property upon the death of any of the children or their forfeiture of any interest therein, the clause then concluding with the words: "The trustees may allow my children or any of them to occupy their respective lands," the language of the general clause as to the power of the trustees is to be limited by the introductory words, that is to those devises and bequests specifically given, by the will, in trust, and does not apply to the first clause, and, therefore, the devise to the son by the first clause is absolute.

Re Jones, 3 D.L.R. 261, 3 O.W.N. 672, 21 O.W.R. 272.

The bequest of a specified sum of money to be drawn from funds of the testator in a specified bank is a demonstrative legacy and if before the testator's death he withdraws the funds and deposits them to his account in another bank, the legatee will not lose his legacy merely because the will directed the money in the second bank to be otherwise bequeathed, but he will be permitted to receive it from the general assets of the estate. [Re Clowes, [1893] 1 Ch. 214, and Re Dods, 1 O.L.R. 7, specially referred to.]

Re Atkins, 3 D.L.R. 180, 3 O.W.N. 665, 21 O.W.R. 238.

Under Wills Act, R.S.O. 1897, ch. 128, sec. 26 (1) providing that every will shall be construed with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears in the will, where one clause of a will bequeathed money in a certain bank to specified legatees and another clause did the same with money in another bank to other specified legatees and before his death the testator withdrew the account in the one bank and deposited it in the other, the fund so increased is to be divided among the legatees to whom was bequeathed the account in the bank to which the transfer was made and not among the legatees of the money in the bank from which the account was drawn, there being nothing in the will to indicate a contrary intention on the part of the testator.

Re Atkins, 3 D.L.R. 180, 3 O.W.N. 665, 21 O.W.R. 238.

M. Division of residue; inconsistent clauses.

(§ III M—198)—Division of residue.

When a testator devises parcels of real property respectively to his children for life, with remainder to their issue, and provides that upon the distribution of the residue of his estate, if, in the opinion of his trustees, the fee simple of the several estates should not then be of equal value, they should apportion to each a sum equal to the difference between the life estates and the value of the most valuable, the sum necessary to equalize such values, or the amount charged, as the will directed, upon the most valuable property for such purpose, will be treated as an increment to the less valuable shares, and be held in the same way as the respective parcels.

Re Drummond, 5 D.L.R. 516, 3 O.W.N. 1459, 22 O.W.R. 554.

Where a will directing that the testator's residuary estate should be invested and the profits applied to the maintenance of his three children, that the share of each child in the residuary estate should be paid as each reached a specified age, and that upon the youngest one

reaching such age the "whole" balance was to be paid to him, was changed by a codicil which revoked the bequest to the second child of his share in the residuary estate and gave him in lieu thereof a certain sum in cash thereby diminishing his share in the residuary estate, and which then directed the balance to be divided among the other two children, "according to the terms and conditions specified as to the other bequests" in the will, the testator did not die intestate as to the balance of the second child's share in the residuary estate given him by the will left after paying him the cash sum provided by the codicil, nor should the words in the will that the youngest child should have the "whole" balance paid to him after paying the second child's share be applied so as to give the youngest child all the balance of the share given to the second child by the will, after paying the latter the cash sum acquired by the codicil; the balance of the second child's share in the residuary estate, given him by the will, will in such case be divided equally between the other two children. [Re Corkett, 3 O.W.N. 761, 21 O.W.R. 468, varied on appeal.]

Re Corkett, 4 D.L.R. 561, 21 O.W.R. 468, 3 O.W.N. 1134.

Under a will directing the executor to sell the residuary estate of the testatrix and equally divide the proceeds therefrom among her three grandsons and her granddaughter who was the youngest of the four, and providing that the grandsons' shares were to be paid to them when the youngest of them reached the age of twenty-one, and the granddaughter's share to be paid to her when she herself arrived at that age, and if any of the grandsons died before the youngest attained that age the deceased's share was to go to the survivors, and, if they all died before the granddaughter became twenty-one years old and before any shares were paid, such proceeds were to go to the next of kin, no part of such proceeds can, without the consent of the next of kin, be given to the grandchildren before the time for the division thereof, and, where the next of kin, because of their infancy, are unable to give this consent, the income of such proceeds cannot be devoted to the support of the grandchildren of the testatrix inasmuch as they may all die before the time when by the terms of the will the payment to them of the funds was to be made.

Re Richardson, 5 D.L.R. 449.

Under a will which provides that three-quarters of the amount a legatee received by specific bequests should be deducted from the amount to which he was entitled as a residuary legatee, and that the difference should be divided among a designated class of legatees, where the amount of such specific bequests exceeded the former's residuary share of the estate the latter share will be divided among such designated class of legatees.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

An absolute gift to the several persons named and not one to the executor in trust, is created by a devise of the residue of the testator's estate to such executor, subject to certain payments to persons named, which was followed by a clause making the executor residuary legatee "after all of the above bequests" have been faithfully carried out.

Re De Blois Trusts, 6 D.L.R. 119, 11 East. L.R. 141.

Where the scheme of a will apart from specific devises and bequests is to give pecuniary legacies of fixed sums to different legatees and then to divide the residue amongst some of them in proportion to the pecuniary bequests which each is to receive, a substitution by codicil of a different sum to one of them, will take effect so as to cause a distribution of the residue in different proportions conforming to the amended legacies unless a contrary intention appears from the will. [Re Courtauld's Estate, Courtauld v. Cawston (1882), 47 L.T.R. 647, (1882), W.N. 185, discussed.]

Re Hunter, 1 D.L.R. 456, 3 O.W.N. 529, 21 O.W.R. 5, 25 O.L.R. 400.

(§ III M—199)—INCONSISTENT CLAUSES.

Where a testamentary gift is modified by a subsequent clause of a will, or is in conflict therewith, the latter clause controls. [Jarman on Wills, 6th ed., 565, and Constable v. Bull, 3 DeG. & S. 411, referred to.]

Re Ley, 5 D.L.R. 1, 21 W.L.R. 757.

IV. Suit to construe or reform.

(§ IV—200)—SUIT TO CONSTRUE OR REFORM.

The Court has no power to rectify a will by correcting what appears to be a misdescription of property thereby devised, unless there be in the will itself the means of identifying the property in question as the subject of the devise.

Re Angus Campbell, deceased, 7 Terr. L.R. 214.

WINDING-UP.

Of company, see Company, VI.

WITNESSES.

I. COMPETENCY.
- A. In general.
- B. Husband or wife.
- C. Effect of death.

II. EXAMINATION.
- A. In general.
- B. Cross-examination.
- C. Privilege.

III. Impeaching; discrediting; corroborating.
IV. Credibility.
V. Fees.

To deed, see Deeds.
As to depositions, see Depositions.
Opinions and conclusions of, see Evidence, VII.
Privileged communications to, see Evidence, X.
Attestation of will, see Wills, I.

I. Competency.

A. In general.

(§ I A—4)—Religious belief.

A witness in a criminal case is not entitled to affirm in lieu of being sworn unless he states that he objects to the oath on conscientious scruples; a mere statement of his preference to affirm and that he considered it optional is insufficient to make legal his testimony given on affirmation, although no objection was taken until cross-examination.

The King v. Deakin, 19 Can. Cr. Cas. 62, 19 W.L.R. 43, 16 B.C.R. 271.

II. Examination.

A. In general.

(§ II A—32)—Refreshing memory.

A witness may refresh his recollection from notes made by him at the time of a transaction in question and then make a statement as to the truth of that memorandum. The rule is that the memorandum proposed to be looked at must be made by the witness, or adopted as a correct account by him at or about the time when it was made. (Per Irving, J.)

Daynes v. B.C. Electric R. Co., 7 D.L.R. 767, 22 W.L.R. 549.

Where the loss of original notes of a certain transaction in question has been proved, and that a transcript thereof has been made on the following day, and that this copy was accurate, and the memory of the witness has been exhausted on the subject, he has a right to refresh his memory by reference to the copy. (Per Martin, J.A.)

Daynes v. B.C. Electric R. Co., 7 D.L.R. 767, 22 W.L.R. 549.

B. Cross-examination.

(§ II B—36)—To discredit witness.

Where a party to a proceeding puts forward a witness who makes certain statements under oath, and where it is desired to shew by his own books or those of the person who puts him forward that his statements are not true, the production of such books may be compelled so as to test his accuracy; and when the witness is under cross-examination, the books may be used for that purpose, and to prove that his evidence is not to be relied upon. (Dictum per Riddell, J.) [Alexander v. Irondale, Bancroft and Ottawa R. Co. (1898), 18 P.R. 20; Russell v. Macdonald (1888), 12 P.R. 458, referred to.]

Re Baynes Carriage Co. (No. 2), 8 D. L.R. 309, 4 O.W.N. 118.

(§ II B—43)—In criminal cases.

A statement by a female witness on a trial for rape, in response to a question of the counsel for the accused, that she would like to see the prisoner go to prison for life, will not permit the Crown prosecutor to question her as to the commission of a similar offence by the accused against the witness.

Rex v. Paul, 5 D.L.R. 347, 21 W.L.R. 699.

A cross-examination by counsel for the accused on a trial for rape as to acts of cruelty committed by the accused against the witness and the complaining witness, to which, in addition to answering the question fully, she volunteered the further reply that the accused was also guilty of a similar offence towards her, will not permit the Crown prosecutor to question her as to the details of such assault.

Rex v. Paul, 5 D.L.R. 347, 21 W.L.R. 699.

III. Impeaching; discrediting; corroborating.

(§ III—50) — Impeaching; discrediting; corroborating.

The denial by the defendant of a conversation which the trial Judge finds took place is not sufficient to set aside the defendant's evidence in favour of the plaintiffs in an action for commission on the sale of land, where such denial does not appear to have been made with intent wilfully to pervert the facts and might be attributable to the infirmities of age.

Gullivan v. Strevel, 1 D.L.R. 44, 19 W.L.R. 778.

(§ III—55)—Unreliable witness; effect on jury.

If a jury believes that a witness cannot be relied upon, the only result should be the rejection of his testimony by them in considering their verdict; it should not affect the other legal evidence in the case. (Per Macdonald, C.J.A., and Galliher, J.A.)

Alexe v. Canadian Western Lumber Co., 8 D.L.R. 1, 22 W.L.R. 559.

(§ III—58)—Corroboration.

On a charge of conspiracy to defraud, the evidence of the accomplice may be sufficiently corroborated by entries found in a memorandum book found upon the prisoner.

The King v. St. Pierre, 19 Can. Cr. Cas. 82.

IV. Credibility.

(§ IV—60)—Credibility.

Upon a reference to the Master in Ordinary, the Ontario practice, which tends to give him final discretion as to the credibility of the witnesses appearing before him on the reference, is tempered by the circumstances, including such tests as whether

there be some unmistakable document or something of the kind which shews the contrary or which the Master has failed to take into consideration; and in the absence of any such circumstances the rule of practice will be given effect. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222; Re Sanderson and Saville (1912), 6 D.L.R. 319, referred to.]

Nassar v. Equity Fire Insurance Co. (No. 2), 8 D.L.R. 645, 23 O.W.R. 340, 4 O.W.N. 340.

The Master or other officer who hears the evidence of the witnesses is the final judge of their credibility. (Per Riddell, J.) [Booth v. Ratté, 21 Can. S.C.R. 637; Bishop v. Bishop, 10 O.W.R. 177, and Hall v. Berry, 10 O.W.R. 954, referred to.]

Re Sanderson and Saville, 6 D.L.R. 319, 3 O.W.N. 1560, 22 O.W.R. 672, 26 O.L.R. 616.

(§ IV—62)—AFFIRMATIVE AND NEGATIVE TESTIMONY.

A witness who testifies to an affirmative is ordinarily to be credited in preference to one who testifies to a negative. [Lefeunteum v. Beaudoin, 28 Can. S.C.R. 89, applied.]

Charlton v. The King, 8 D.L.R. 911, 14 Can. Ex. 41.

V. Fees.

(§ V—65)—FEES.

On the dismissal of an appeal from a summary conviction on which there is a rehearing, the practice in Saskatchewan does not require that the witness fees of a witness called on such re-hearing shall on taxation be divided because he also attended the sittings on the same day as a witness in another case. [Hamilton v. Beck, 3 Terr. L.R. 405, followed; Scott v. Dalphin, 6 W.L.R. 371, considered.]

Pahkala v. Hannuksela (No. 2), 8 D.L.R. 107.

Witnesses are taxed under the authority of the trial Judge and the Court has no jurisdiction to interfere with said taxation which is considered part of the final judgment.

Consolidated Gold Mines v. Cordasco, 13 Que. P.R. 333 (Sup. Ct.).

(§ V—69)—PROFESSIONALS.

Under a subpœna requiring a solicitor to attend before a special examiner for cross-examination upon an affidavit made as solicitor, where the knowledge basing the affidavit was acquired by the deponent in the course of the rendering of professional services, the witness is entitled to a professional witness fee per diem of $4 in advance, pursuant to Con. Rules 492, 443, and disbursements tariff item 119.

Campbell v. Verral (No. 2), 7 D.L.R. 321, 4 O.W.N. 177, 23 O.W.R. 175.

WOMEN.

Libel of, see Libel and Slander.

WORDS.

Meaning of, see Definitions.

Slanderous words, see Libel and Slander.

See appendix of Words and Phrases.

WORK AND LABOUR.

Contracts of service generally, see Master and Servant.

Contracts express and implied, formation of, see Contracts, I.

Rescission or termination of contract for, see Contracts, V.

Interpretation of contracts to perform work, see Contracts, II.

Validity and effect of contracts for, see Contracts, III.

Performance; breach of contract or incomplete performance, see Contracts, IV.

Wrongful interference with contracts, see Contracts, VIII; Conspiracy.

WRIT AND PROCESS.

I. IN GENERAL.

II. SERVICE.
- A. In general; on non-residences.
- B. On corporations.
- C. By publication; substantial service.
- D. Privilege; exemption.
- E. Liability for serving.

III. RETURN; PROOF.

Various particular writs, see Attachment; Certiorari; Execution; Garnishment; Injunction; Mandamus; Prohibition; Quo Warranto.

Appearance to writ, see Appearance.

I. In general.

(§ I—2)—VALIDITY.

A conviction under the Canada Temperance Act, R.S.C. 1906, ch. 152, was set aside where no place of trial was mentioned in the summons and defendant did not appear.

The King v. Wilson; Ex parte Harrington, 40 N.B.R. 383.

(§ I—4)—NAME OF PARTY.

Inasmuch as a writ of summons cannot be issued without a statement of claim annexed thereto, a writ expressly referring to the statement of claim as annexed thereto and the statement of claim are to be taken as one, so that one whose name is omitted from the writ is nevertheless a party if his name appears in the statement of claim. (Per Beck, J.)

Albertson v. Secord, 1 D.L.R. 804, 29 W.L.R. 64.

(§ I—6)—AMENDMENT.

Where a writ purp[illegible] of the judicial distr[illegible] after that judi[illegible] exist, an app[illegible] was dismiss[illegible] not shewn the proper

and that consequently the only objection was that the writ was not properly styled, and this, being an irregularity merely, could be amended. [Saskatchewan v. Leadley, 6 Terr. L.R. 82, distinguished.]

Theriault v. Evans, 7 Terr. L.R. 490.

An application made after service of the writ of summons to amend by correcting the corporate name of the plaintiff company where the name used in the writ was that of another corporation, will only be dealt with on notice to the defendant. [Tildesley v. Harper, 3 Ch. D. 277, referred to.]

United Motor Co. v. Slinn, 8 D.L.R. 471, 22 W.L.R. 738.

(§ I—8)—RENEWAL OF WRIT.

It is an abuse of the process of the Court to keep renewed for service, for the sole purpose of preventing the operation of the Statute of Limitations, and without any bonâ fide intention of proceeding in the action, a writ of summons of which service is deliberately withheld to keep the litigation pending for a longer time.

Appleyard v. Mulligan, 3 D.L.R. 288, 3 O.W.N. 943, 21 O.W.R. 557.

A motion to vacate the renewal of a writ not served within twelve months of its issue will be granted where the order for renewal was made on an insufficient affidavit, reserving, however, to the defendants the right to move against the order if there were no adequate grounds for the renewal, and where, on the hearing of the motion to vacate, the plaintiff offers no good excuse for the failure to serve the original writ within the twelve months.

Appleyard v. Mulligan, 3 D.L.R. 288, 3 O.W.N. 943, 21 O.W.R. 557.

II. Service.

A. In general; on non-residences.

(§ II A—10)—IN GENERAL.

To summon a defendant by service of the writ only without a declaration, or of the declaration only without the writ is an irregularity which makes the proceedings radically null. Therefore, the deposit with the prothonotary, in a case of capias, of a copy of the declaration for the defendant the day after the return of the writ and after the expiration of the three days following the service of the writ is a radical nullity and the capias will be quashed on exception to the form.

Trottier v. Belair, 13 Que. P.R. 400 (Sup. Ct.).

No leave is required to either issue or serve a third party notice by one defendant against a co-defendant under rule 67 of the Judicature Ordinance, C.O. 1898, ch. 21, whether such notice issues before or after the time limited for delivering defence.

Moline v. Blythe et al., 7 Terr. L.R. 316.

(§ II A—16)—NON-RESIDENT; EX JURIS.

In an action for specific performance of an agreement for purchase of land the original purchaser is properly joined as a party, although he is living outside of Canada and has transferred all his interest in the contract and in the land to his co-defendant resident within the jurisdiction, and he may be served outside the jurisdiction with a statement of claim in such an action under the provisions of the Manitoba King's Bench, rule 201, which authorizes service outside of the jurisdiction whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Smith v. Ernst (No. 1), 1 D.L.R. 547, 20 W.L.R. 353, 22 Man. L.R. 317.

In an action against two parties, one of whom is out of the jurisdiction, an order may be made for service of the writ upon him provided his co-defendant is first served, under clause (g) of Consolidated Rule 162, whereby the service of a writ out of Ontario may be allowed where the person sought to be served is a necessary or proper party to an action properly brought against another person duly served in Ontario.

Hay v. Sutherland, 2 D.L.R. 391, 3 O.W.N. 584, 21 O.W.R. 200.

It is a convenient practice to serve a copy of the order for service ex juris of an originating summons on the party or parties to be so served, and if done, the costs incidental thereto will be allowed on taxation.

North of Scotland Canadian Mortgage Co. v. Kimber et al., 7 Terr. L.R. 478.

Service out of the jurisdiction—Motion to set aside—Guaranty executed in another Province—Conditional appearance.

Farmers Bank of Canada v. Security Life Assurance Co., 5 D.L.R. 889, 4 O.W.N. 61, 23 O.W.R. 17.

Service—Non-resident—Motion to set aside—Irregularities.

Edgeworth v. Allen, 3 D.L.R. 880, 3 O.W.N. 1375, 22 O.W.R. 617.

Service out of the jurisdiction—Cause of action, where arising—Conditional appearance.

Farmers Bank of Canada v. Heath, 1 D.L.R. 915.

(§ II A—18)—ON INFANTS.

The summoning of a minor under Quebec law in an action in damages brought by a plaintiff who had been decoyed from the United States to the Province of Quebec, by fraudulent representations in order that he might be arrested on capias is not null merely from the fact that the defendant is a minor, such incapacity as that of minority being removable on application to the Court for the appointment of a tutor to represent and assist the minor.

Serling v. Levine, 7 D.L.R. 266.

(§ II A—23)—TIME OF SERVICE OF WRIT.

An application to set aside a default judgment on the ground of irregularity in service of the writ of summons will not be entertained where it appears that the writ was given to the defendant's wife and that she gave it to her husband on the same day. [Phillips v. Ensell, 1 C.M. & R. 374, followed.]

Vidito v. Veinot, 3 D.L.R. 179, 10 E.L.R. 292.

B. On corporations.

(§ II B—26)—ON OFFICER OF CORPORATION.

Where a corporation officer (competent generally under the terms of the statute to accept service of process), in a suit against the company, is himself the plaintiff, or bears such a relation to the plaintiff or to his claim as to make it to such officer's interest to suppress the fact of service, the Court will authorize some other and proper method of service. [32 Cyc., title "Process," p. 554, referred to.]

Crawford v. Calville Ranching Co., 6 D.L.R. 375, 22 W.L.R. 50.

In an action upon a promissory note against an incorporated company in which the plaintiffs are four directors, one of the four being the secretary-treasurer, of the defendant company, the secretary-treasurer (although a competent officer generally to be served with process) is not, while a party plaintiff, a competent or proper person upon whom to serve the writ of summons, and such service will be set aside.

Crawford v. Calville Ranching Co., 6 D.L.R. 375, 22 W.L.R. 50.

(§ II B—26a)—SERVICE ON OFFICER OF FOREIGN CORPORATION.

Motion to set aside—Assets in Ontario—Con. Rule 162—Leave to enter conditional appearance.

Rainy River Navigation Co. v. Ontario and Minnesota Power Co., 3 D.L.R. 870, 3 O.W.N. 1314, 22 O.W.R. 221.

Defendant—Service on person in Ontario—Motion by person served to set aside—Affidavit denying connection with company—Insufficiency.

Powell-Rees Limited v. Anglo-Canadian Mortgage Corporation, 1 D.L.R. 920.

(§ II B—28)—ON AGENT.

Service on foreign corporation—Registered attorney.

Reinhorn v. The Knetchel Furniture Co., 8 D.L.R. 1047, 22 W.L.R. 605.

Under the Execution Act, 9 Edw. VII. (Ont.), ch. 47, a sheriff can seize shares in an incorporated company only (1) if the head office of the company be within his county, or (2) if the company have, within his bailiwick, a place at which service of process may be made. [Malouf v. Labad (No. 1), 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575, affirmed on appeal.]

Malouf v. Labad (No. 2), 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99.

Where the directors of a company passed a resolution authorizing a transfer of its head office to another place and appointed a representative there to receive legal notice addressed to the company and went no further, failing to pass the by-law required by sec. 88, Ontario Corporation Act, and to comply with other requirements of that section, there was no place in the bailiwick of the sheriff of the district to which the head office was attempted to be moved at which service of process could be made under the Ontario Execution Act, 9 Edw. VII., ch. 47, providing that upon an execution being directed against the shares in a company owned by a debtor a notice that the shares are to be seized thereunder must be given by the sheriff if the company has within his bailiwick a place at which service of process could be made. [Malouf v. Labad (No. 1), 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575, affirmed on appeal.]

Malouf v. Labad (No. 2), 3 D.L.R. 755, 3 O.W.N. 1235, 22 O.W.R. 99.

C. By publication; substitutional service.

(§ II C—35)—SUBSTITUTIONAL SERVICE.

Where the end aimed at in an order for substituted service is service upon defendant's brother, service upon a brother other than the one designated in the order may be confirmed and allowed as sufficient.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281.

Under Consolidated Rule 938 (a), Ont. C.R. 1897, giving an executor right to serve a notice for the determination without the administration of the estate of any question affecting the rights or interests of the persons claiming to be crediting devisee, legatee, next-of-kin or heir-at-law or cestui que trust, the Court will not grant leave to serve substitutionally one who has a claim upon certain land of the estate as the rule is not intended to enable a determination whether certain property belongs to an estate or not.

Re Turner, 5 D.L.R. 731, 3 O.W.N. 1438, 22 O.W.R. 543.

III. Return; proof.

(§ III—58)—SETTING ASIDE; ANNULMENT.

In the absence of fraud and prejudice mere irregularities in the service of process will not give rise to cancellation, and such irregularities should be raised by intervention or opposition and not by petition to annul.

Savoie-Guay Co. v. LesLauriers & DeBriére; Rose v. Savoie-Guay Co., 7 D.L.R. 205.

APPENDIX

WORDS AND PHRASES SPECIALLY CONSIDERED IN THIS DIGEST.

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